Chapter 24

RIGHTS AND DISABILITIES OF PATIENTS

24.01 Introduction

This chapter reviews a wide range of ordinary law where there is some interface with mental disorder. It examines the right to vote, to be elected and to remain in public office, to serve as a juror, to marry (and the extent to which mental disorder is a relevant ground for nullity and divorce), to rear children, to sue or to be sued in the courts of law, to send and receive post while a patient in hospital, to drive a car, and the right not to be unfairly dismissed from employment. Rights and disabilities of mentally disordered persons which concern their financial position such as their liability in contract and tort, and partnership arrangements are discussed at paras. **23.26–23.31** *ante*.

As a very general rule mental disorder is not in itself sufficient to render a person under a disability; indeed, even the fact that a person is a patient in hospital or under guardianship will often not automatically render him incapable of exercising a civil right or privilege. In each case the question must be put whether a mentally disordered person has the competence to understand the nature and purpose of the act in question.

A. THE FRANCHISE

24.02 Background

24.02.1 *Anomalies under the old legislation*

Section 4(3) of the Representation of the People Act 1949 (now repealed) placed an absolute bar on any patient using a mental illness or mental handicap hospital as a place of residence for voting purposes. This created a number of anomalies—for example, an informal patient who had a home address could be registered at that address and could visit a polling station or be treated as an absentee voter; further a patient in a psychiatric wing of a district general hospital could use that hospital as a place of residence for voting purposes.[1] The second Speaker's Conference on Electoral Reform (21 October 1973) recommended that patients in mental hospitals should be placed on the same footing as those in general hospitals.

24.02.2 *The "Voting Rights" cases*

Section 4(3) prevented "patients" in mental hospitals from using the hospital as a place of residence for voting purposes. In *A and B v. Dumfries and Galloway Electoral Registration Officer*,[2] although

[1] See further L. Gostin (1976) A Mental Patient's Right to Vote, *Poly L. Rev.* vol. 2, pp. 17–21.

[2] [1963] (2) S.L.T. Sh. Ct. Rep. 25.

the Sheriff found that a provision identical to section 4(3) prevented two residents of the Crichton Royal Institution from entry onto the electoral register, it was clear that their status as "patients" had not been considered.

In two subsequent cases[1] brought by MIND the County Court construed the term "patient" which was (and continues to be) defined as a "person suffering or appearing to be suffering from mental disorder" (see s. 145(1) of the Mental Heath Act 1983). The Court found that if residents of a mental illness or a mental handicap hospital were not mentally disordered within the meaning of the Mental Health Act they were not "patients" under section 4(3), and could use the hospital as a place of residence for voting purposes. These were decisions of some major significance. The DHSS and Home Office issued circulars following these cases giving guidance to hospitals and registration officers.[2]

It is difficult to suggest the extent to which these cases survive the Representation of the People Act 1983, although the term "patient" is still used in section 7 of that Act. However, now that section 7 allows a "voluntary mental patient" to use the hospital as a place of residence for voting purposes if he can complete a statutory declaration without assistance, the practical impact of these county court cases is minimal. The only time where these decisions could have any potential relevance is in cases where a patient wishes to use the hospital as his place of residence either because he has never had an identifiable residence other than a mental hospital or because he wishes to vote in the constituency where he actually lives.

24.03 Those Entitled to Vote

The persons entitled to vote as electors at a parliamentary election in any constituency are those resident there on the qualifying date and, on that date and on the date of the poll, are not subject to any legal incapacity to vote (age apart) and are commonwealth citizens or citizens of the Republic of Ireland; electors must also be of voting age (*i.e.* 18 years or older) on the date of the poll. (The Representation of the People Act 1983, s. 1(1)). (All further references in paras. **24.03** to **24.06** are to this Act unless otherwise specified). There are two questions to consider to determine whether a mentally disordered person can vote—whether he is under a legal incapacity to vote, and whether he has a place of residence for voting purposes.

Legal incapacity to vote is "some quality inherent in a person, which, either at common law or by statute, deprives him of the status of a

---

[1] *Wild and Others v. The Electoral Registration Officer for the Borough of Warrington.* Judgment given in the Warrington County Court on 15 June 1976; *Smith and Others v. Jackson (Electoral Registration Officer for Clitheroe).* Heard at Blackburn County Court on 16 Sept. 1981.

[2] RPA 218 (1 Oct. 1976); RPA 261 (7 Dec. 1981); HN(76)180 (Oct. 1976).

Parliamentary elector"[1] (see s. 202(1)). A person who is disqualified at common law (*e.g.*, a peer[2]) or by statute (*e.g.*, a convicted person during the time he is detained in a penal institution[3] in pursuance of his sentence (s. 3)) is subject to a legal incapacity and is not entitled to vote even if his name appears on the electoral register. The common law incapacity to vote by virtue of mental disorder is considered in the next paragraph.

24.04 Incapacity by Virtue of Mental Disorder

A mentally disordered person is not incapacitated *per se* but it appears from the *Bedford County Case, Burgess' Case*[4] that the name of an 'idiot' (now presumably a severely mentally handicapped person) may not appear on the electoral register, and such a person may not vote. In the *Oxfordshire Case*[5] there was an objection to a voter as being insane (now presumably mentally ill) and so disordered in his senses that he could not repeat the oaths. It is clear, however, from the *Oakhampton Case, Robin's Case*[6] and the *Bridgewater Case, Tucker's Case*[7] that a mentally ill person can vote during lucid intervals.

A mentally disordered person who is capable of lucid intervals should be registered. A person registered as a parliamentary or local government elector cannot be excluded from voting on the ground that he is otherwise subject to a legal incapacity to vote, but this does not prevent the rejection of his vote on a scrutiny or affect his liability to any penalty for voting (s. 49(5)).

The presiding officer is entitled to put to him the questions permitted by rule 35 of the election rules (*e.g.*, "Are you the person registered in the register of parliamentary electors . . .?"). If the elector is *compos mentis* to discriminate between the candidates and to answer these statutory questions in an intelligible manner he should be permitted to vote.

If a mentally disordered person is in hospital on an informal basis (see para. **24.06** below) or is subject to guardianship, that fact in itself does not place him under a legal incapacity to vote. His competency is still an open question of fact.

24.05 Registration of Detained Mental Patients

A person who is detained in any place by virtue of any enactment relating to persons suffering from mental disorder cannot treat that

---

[1] Per Lord Coleridge, C.J. in *Stowe v. Jolliffe* (1874) L.R. 9. C.P. 750.

[2] *Beauchamp, Earl v. Madresfield* (1872) L.R. 8 C.P. 245; *Wedgwood Benn Case* [1961] 3 All E.R. 354.

[3] A penal institution includes prisons, detention centres and remand centres, but not remand homes (see s. 3(2)(*b*)).

[4] (1785) 2 Lud. E.C. 381, 567.

[5] 27 Journ. 176.

[6] (1791) 1 Fras. 69, 162–164.

[7] (1803) 1 Peck. 101, 108.

place as their place of residence for the purposes of electoral registration (s. 7(1)).[1] Earlier Home Office guidance advised Electoral Registration Officers (EROs) that detained patients also could not be regarded as being resident at an address outside their place of detention since, unlike voluntary patients, they are not at liberty to return there. The earlier guidance went on to say that, for these reasons, patients who are detained on the qualifying date are unable to register as electors (RPA 379, 27 August 1993).

Following a challenge from MIND, the Home Office determined that the advice in RPA 379 was too sweeping, and that the question whether a detained patient can register as an elector at a place of residence outside the hospital is a question of fact (RPA 407, 7 May 1996). EROs must decide on the facts of the particular case whether a person had a residence at a specific address prior to his or her detention in hospital. A person with an established residence at an address in the community who becomes detained shortly before the qualifying date, and who intends to return to that address at the end of his or her detention, is likely to qualify for inclusion in the register. However, a detained patient who has severed links with his or her previous address is unlikely to be included on the electoral register.

The Home Office view is that it "might be difficult for a person who had been detained for more than six months on the qualifying date to claim that he or she was entitled to be considered as still resident at the former address." Certainly, according to Home Office guidance, a detained patient who has not lived at a particular address in the community for one year or more is unlikely to be included in the electoral register.

Although the Act states that detained patients cannot use the hospital as a place of residence for the purpose of registration, it does not bar them from voting. Provided that detained patients retain the mental capacity (see para. **24.04** *above*) and they have a residence in the community that permits their inclusion on the register, they are legally eligible to vote. The question of law, then, is under what circumstances a person can use a "home" address in the community as a place of residence for electoral purposes. A mid-nineteenth century case involving a person who had been in prison and who was seeking to use his former home as an address for electoral purposes stated: "absence . . . no matter how long, if there be the liberty of returning at any time, and no abandonment of the intention to return . . . will not prevent a

[1] The bar on using the hospital as a place of residence for electoral registration was first introduced in the Representation of the People Act 1918. Apparently, the intent of Parliament was to prevent inmates of prisons and lunatic asylums from registering in the constituency in which those institutions were located. See Camilla Parker, *Voting Rights* (MIND, May 1996), citing, H Samual MP, Representation of the People Bill, Report Stage Debates, vol. 99, 20 November 1917, col. 1115 ("a man [detained in a lunatic asylum] might retain his qualification for his own home. . . .").

constructive legal residence." Notably, the court distinguished "a man who is kept away from his residence by bodily or mental infirmity" from a prisoner who has "debarred himself from the liberty or returning."[1]

It appears, then, that while the decision whether a detained patient can register at his or her community address is a question of fact, there may be no litmus test of under six-to-twelve months as suggested in Home Office guidance. The law requires that the ERO make a fact-specific determination concerning the person's continuing ties to his community home, the length of his absence, and his intention to return.

24.06 Registration of Voluntary Mental Patients

24.06.1 *Scope of section 7 and definitions*

The Mental Health (Amendment) Act 1982 made provisions for the registration of "voluntary mental patients" which were subsequently consolidated in section 7 of the Representation of the People Act 1983. A "voluntary mental patient" means a patient in a mental hospital who is not liable to be detained there (s. 7(2)); and a "mental hospital" means an establishment maintained wholly or mainly for the reception and treatment of persons suffering from any form of mental disorder (s. 7(2)). This latter definition includes mental illness and mental handicap hospitals and mental nursing homes, but not hostels or other residential care establishments where the treatment of residents is not the primary purpose. The definition also excludes psychiatric wards of district general hospitals and old people's homes. Residents in general hospitals, nursing homes or hostels can be registered at the address of the home or institution where they live. In addition, people who live in mental illness or mental handicap hospitals (whether on an in-patient or out-patient basis) but who have a home outside the hospital can still be registered at that home address (s. 7(3)). Householders are still advised on Form A: Return by Occupier as to Residents (Sch. 3 of the Representation of the People Regulations, S.I. 1983, No. 435) "to include those who normally live at your address but are temporarily away . . . including voluntary patients in psychiatric hospitals". Such informal patients can register to vote at their home address and can use absent voter facilities, if appropriate. (As to the postal vote see para. **24.06.7**).

24.06.2 *Notification to patients*

Hospital managers are advised to give patients who are not liable to be detained, and who will not be registered at their home address, notice that they are entitled to make a patient's declaration for voting purposes.

---

[1] *Powell v. Guest* (1864) 18 CB (N.S.) 72. See also *Fox v. Stirk and Bristol Electoral Registration Officer* [1970] 2 Q.B. 463 (temporary absence because a person is on holiday or in hospital does not deprive him of his residence).

24.06.3 *Patient's declaration*

A person who on the qualifying date is a voluntary mental patient is entitled to make a declaration for voting purposes in accordance with section 7(4) (s. 7(3)). The patient must be able to make a declaration without assistance (s. 7(4)). "Assistance", however, does not include assistance necessitated by blindness or other physical incapacity (s. 7(2)). The only requirement is that the patient must be able to understand the information requested on the form and to communicate it to the person responsible for attesting the declaration. Hospital managers are advised that the patient can be given help with reading and writing, and with enquiries about previous addresses.[1]

The declaration must be made annually, on or before the qualifying date. The contents of a patient's declaration are specified in section 7(4). In particular the declarant must state the address where he would be resident in the U.K. if he were not a voluntary mental patient; or, if he cannot give such address, an address (other than a mental hospital) at which he has resided in the United Kingdom. This residential requirement is widely drawn to ensure that patients who wish to make a declaration can supply an address. The address where the patient would be resident if he were not in hospital could be his family home or that of a relative or friend. If he cannot provide an address where he would otherwise be resident, he can declare any U.K. address at which he has ever lived—for example, a private home, hostel or orphanage. The fact that a former address no longer exists because of redevelopment etc. does not prevent it from being given in a declaration.

24.06.4 *Attestation*

Requirements for attestation of a patient's declaration are provided for in regulation 10 of the Representation of the People Regulations, S.I. 1983, No. 435. A person may attest such a declaration if he is a member of staff of the mental hospital at the time of the declaration and authorised for that purpose by the hospital managers. The person must attest that the statements are true to the best of his knowledge and beliefs. The declaration must be transmitted to the appropriate registration officer who must notify the declarant that it has been received. Where the declaration does not appear to be properly made the registration officer must return it to the declarant and explain his reasons for so doing (reg. 11).

24.06.5 *Cancellation of declaration*

A patient's declaration may at any time be cancelled by the declarant; a declaration bearing a later date automatically cancels an earlier declaration (s. 7(6)). Further, if a patient declares more than one address or makes more than one declaration bearing the same date and declaring different addresses, the declarations are void (s. 7(5).

[1] HC(83)14.

24.06.6 *Local elections*

A patient's declaration cannot specifically be made for the purpose of local government elections, but any declaration made for parliamentary elections has effect also for local elections. (But a peer who is subject to a legal incapacity for Parliamentary elections can make a patient's declaration for local elections only) (s. 7(9)).

24.06.7 *Postal vote*

Persons voting at a parliamentary election must do so in person at the polling station except, *inter alia*, those unable, by reason of blindness or other physical incapacity to go in person or to vote unaided (s. 19(1)(*c*)), or those no longer residing at their qualifying address (s. 19(1)(*e*)). This latter provision applies to a person who is registered by virtue of a patient's declaration, but the application for a postal vote applies only for a particular election (s. 20(2)). (See further para. **24.06.1** above.)

24.06.8 *Observations*

The arrangements in respect of electoral registration of voluntary mental patients introduce new principles into electoral law. First, the requirement of a declaration without assistance appears to represent an implicit capacity test; this is apart from the common law tests of capacity which apply to any elector irrespective of his place of residence. In practice social workers already give assistance in completing electoral registration forms to people living in residential accommodation or in the community. Second, the new arrangements still will result in anomolies in that a mental hospital cannot be used as a place of residence for voting purposes, while other hospitals and homes can. The intention behind section 7 was to prevent mental patients from voting in elections in the constituency where the hospital is located because of the fear of "swamping"; this effectively prevents patients, many of whom have lived in the hospital for many years, from influencing elected officials through the ballot box in their areas. It means they must vote in a constituency, perhaps far away from the hospital, where they may have little local interest or contacts.

B. ELECTED OFFICIALS AND JURORS

24.07 Disqualification of Candidates for Office

24.07.1 *Members of Parliament*

At common law "idiots" (presumably now severely mentally handicapped people) are disqualified from membership in the House of Commons and lunatics (presumably now mentally ill people) are

disqualified in their non-lucid intervals.[1] A lunatic is a person who has lucid intervals and may "be elected for their lunacy may never return".[2] There is no similar disqualification for members of the House of Lords.

24.07.2 *Local councillor*

There appears to be no statutory provision and no case barring a mentally disordered person from standing as a candidate for election to a local authority.

24.08 Removal from Office of a Member of Parliament

Section 141 of the Mental Health Act 1983 sets out the procedure for vacating the seat of a Member of Parliament where he is authorised to be detained due to a mental illness. Where a member of the House of Commons is authorised to be detained[3] on the ground that he is suffering from mental illness, it is the duty of those associated with authorising his detention to notify the Speaker of the House of Commons that the detention has been authorised. The persons responsible for notifying the Speaker include the court, authority or person on whose order or application the detention was authorised and the person in charge of the hospital or place in which the M.P. is authorised to be detained (s. 141(1)). Note that the detention need not be under the Mental Health Act 1983 but could be under mental health legislation in a jurisdiction outside England and Wales. Note also that the ground of detention must be that he is suffering from mental illness and not from any other form of mental disorder.

Where the Speaker receives such notification, or is notified by two M.P.s that they are credibly informed that another M.P. has been authorised to be detained as above, the Speaker shall ensure that the M.P. is visited and examined by two registered doctors (s. 141(2)). The two doctors are appointed by the President of the Royal College of Psychiatrists (see further para. **6.16** *ante*) and must appear to the President to have special experience in the diagnosis or treatment of mental disorder (s. 141(3)). The doctors must report to the Speaker whether the M.P. is suffering from mental illness and is in fact authorised to be detained as such (s. 141(4)). If so, the Speaker must after six months from the date of the report, if the House is then sitting, and otherwise as soon as may be after the House next sits, again ensure that the M.P. is examined by two registered doctors as above (s. 141(5)). If the second report also states that the M.P. is still mentally ill and authorised to be detained, it is laid before the House of Commons, and thereupon the Member's seat becomes vacant (s. 141(6)).

---

[1] As to the distinction between a "natural fool" or "idiot" and a "lunatic" see *1 Bl. Comm.* 303–304.

[2] 1 Roe. 113. See D'Ewes Journals of all the Parliaments in the reign of Queen Elizabeth (1682 Ed.) 126.

[3] As to compulsory detention of Peers, see Leopold (1985) *Public Law* 9.

THIS PAGE IS DELIBERATELY LEFT BLANK

24.09 Jury Service

The following mentally disordered persons are disqualified from serving as jurors:[1]

(*i*) A person who suffers or has suffered from mental illness, psychopathic disorder, mental handicap or severe mental handicap and on account of that condition either is resident in a hospital or some other similar institution, or regularly attends for treatment by a medical practitioner. 'Mental handicap' is defined as a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning; "severe mental handicap" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning; and "mental illness" and "psychopathic disorder" are to be construed in accordance with the Mental Health Act 1983 (as to which see paras. **9.02–9.05** *ante*). The definitions of mental handicap are the same as those given for mental impairment in the Act, except that it is not necessary to show any association with abnormally aggressive or seriously irresponsible conduct to be disqualified from serving as a juror. But it is necessary to show that on account of his mental condition he is receiving in-patient care or treatment or is attending a doctor for treatment.

(*ii*) A person who is subject to guardianship under section 7 of the 1983 Act (as to which see paras. **11.07–11.08** *ante*).

(*iii*) A person who is subject to the jurisdiction of the Court of Protection under Part VII of the 1983 Act (as to which see paras. **23.01–23.13** *ante*).

C. MARRIAGE

24.10 Capacity to Enter into a Marriage

In considering whether a marriage is invalid on the ground that one of the parties was mentally disordered at the time it was entered into the test to be applied is whether he or she is capable of understanding the nature of the contract of marriage. To understand the contract of marriage a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to

[1] The Juries Act 1974, s. 1, Sch. 1, Pt. 1, Group D, substituted by the Mental Health (Amendment) Act 1982, s. 65(1), Sch. 3, Pt. 1, para. 48, amended by the Mental Health Act 1983, s. 148, Sch. 4, para. 37.

marriage;[1] only a broad understanding of the nature of marriage is necessary as no-one can ever be expected to appreciate everything that the married relationship entails.

A mentally ill or mentally handicapped person, therefore, can marry so long as he or she is capable of understanding the marriage contract. The contract is a simple one which does not require a high degree of intelligence to comprehend.[2] A mere comprehension of the words of the promise exchanged is not sufficient if, for example, the presence of delusions prevents an appreciation of the contract.[3]

The presumption is in favour of marriage and the burden of proof is on the party attempting to show lack of consent.[4]

Thus the right of a mentally disordered person, even if detained under the Mental Health Act, is the same as that of any other person. The mentally disordered person must understand the nature and purpose of the marriage, must be capable of giving consent, and must not be under duress.

When a marriage was entered into before August 1, 1971, a lack of capacity to consent would make it void—*i.e.*, as if the marriage had never occurred. If the marriage took place on or after that date, a lack of capacity to consent would make the marriage voidable. (See para. **24.13** below.)

24.11 Prevention of a Marriage

If one of the parties to a marriage is incapable by reason of mental disorder from entering into the contract (see discussion at para. **24.10** above), there are methods by which it can be prevented, at least for a time. The method of preventing a marriage ceremony depends upon its nature:

(*a*) **By dissent from publication of banns**—If the marriage is to be celebrated in the Church of England an objection may be raised at the publication of the banns of marriage, or at the ceremony itself. The clergyman should then make enquiries as to the validity of the objection.

(*b*) **By caveat against the granting of a special or common licence**—If a marriage is to take place upon the issue of a special licence by the Archbishop of Canterbury or the issue of a common licence by the Diocesan Bishop, a caveat could be entered at the faculty office from which the licence will issue. Where a caveat against the granting of a common licence is entered no licence can be

---

[1] *Re Park's Estate* [1954] P. 112, [1953] 2 All E.R. 1411, C.A.
[2] *Ibid.*, per Birkett, L.J.
[3] *Ibid.* See *Durham v. Durham* (1885) 10 P.D. at 82, per Hanne, P.
[4] *Harrod v. Harrod* (1854) 1 K. & J. 4.

granted until the appropriate ecclesiastical judge certifies that it ought not to obstruct the grant of the licence, or until the caveat is withdrawn.[1]

(*c*) **By caveat with the superintendent registrar**—If a marriage is to take place at the Registry Office (or at a place of worship not of the Establishment Church) any person can enter a caveat with the superintendent registrar. If the marriage is to take place on the issue of a Registrar-General's licence, a caveat may be entered either at the office of the Registrar-General or of the superintendent registrar.[2]

It is open to anyone, for example the doctor in charge of the patient's treatment, who does not believe that the patient is capable of giving valid consent, to object to the marriage by entering a caveat with the superintendent registrar.[3] The doctor, however, should enter a caveat only if he genuinely believes the patient cannot understand the marriage contract, and not because he believes the marriage would not be in the best interests of the patient or prospective spouse.

24.12 Place of Marriage

24.12.1 *Background*

Article 12 of the European Convention of Human Rights guarantees to men and women of marriageable age the right to marry and to found a family. The European Commission of Human Rights has considered two cases which raise the question of how far the rights guaranteed by Article 12 can apply to prisoners.[4] The Commission's opinion was that the right to marry was, in essence, a right to form a legally binding association between a man and a woman and that this right should not be denied on the grounds that, as one of the partners was detained, the couple would not be able to live together. The imposition of substantial delay before a prisoner could exercise his right to marry was a violation of Article 12.

The Government, in enacting the Marriage Act 1983, considered that these principles apply also to mentally disordered persons detained for substantial periods. Prior to the 1983 Act, neither prisoners nor detained patients had ready access to authorised places of marriage; patients could not use hospital chapels for marriages. The problem applied, in particular, at special hospitals (see para. **3.04** *ante*) where it is practically more difficult to grant a leave of absence for the purposes of getting married. A further liberalisation has been effected by the Marriage Act 1994.[5]

---

[1] Marriage Act 1949, s. 16(2).

[2] Marriage (Registrar-General's Licence) Act 1970, s. 5.

[3] HC(84) 12.

[4] *Hamer v. the United Kingdom* [1981] 24 Decisions and Reports, p. 5; *Draper v. the United Kingdom* [1981] 24 Decisions and Reports, p. 72.

[5] The Marriage Act 1994 amends the Marriage Act 1949. See also the Marriages (Approved Premises) Regulations 1995 (S.I. 1995 No. 510) and the *Registrar General's Guidance to Local Authorities for the Approval of Premises for Marriages in Pursuance of Section 26(1)(*bb*) of the Marriage Act 1949.*

The 1983 and 1994 Acts concern only the place of marriage; the appropriateness of marriage is not a matter for hospital staff or managers but, if the patient is incapable of understanding the marriage contract, a caveat can be entered (see paras. **24.10–24.11** above).

24.12.2 *Marriages of house-bound or detained persons*

The marriage of a house-bound or detained person may be solemnized in England and Wales on the authority of a superintendent registrar's certificate issued under Part III of the Marriage Act 1949 at the place where that person usually resides (Marriage Act 1983 s. 1(1)). For these purposes a person is detained if he or she is for the time being detained as a patient in a hospital otherwise than for a short term of detention (*i.e.* ss. 2, 4, 5, 35, 36 or 136) (Marriage Act 1983, s. 1(3)).

24.12.3 *Use of health service premises for marriage*

Health service managers do not have to agree to the marriage taking place on health service premises; the marriage may take place at a normal location of marriage outside the hospital. Where the managers do agree to make facilities available, they can decide the most suitable place on the hospital grounds for the ceremony.[1]

When a detained patient wishes to be married in hospital the notice of marriage must be accompanied by a statement in the prescribed form by the hospital managers identifying the hospital where the person is detained and stating that the managers have no objection to that hospital's being used.[2]

Hospitals should arrange for careful counselling, particularly for detained patients who wish to marry, and possibly for their prospective spouses, so that both parties may consider the matter fully.[3]

24.12.4 *Consummation of marriage and conjugal visits*

While the law enables mentally disordered persons to be married provided they understand the marriage contract, the law is silent as to whether married couples have a right to have a private place for sexual intercourse while detained in a mental hospital.[4]

Nothing in English law provides a right for detained patients to have unsupervised visits. Such a right could conceivably be claimed under Article 12 or 8 of the European Convention on Human Rights.

The Department of Health states that the term "founding a family" in Article 12 of the European Convention has not been interpreted as referring to the consummation of marriages or having children.[5]

---

[1] HC(84) 12 April 1984.
[2] *Ibid.* The form required is attached to HC(84) 12.
[3] *Ibid.*
[4] In *Ford v. Ford* [1987] Fam Law 232, Goodman J noted that although there was no official provision for "conjugal visits" for prisoners, these do take place.
[5] HC(84) 12, para. 1.

Article 8 of the European Convention provides persons with the "right to respect for his private and family life, his home and his correspondence." The right to privacy in Article 8 applies to sexual life.[1] Yet, it is likely that reasonable rules restricting private meetings between spouses when one or both are subject to lawful detention would be upheld by the European Commission and Court of Human Rights.[2]

The Department of Health advises that, "given there is probably nothing in law to prevent a marriage from taking place, the hospital then has to consider whether facilities should be made available for consummation of the marriage, a matter raising questions about human rights. The decision whether to allow unsupervised visits should be based upon the following criteria: (*i*) any risk one spouse may present to the other; (*ii*) overall security within the hospital; (*iii*) the social consequences of making available to certain patients privileges not available to others; (*iv*) the availability of suitable facilities.[3]

Certainly, a married couple should not ordinarily be prevented from meeting in the course of ordinary hospital life. It is good practice to allow married patients *supervised* visits of a social nature, unless they pose a danger to themselves or others.

24.12A Married Patients—Nearest Relative Functions

A husband or wife has highest priority to exercise the functions of the nearest relative under section 26 of the Mental Health Act. Once a patient marries, even if it is to another patient, his or her spouse may exercise the powers of a nearest relative. The Act does not disqualify a nearest relative who is detained under the Mental Health Act from exercising his or her powers. Where two patients detained under the Act marry, the Department of Health advises that the hospital give consideration to encouraging an application to the County Court for displacement of the nearest relative under section 29(3).[4]

This advice, however, may be over-broad, because the criteria for displacement in the Act must first be met before the nearest relative can be displaced by the County Court. The County Court would have to find that the nearest relative is incapable of acting as such by reason

---

[1] *Dudgeon v. United Kingdom*, 4 AHR 1449.

[2] Council of Europe, Human Rights File No. 5, 1981 (The Commission declined an application by a Swiss married couple claiming a violation of Article 8 when they were detained in prison for two months without being allowed unsupervised visits. The Commission and the prison authority actions were justified on the grounds of prevention of disorder in prison). See advice of Anthony Harbor in a letter to P. Taylor of the Special Hospitals Service Authority, 10 January 1991.

[3] *Re Patient Marriages*, Letter from P. Burns, DHHS to Dr. D. Atna, Rampton Hospital, Ref. No. 5HQ 5/11, 18 November 1987.

[4] M.J. Cantrell, Sol C2, *re*: Two Married Couples—Rampton Hospital Nearest Relative, 18 February, 1987.

of mental disorder; that the nearest relative unreasonably objects to an application for admission to hospital or into guardianship; or that the nearest relative is exercising without due regard to the patients' welfare or interests of the public, the power to discharge the patient. The fact that the person is detained under the Act does not automatically mean that relatives cannot make reasonable judgements. The County Court must make a fact specific finding based upon the nearest relative's behaviour demonstrating that one of these criteria is met before disqualifying the patient from acting as the nearest relative. (See further paras **8.02–8.09** ante).

24.13 Voidable Marriage

24.13.1 *Lack of consent*

A voidable marriage is one which is regarded as valid and subsisting but which may be set aside by a decree of nullity pronounced by the competent court upon the application of either or both parties to the marriage. At para. **24.10** above it was already pointed out that if one of the parties could not consent to the marriage contract the marriage was voidable. Further, a marriage brought about by undue influence being brought to bear upon one of the parties who suffered from mental disability may be set aside at his instance, as it was contracted without his voluntary consent.[1]

24.13.2 *Mental disorder*

A marriage is voidable if at the time of marriage either party, although capable of giving valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 (see para. **9.01** *ante*) of such a kind or to such an extent as to be unfitted for marriage.[2] The mental disorder may be that of the petitioner or the respondent. In order to succeed a petitioner must establish mental disorder which rendered the person incapable of living in a married state and of carrying out the duties and obligations of marriage. The mere fact that the peson is difficult to live with does not make him unfitted for marriage.[3]

When a decree of nullity is sought on the grounds of lack of consent or of mental disorder, this will not be granted unless the proceedings have been instituted within three years of the date of the marriage.[4]

---

[1] *Countess of Portsmouth v. Earl of Portsmouth* (1828) 1 Hag. Ecc. 355.

[2] Matrimonial Causes Act 1973, s. 12(*c*), (*d*).

[3] *Bennett v. Bennett* [1969] 1 All E.R. 539, [1969] 1 W.L.R. 430.

[4] Matrimonial Causes Act 1973 s. 13(2), amended by Matrimonial and Family Proceedings Act 1984, s. 2. The petitioner may not proceed without the leave of the district judge; the judge may condition the leave by requiring that a guardian ad litem be appointed for the respondent. Family Proceedings Rules 1991 (S.I. 1991, No. 1247) r. 9.4.

Further, a decree will not be granted on either of these grounds if the petitioner in the knowledge that he could have the marriage avoided, behaves in such a way towards the respondent, that the respondent reasonably believes he would not seek an annulment and that it would be unjust to the respondent to grant a decree.[1]

A decree of nullity granted after July 31, 1971 in respect of a voidable marriage operates to annul the marriage only with effect from the time the decree is made absolute. Such a marriage is treated as if it had existed up to that time.[2]

[1] *Ibid.*, s. 13(1).
[2] *Ibid.*, s. 16.

THIS PAGE IS DELIBERATELY LEFT BLANK

D. DIVORCE

24.14 Grounds for Divorce

Mental disorder *per se* is not a ground for divorce, although it may be a relevant consideration. The sole ground for divorce is that the marriage has irretrievably broken down.[1] This can be established only if one of five facts are established.[2] In listing these five facts the possible effect of mental disorder, if relevant, will be briefly discussed.

24.14.1 *Adultery*

The respondent has committed adultery and the petitioner finds it intolerable to live with the respondent. Adultery by a respondent who is mentally disordered is dealt with in the same way as any other reason for adultery. The fact that the petitioner regards the respondent as unbearable to live with need not be because of the adultery itself but could be because of the mental disorder.[3]

24.14.2 *Behaviour*

The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent. The petitioner might argue that because of the effects of the respondent's mental disorder it is unreasonable to expect him to go on living with the respondent. The spouse is expected to be more tolerant of behaviour which results from illness or disability than from deliberate unkindness. However, if the behaviour of a mentally disordered person, although of no fault of his own, is so intolerable that the petitioner should not be expected to put up with it, it may provide a ground for divorce.[4]

24.14.3 *Desertion*

The respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition. Desertion is the separation of one spouse from the other with the intention of bringing cohabitation permanently to an end without reasonable cause and without consent of the other spouse. Mental disorder could conceivably affect a court's determination as to whether there had been a desertion: the departure may not be regarded

---

[1] Matrimonial Causes Act 1973, s. 1.
[2] *Ibid.*, s. 1(2).
[3] *Goodrich v. Goodrich* [1971] 1 W.L.R. 1142.
[4] *Thurlow v. Thurlow* [1975] 3 W.L.R. 161, [1975] 2 All E.R. 979. (Wife suffering from increasingly severe neurological disorder; unendurable behaviour included negative conduct, *e.g.* prolonged silences or total inactivity, and included involuntary conduct which stemmed from mental illness).

as intentional if the respondent was mentally incapable of forming the necessary intent or if the respondent was involuntarily detained in hospital. It is a question of fact as to whether the respondent was capable, by reason of mental disorder, of forming the necessary intention. If the desertion results from a delusion, the conduct of the deserting spouse will be judged as if the delusions were true; if the respondent believes the reason was a justifiable one, there will be no desertion.[1] If the respondent becomes mentally disordered during the period of desertion and no longer has the capacity to form an intention, then the desertion will continue provided the evidence shows that the desertion would have continued even if the respondent had not become mentally disordered.[2] Once the desertion has commenced, the fact that the petitioner thereafter goes into a mental hospital does not prevent the desertion from continuing to run. If there is no desertion and the petitioner becomes ill and goes into a hospital or home and during the period of illness the respondent disappears and does not return when the petitioner's recovery is effected, desertion begins from the date of the respondent's renunciation of his or her obligations.[3]

24.14.4 *Living apart for two years*

The spouses have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition, and the respondent consents to a decree being granted. The consent of the respondent is a positive requirement and cannot be implied and it must continue up to the date of the decree nisi and be a valid subsisting consent when the decree is heard.[4] The fact that the person is mentally disordered (even if detained in hospital, subject to guardianship or under the jurisdiction of the Court of Protection) does not automatically prevent a person from giving the necessary consent.[5] A valid consent depends upon whether he can understand the nature and effects of what he is consenting to; the burden of establishing consent is on the petitioner. However, the Official Solicitor as guardian *ad litem* cannot give consent for the patient. As to whether consent could be given by the Court of Protection remains an open question;[6] although one standard text suggests that the Court would not be prepared to give such consent.[7]

---

[1] *Perry v. Perry* [1963] 3 All E.R. 766.

[2] Matrimonial Causes Act 1973, s. 2(4).

[3] *Sotherden v. Sotherden* [1940] P.73, [1940] 1 All E.R. 252, C.A. (Husband left wife during a period during which she was detained in a mental hospital; the mere fact that one of the parties was incompetent did not make desertion impossible).

[4] *Beales v. Beales* [1972] Fam. 210.

[5] *Mason v. Mason* [1972] Fam. 302, [1972] 3 All E.R. 315 (a respondent who was a patient under the jurisdiction of the Court of Protection could give consent if he was capable of understanding its nature and effect).

[6] *Mason v. Mason* [1972] 3 All E.R. at 318.

[7] E. R. Taylor (1978, 10th ed.) *Heywood & Massey Court of Protection Practice*, Stevens, London, p. 243.

24.14.5 *Living apart for five years*

The spouses have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. No consent is required from the respondent and the mental incapacity of the respondent will not affect the granting of a decree.

24.15 Patients Under the Jurisdiction of the Court of Protection

By section 96(1)(*i*) of the Mental Health Act 1983 the Court of Protection has the power to conduct legal proceedings in the name, or on behalf of, a patient under the Court's jurisdiction. An order, direction or authority to present a petition on behalf of the patient for nullity or divorce or judicial separation can be made or given only by the Lord Chancellor or a nominated Judge; the Master of the Court has jurisdiction in regard to defending a matrimonial cause on the patient's behalf.

The Judge, in considering an application to institute divorce or any other matrimonial proceedings, will consider what was for the "benefit" of the patient; the word "benefit" is to be given a wide construction so as to include whatever would be beneficial in any respect, material or otherwise. Primarily, the Judge will have regard to the requirements and benefit of the patient and also his family. (See further para. **23.04** *ante*).[1] In an application for leave to bring a divorce sent on behalf of a patient, the patient should first be seen by one of the Lord Chancellor's Medical Visitors (as to which see para. **23.12** *ante*). The Medical Visitor should report whether there is a real chance of the patient recovering; and, if the patient is able to appreciate what the proceedings are about, what his or her views are concerning the desirability of a divorce.[2]

24.15.1 *Practice and procedure*

Practice and procedure relating to persons under disability (*i.e.* minors and patients under the jurisdiction of the Court of Protection) are governed by rule 9 of the Family Proceedings Rules 1991, S.I. 1991 No. 1247, as amended by S.I. 1992 No. 456. Rule 9.2 provides that a person under disability may begin and prosecute any family proceedings by his *guardian ad litem*. If a person has been authorised by the Court of Protection under Part VII of the 1983 Act to conduct proceedings on the patient's behalf, he is entitled to be the next friend. The Official Solicitor may be appointed next friend or guardian ad litem. If the person has already been appointed by the Court of Protection he must, unless he is the Official Solicitor, lodge with the petition his written consent to act as next friend and an office copy of the order of the Court of Protection granting authority to conduct legal proceedings.

---

[1] *Re W.* [1970] 3 W.L.R. 87.
[2] *Re W.* [1970] 3 W.L.R. at 94.

Where there is no-one authorised to act, the proposed next friend must, unless he is the Official Solicitor, lodge his written consent to act and a certificate stating: (*a*) that he knows or believes the person to whom the certificate relates to be a patient, stating the grounds of his knowledge or belief; (*b*) that no-one has been authorised under Part VII of the 1983 Act to conduct proceedings on the patient's behalf; (*c*) that the person named as next friend or guardian ad litem has no interest in the matter which is adverse to that of the person under disability; and (*d*) that he is a proper person to be next friend or guardian.[1]

[1] See further *Rayden and Jackson on Divorce and Family Matters* (16th Edn) 1991 Butterworths London, 468–9, 4621–4623.

E. CHILDREN

24.16 The Children Act 1989 and the Care of Children under Eighteen

Children under eighteen who need mental health care and treatment are particularly vulnerable. They may be separated from their family, still growing and maturing, not fully competent and experienced, and sometimes subject to neglect or abuse. Conversely, the welfare of a child may be at risk as a result of the inability of parents to provide proper care due to their own mental health problems, or the parents may be preventing the child from obtaining necessary health care. Accordingly, children and young people deserve special protection. The Children Act 1989 provides a comprehensive statutory framework for public and private law decision-making in relation to children. The domestic panel of the magistrates' court is renamed the "family panel", and the domestic court renamed the "family proceedings court". It handles most cases. Care cases usually start there but there is a power to transfer to specified county courts or the High Court. The Lord Chancellor has the power to order that specified proceedings must be commenced in specified courts.[1]

Section 1 of the 1989 Act stipulates three principles for the guidance of courts making decisions determining any question with respect to the upbringing of a child or the administration of a child's property or the application of an income arising from it. First, the child's welfare shall be the court's paramount consideration. Second the court should not make an order under the Act unless it considers that to do so would be better than to make no order at all. Finally, courts are to have regard to the general principle that delay in determining a question with respect to a child is likely to prejudice his welfare.

In the New Zealand case *Walker v. Walker and Harrison* Hardie Boys J gave the following explanation of welfare:

> Welfare is an all-encompassing word. It includes material welfare, both in the sense of an adequacy of resources to provide a pleasant home and a comfortable standard of living, and in the sense of adequacy of care to ensure that good health and due personal pride are maintained. However, while material conditions have their place, they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships that are essential for the full development of the child's character, personality and talents.[2]

---

[1] Children Act 1989 Sch 11, para. 1, Children (Allocation of Proceedings) Order 1991, S.I. 1991 No. 1677 as amended by S.I. 1993 No. 624, Lord Chancellor's Direction—The Family Proceedings (Allocation to Judiciary) Directions 1991 [1991] 2 F.L.R. 463.

[2] [1981] NZ Recent Law 257, quoted in R.M. Jones, *Encyclopaedia of Social Services Law* London Sweet and Maxwell A1–255.

A central concept in the 1989 Act is that of parental responsibility, defined in section 3 as meaning "all the rights, duties, powers, responsibility and authority which by law a parent has in relation to the child and his property." Parental responsibility may be held by a number of people simultaneously. Parents or guardians do not lose it even when a child is placed in care under a care order, although then their ability to exercise it is circumscribed. If a child is adopted the parents do lose parental responsibility. It may be acquired by an unmarried father by formal agreement with the mother or following an application for a parental responsibility order under section 4.

All courts dealing with family proceedings may make orders under section 8 of the 1989 Act. These include the following:

(*a*) contact orders which require the person with whom a child lives to allow the child to have contact with the person named in the order;

(*b*) prohibited steps orders that no step which could be taken by a parent in meeting his parental responsibility for a child and which is named in the order shall be taken without the court's consent;

(*c*) residence orders settling the arrangements to be made as to the person with whom the child is to live; and

(*d*) specific issue orders giving directions for the purpose of determining a specific issue which has arisen or which may arise, in connection with any aspect of parental responsibility for a child.

A section 8 order may be made at any time before a child's eighteenth birthday. If an order is to be made or continued after the child has reached the age of sixteen, the circumstances must be exceptional.[1] Where a residence order has been made in respect of a child who is under eighteen, section 28 of the Mental Health Act 1983 provides that the person named in the order shall be deemed to be the patient's nearest relative for the purposes of the 1983 Act. (As to the definition and powers of the nearest relative, see paras. **8.01–8.03** *ante*.) A specific issue order may relate to medical treatment.[2] Local authorities are prohibited from applying for any section 8 order other than a residence order in respect of a child who is in their care.[3] When a child is simply being accommodated by a local authority and is not in their care under a care order, the Act does not restrict the use of section 8 orders.[4] If the child is not in their care they may only apply for a prohibited steps or specific issue order.[5] This is to prevent section 8 being used as an alternative to care proceedings under section 31 of the Act.

---

[1] Children Act 1989, s. 9(7) see *e.g. Re M (a Minor) (Immigration: Residence Order)* [1993] 2 F.L.R. 858.

[2] *Re O (A Minor) (Medical Treatment)* [1993] 2 F.L.R. 149.

[3] Children Act 1989, s. 9(1).

[4] See however the general restrictions on specific issue and prohibited steps orders in s. 9(5).

[5] *Ibid.*, s. 9(2).

24.16.1 *Treatment of minors*

Mental health professionals should be aware of who has legal authority over, and responsibility for, the minor. Professionals should request copies of any court orders (parental responsibility, wardship, care order, residence order, evidence of appointment of a guardian or contact order (Code of Practice, para. 30.4)). If the child is living with either of the parents who are separated, professionals should ascertain if there is a residence order, and if so, in whose favour. Where a residence order has been made in respect of a child who is under eighteen, section 28 of the Mental Health Act provides that the person named in a residence order is the child's nearest relative for the purposes of the 1983 Act. (As to the definition and powers of the nearest relative, see paras. **8.01–8.03** *ante*.) Note however, that both parents still have parental responsibility.

Mental health professionals should make an assessment of the child's capacity to make his own decisions in terms of emotional maturity, intellectual capacity and psychological state. Where a parent refuses consent to treatment, are the reasons sound? Specific issue orders may in certain cases be used to authorise medical treatment, and have been used to override the refusal of parents, who were Jehovah's witnesses, to consent to the use of blood products on their child who had leukaemia.[1] If the local authority already has parental responsibility for the child by virtue of a care order, it cannot apply for a specific issue order because of section 9(1). In such a case it should invoke the inherent jurisdiction fo the High Court (see para. 24.23 below).[2] In *South Glamorgan County Council v. B and W*[3] Douglas Brown J held that the High Court, exercising its inherent jurisdiction could override the wishes of a girl of 15 years even if she was capable of making an informed decision about medical treatment, because it was in her best interests to do so. In *Re HG (Specific Issue Order)*[4] Peter Singer QC held that he did not find the procedure of applying for a specific issue order as to whether a child should be sterilised by the child through her next friend to be "void of jurisdictional validity." However, a Practice Note subsequently issued by the Official Solicitor has clarified that sterilisation will in virtually all cases require the sanction of a High Court judge and that the procedural and administrative difficulties attaching to application under this section are such that the preferred course is to apply under the inhrent jurisdiction.[5]

Where it is proposed to treat a child for mental disorder mental health professions should consider how necessary the treatment is for

---

[1] *Re R (A Minor) (Blood Transfusion)* [1993] 2 F.L.R. 757.
[2] *Re O (A Minor) (Medical Treatment)* [1993] 2 F.L.R. 149.
[3] (1992) 11 B.M.L.R. 162.
[4] [1993] 1 F.L.R. 587.
[5] *Practice Note (Official Solicitor) (sterilisations: minors and mental health patients)* [1993] 2 F.L.R. 222.

the child's health or welfare. Is the home environment conducive to less restrictive care and treatment in the community? Could the needs of the young person be met in an educational or social services placement. To what extent have all these authorities exhausted all possible alternative placements. A key issue is whether an unwilling child should be treated for mental disorder by detaining him or her under the Mental Health Act or by relying on the consent of the parents or the provisions of the Children Act. The Mental Health Act provides more effective regular audit of compulsory powers via the second opinion system under Part IV and through review of detention by Mental Health Review Tribunals. However, mental health professionals tend to be reluctant to use compulsory powers under mental health legislation on the grounds that they are stigmatising and may lead to the child being treated in a discriminatory manner in later life. Informal admission to psychiatric hospital or being the subject of a care or secure accommodation order may be equally stigmatising. (As to consent to treatment by, or on behalf of, a minor, see paras. **20.13–20.01.6A** *ante*. As to informal admission of minors, see para. **10.02.2** *ante*.)

24.16.2 *Children in care placed in "secure accommodation"*

Local authorities are placed under a duty to take reasonable steps to avoid the need for children in their area to be placed in secure accommodation.[1] Section 25 of the Children Act 1989 provides that a child who is being looked after by a local authority may not be placed, and if placed, may not be kept in accommodation provided for the purpose of restricting liberty ("secure accommodation") unless it appears that:

(*a*) (i) he has a history of absconding and is likely to abscond from any other description of accommodation; *and*

(ii) if he absconds, he is likely to suffer significant harm; *or*

(*b*) that if he is kept in any other description of accommodation he is likely to injure himself or other people.

The section further provides that a person shall not be kept in secure accommodation which restricts the child's liberty for more than 72 hours unless authorised by the family proceedings court.[2] Section 25 extends to children accommodated by health and education authorities. The placement of a child in an NHS secure unit or a private nursing home would require a court application, unless the person is detained under the Mental Health Act 1983. Applications are to be made by local authorities if children are looked after by them, and by health

[1] *Ibid.*, Sched 2 para. 7(*c*).

[2] *Ibid.*, s. 25(2) and the Children (Secure Accommodation) Regulations 1991, S.I. 1991 No. 1505 and the Children (Secure Accommodation) (No. 2) Regulations 1991, S.I. 1991 No. 2034.

authorities, NHS Trusts, local education authorities or persons running residential care, nursing or mental nursing homes in other cases involving such establishments. Section 25 does not apply to children who are detained under the 1983 Act (Code of Practice, para. 30.9).

Although local authorities are under the general duties in section 22(1)(*a*) of the 1989 Act to safeguard and promote the welfare of every child they are looking after, this is subject to an exception where it is necessary to protect the public from serious injury.[1] Courts are required by section 1 of the 1989 Act to give paramountcy to the welfare of the child in determining any question. Where a court is hearing an application under section 25, the child's welfare is a relevant, but not the paramount, consideration. As Hoffman LJ said in *Re M (Secure Accommodation Order)*[2] "the duty of the court is to put itself in the position of a reasonable local authority and to ask first, whether the conditions in section 25(1) are satisfied, and secondly, whether it would be in accordance with the local authority's duty to safeguard and promote the welfare of the child (subject to the requirement in section 22(6)) for the child to be kept in secure accommodation and, if so, for how long."

24.16.3 *Placement of children on adult wards*

Children have special needs and are vulnerable to exploitation. Accordingly, they should, wherever possible, be cared for and treated with children their own age. Thus children and young persons should not be placed on adult wards nor should children be admitted to adolescent facilities (or vice versa). (Code of Practice, para. 30.12.)

24.17 Parent Under the Jurisdiction of the Court of Protection

If a parent of a child is under the jurisdiction of the Court of Protection, the court may authorise the receiver to exercise parental responsibility.[3]

24.18 Services for Children in Need including Accommodation

Section 17 of the Children Act 1989 provides a statutory basis for preventative child care by placing a general positive duty on local authorities to provide an appropriate range and level of services to safeguard and promote the welfare of children within their areas who are in need; and so far as is consistent with that duty to promote their upbringing with their families. A child is defined as being in need if:

(*a*) he is unlikely to achieve or maintain, or to have the opportunity

---

[1] Children Act 1989, s. 22(6).
[2] [1995] 1 F.L.R. 418 at 427.
[3] *Re L.H.B.* [1935] Ch. 643.

of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority;

(*b*) his health or development is likely to be significantly impaired or further impaired, without the provision for him of such services; or

(*c*) he is disabled.[1]

In *X (Minors) v. Bedfordshire County Council*; *(M a Minor) and Another v. Newham London Borough Council and Others*; *E (a Minor) v. Dorset County Council*; *Christmas v. Hampshire County Council*; *Keating v. Bromley London Borough Council*[2] Lord Browne Wilkinson observed that the section 17 duty is described as a general duty. He went on to say that:

> [N]ot only is the duty not a specific one, but the section itself points out the basic tension which lies at the root of so much child protection work: the decision whether to split the family in order to protect the child. I find it impossible to construe such a statutory provision as demonstrating an intention that even when there is no carelessness by the authority, it should be liable in damages if a court subsequently decided with hindsight that the removal, or failure to remove, the child from the family either was or was not consistent with the duty to safeguard the child.[3]

Section 17(2) provides that for the purpose principally of facilitating the discharge of their general duty under section 17 local authorities shall have the specific duties and powers set out in Part I of Schedule 2. Paras 1(1) and 4(1) provide that every local authority must take reasonable steps to identify the extent to which there are children in need in its area and, through the provision of services under Part III of the 1989 Act, to prevent children in their area suffering ill-treatment or neglect.

Section 20 of the 1989 Act provides for what used to be known as voluntary care. It places authorities under a duty to provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

(*a*) there being no person who has parental responsibility for him;

(*b*) his being lost or abandoned; or

(*c*) the person who has been caring for him being prevented (whether or not permanently, and of whatever reason) from providing him with suitable care.

---

[1] Children Act 1989, s. 17(10).
[2] [1995] 2 F.L.R. 276.
[3] *Ibid.*, p. 299.

The provision of accommodation has the same voluntary nature as a voluntary care had under section 2 of the Child Care Act 1980. Section 20(7) and (8) of the 1989 Act provide that the local authority may not provide accommodation to a child under 16 if any person with parental responsibility who is willing and able to provide such accommodation objects, and a person with parental responsibility may remove a child from accommodation at any time.[1] Subsections (7) and (8) do not apply where one of the following has consented: (*a*) the child where he is over 16; (*b*) a person in whose favour a residence order has been made; or (*c*) a person who has care of the child by virtue of the High Court's inherent jurisdiction.[2]

24.19 Children at Risk of Significant Harm: Local Authorities' Investigative Duties, Child Assessment Orders and Emergency Protection Orders

Part V of the 1989 Act replaces the investigative duties in section 2 of the Children and Young Persons Act 1969 and the various statutory powers to remove children to a place of safety with a scheme of new powers and duties. The duty to investigate under section 47 requires local authorities to make, or cause to be made, such enquiries as they consider necessary[3] to enable them to decide whether they should take any action to safeguard or promote the child's welfare. It arises in the following circumstances:

(*a*) Where they are informed that a child who lives or is found in their area is subject to an emergency protection order or is in police protection;[4]

(*b*) where they have reasonable cause to suspect that a child who lives or is found in their area is suffering or is likely to suffer significant harm;[5] or

(*c*) where they have obtained an emergency protection order in respect of a child.[6]

Section 43 of the 1989 Act provides that where the applicant has reasonable cause to suspect that a child is suffering or is likely to suffer significant harm, the local authority or the National Society for the

---

[1] Children Act 1989, s. 20(7).

[2] *Ibid.*, s. 20(9), (11).

[3] As Lord Browne Wilkinson put it in *X (Minors) v. Bedfordshire County Council*; *(M a Minor) and Another v. Newham London Borough Council and Others*; *E (a Minor) v. Dorset County Council*; *Christmas v. Hampshire County Council*; *Keating v. Bromley London Borough Council* [1995] 2 F.L.R. 276 at 299 the phrase "such inquiries as they consider necessary" indicates that "the duty to make inquiries is made dependent on the subjective judgement of the local authority. To treat such duties as more than public law duties is impossible."

[4] s. 47(1)(*a*).

[5] s. 47(1)(*b*).

[6] s. 47(2).

Prevention of Cruelty to Children may apply to the court for a child assessment order. An order may be made if an assessment is required to determine whether the child is suffering (or likely to suffer) significant harm, that it is unlikely that an assessment would be made without an order, and the grounds are not satisfied to make an emergency protection order or it would not be appropriate to make an emergency protection order.[1] Assessment can include psychiatric, medical, educational, or psychological evaluation, and the court can attach directions which can include that the child can be kept away from home during the assessment. The child may, if he is of sufficient understanding to make an informed decision, refuse to submit to any medical or psychiatric examination or other assessment.[2] A child who is in the care of a parent with a mental disorder may be suffering significant harm as a result. Significant harm is to be evaluated in accordance with section 31(10) of the 1989 Act, which provides that where the question of whether harm suffered by a child is significant turns on the child's health or development, and his health or development shall be compared with that which could reasonably be expected of a similar child. There should be a substantial deficit in the standard of upbringing and minor deficits should not justify compulsory intervention unless by virtue of their number they are causing or are likely to cause significant harm. A child assessment order lasts for a maximum of seven days.[3]

A court may make an emergency protection order under section 44 of the 1989 Act only if *the court* is satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm (*a*) if he is not removed to accommodation provided by or on behalf of the applicant; (*b*) if he does not remain at the place where he is currently being accommodated. Hence an emergency protection order can operate to remove a child from a harmful environment or prevent him from being removed from accommodation where he is being kept safe. The third ground for making an order is where the court is satisfied that *the applicant* has reasonable cause to suspect that a child is suffering or likely to suffer significant harm and is making enquiries but those enquiries are being frustrated by access to the child being unreasonably refused. The applicant must also have reasonable cause to believe that access to the child is required as a matter of urgency. The court may attach such directions as it thinks fit for the contact which is to be allowed between the child and any named person, or the medical, psychiatric or other assessment of the child.[4] Where a direction is given for the medical or psychiatric examination or other assessment of the child, the child may, if he is of sufficient understanding to make an

[1] *Ibid.*, s. 43.
[2] *Ibid.*, s. 43(8). See also *Gillick v. West Norfolk and Wisbech Health Authority* [1986] A.C. 112.
[3] *Ibid.*, s. 43(5).
[4] *Ibid.*, s. 44(6).

informed decision, refuse to submit to the examination or assessment.[1] An emergency protection order lasts for eight days in the first instance which may be extended once by the court for a maximum of a further seven days.[2]

24.20 Care proceedings

Part IV of the 1989 Act related to the making of care and supervision orders on the application of a local authority or an authorised officer of the National Society for the Prevention of Cruelty to Children.[3] Any court which is hearing family proceedings in which a question arises about the welfare of a child may direct a local authority to investigate the child's circumstances if it appears that a care or supervision order may be appropriate. The local authority is then under a duty to consider what action to take with regard to the child, and to report their decision to the court.[4] Previously care and supervision orders might be made under various different statutory provisions according to different criteria and with differing effects. The Children Act replaces these with one sort of care or supervision order made in accordance with the criteria in section 31(2). Neither a care nor a supervision order may be made unless:

(*a*) the child concerned is suffering, or is likely to suffer, significant harm;[5] and

(*b*) the harm, or likelihood of harm is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it is reasonable to expect a parent to give him; or

(ii) the child being beyond parental control.

24.20.1 *Care orders*

A care order may be made in respect of a child who has not yet suffered significant harm but is likely to do so, which might be the case where a child is born to a parent or parents suffering from a severe mental illness or learning disability such that they would be unable to care properly for the child. A care order gives the local authority parental responsibility for the child, and the power, where they are satisfied that it is necessary for the child's welfare, to determine the extent to which a parent or guardian may discharge his parental

[1] *Ibid.*, s. 44(7). See also *Gillick v. West Norfolk and Wisbech Health Authority* [1986] A.C. 112.

[2] *Ibid.*, s. 45.

[3] s. 31(9). The Secretary of State may by order authorise others.

[4] s. 37.

[5] Harm includes ill treatment (including sexual abuse and non-physical ill treatment such as emotional abuse) and the impairment fo health or development (s. 31(9)).

responsibilities towards the child. A parent or guardian retains the right to withhold agreement to a child's adoption or consent to his marriage.[1] In any case where an application has been made for a care or supervision order and the proceedings are adjourned, the court may, pending a final decision, make a section 8 order, an interim care order, or an interim supervision order.[2] An interim care or supervision order may be made where a local authority has been directed under section 37(1) to carry out an investigation as to the appropriateness of a full care or supervision order.

24.20.2 *Supervision orders*

Care and supervision orders are mutually exclusive.[3] A supervision order puts a child under the supervision of a local authority or a probation officer. The supervisor is required to advise, assist and befriend the child and to take all steps which are reasonably necessary to give effect to the order.[4] A supervision order may require the supervised child to submit to a medical or psychiatric examination or to submit to such an examination from time to time as directed by the supervisor.[5] Such a requirement cannot be attached to a supervision order unless the court is satisfied that (*a*) where the child has sufficient understanding to make an informed decision, he consents to its inclusion; and (*b*) satisfactory arrangements have been, or can be, made for the examination.[6] A medical or psychiatric examination shall be required to be conducted by or under the direction of a specified medical practitioner. The order must also specify the place where the examination is to take place. This may be at a place where the child is to attend as a non-resident patient. If the court is satisfied on medical evidence that the child may be suffering from a physical or mental condition that requires or may be susceptible to treatment and that a period as a resident patient may be necessary if the examination is to be carried out properly, the court may require the examination to take place at a health service hospital or mental nursing home at which the supervised child is, or is to attend as a resident patient.[7]

A court may include in a supervision order a requirement that the child submit to specified treatment for a mental condition for a period specified in the order.The court must be satisfied, on the evidence of a doctor approved under section 12 of the Mental Health Act 1983, that (*a*) the child's mental condition is such as requires, and may be suscep-

---

[1] s. 33.
[2] s. 38(1).
[3] s. 91(3) and Schedule 3, para 10.
[4] s. 35(1) and Schedule 3. The powers and functions of supervisors are set out in Schedule 3.
[5] Children Act 1989, Sched 3, para. 4(1).
[6] Sched 3, para. 4(4).
[7] Sched 3, para. 4(2)(*b*), (*c*), 4(3).

tible to, treatment; but (*b*) is not such as to warrant his detention under a hospital order.[1] A requirement of submission to treatment may not be included in a supervision order unless the court is satisfied (*a*) that the child has consented, where he has sufficient understanding to make an informed decision; and (*b*) that satisfactory arrangements have been or can be made for the treatment.[2] The doctor treating a child subject to a supervision order with a condition of treatment must make a report in writing to the supervisor if he is unwilling to continue to treat or direct treatment, or considers that (*a*) the treatment should be continued beyond the period specified in the order; (*b*) the child needs different treatment; (*c*) he is not susceptible to further treatment; or (*d*) he does not require further treatment. The supervisor must then refer the report to the court, and on such a reference the court may make an order varying or cancelling the order.[3]

The 1989 Act creates a new kind of supervision order, an education supervision order, which may be made on the application of a local education authority, to secure that the child received a proper education.[4] Such an order may only be made if the child is of compulsory school age and is not receiving efficient full-time education appropriate to his age, ability, and aptitude and any special needs which he may have.[5] Where a local education authority informs a local authority that a child is persistently failing to comply with directions given under an education supervision order, the local authority must investigate the child's circumstances.[6] The duty to investigate a child's circumstances also arises where a court discharging an education supervision order so directs.[7]

A court in family proceedings which has the power to make an order under Part II of the 1989 Act may in exceptional cases make a family assistance order requiring a probation officer or an officer of the local authority to be made available to advise, assist and befriend any person named in the order. The order may name the child, a parent or guardian, any person with whom the child lives, or any person in whose favour a contact order is in force. Before such an order may be made each person named therein (except the child) must give his consent. The maximum duration of a family assistance order is six months, its purpose being to give expert help to families on a short term basis.[8]

---

[1] Sched 3, para. 5(1).
[2] Sched 3, para. 5(5).
[3] Sched 3, para. 5(6), (7).
[4] s. 36.
[5] s. 36(3) and (4).
[6] Schedule 3, para. 19.
[7] Schedule 3, para. 17(2).
[8] s. 16.

24.21 Duties of local authorities towards children looked after by them

Children who are in care, who are being accommodated voluntarily under section 20, or who are compulsorily accommodated by a local authority,[1] are referred to as being "looked after" by the authority.[2] The authority owes to such a child a general duty to safeguard and promote his welfare and to make such use of services available for children cared for by their own parents as appears to the authority to be reasonable in his case.[3] Before taking any decision with regard to a child whom they are looking after or proposing to look after, a local authority must, so far as is reasonably practicable, ascertain the wishes and feelings on the matter of the child, his parents, any other person exercising parental responsibility, and any other person whose wishes and feelings they consider relevant.[4] In arriving at their decision they must take account of the views expressed to them by those people, having regard, in the case of the child, to his age and understanding. Even if there has not been time to canvass the views of the people listed above, the authority must give due consideration to the child's religious persuasion, racial origin, and cultural and religious background.[5] These duties may be overridden if the local authority considers it necessary to do so for the protection of the public from serious injury. The Secretary of State may give directions to a local authority as to how they should exercise their powers with respect to a child whom they are looking after, if he considers it necessary to protect the public from serious injury, even if those directions are incompatible with duties under section 22.[6]

In deciding where to place a child whom they are looking after, a local authority must, so far as reasonably practicable and consistent with his welfare, make arrangements for him to live with a person connected with him—for example a parent, a person having parental responsibility for him, a relative or a friend.[7] If the authority provides accommodation, it must, so far as is reasonably practicable and consistent with his welfare, secure that the accommodation is near his home and where they are also providing accommodation for a sibling that they are accommodated together.[8] When a child being looked after is disabled, the authority must, so far as practicable, ensure that the accommodation is suited to his needs.[9]

Where a local authority is looking after a mentally disordered child in care under a care order, the authority is deemed to be the nearest

---

[1] s. 21.
[2] s. 22(1).
[3] s. 22(3).
[4] s. 22(4).
[5] s. 22(5)(*c*).
[6] s. 22(7).
[7] s. 23(6).
[8] s. 23(7).
[9] s. 23(8).

relative for the purposes of the Mental Health Act 1983 in preference to anyone other than the patient's husband or wife.[1] (As to the definition and powers of the nearest relative, see paras. **8.01–8.03** *ante*.) By section 116 of the 1983 Act, if such a child or young person is admitted to a hospital or nursing home, the local authority has specified duties to see that he is visited (see para. **4.10.2** *ante*).

24.21.1 *Liability of local authority in relation to Children Act duties*

In *X (Minors) v. Bedfordshire County Council*; *M (a Minor) and Another v. Newham London Borough Council and Others*; *E (a Minor) v. Dorset County Council*; *Christmas v. Hampshire County Council*; *Keating v. Bromley London Borough Council*[2] the House of Lords held that there could be no action for breach of statutory duty in respect of local authorities' duties under the Children Act, whose wording was inconsistent with any intention to create a private law cause of action. Similarly, local authorities did not owe a direct common law duty of care in respect of their decisions in child abuse cases. The actions of authorities may be questioned through the statutory complaints procedure under section 7(B) of the Local Authority Act 1970.[3] In one of the cases ruled on by the Law Lords, *M (a Minor and Another v. Newham London Borough Council and Others*,[4] the plaintiff alleged negligence against a social worker and a psychiatrist who interviewed the child in relation to allegations from the family doctor that she might be suffering sexual abuse. The professionals had wrongly concluded that the mother's boyfriend was the abuser on the basis of the child saying that someone with the forename X had committed the abuse. X was the mother's boyfriend's forename, but in fact the child had been referring to a cousin with the same forename. On the basis of the social worker and psychiatrist's findings, the child was removed from her mother, and they were separated for about a year, both alleging that they suffered psychiatric disorder as a result. The plaintiff argued that the social worker and the psychiatrist had failed to exercise reasonable professional skills in the conduct of their interview with the child and to make proper inquiries, and that their employers (the local authority and the health authority) were vicariously liable for their breach of duty. The majority in the Court of Appeal and the House of Lords held that the social workers were retained by the local authority to advise the local authority, not the plaintiffs. Although the subject matter of the advice and activities was the child, and this involved interviewing and examining the child, this did not alter the extent of

[1] Mental Health Act 1983, s. 27.
[2] [1995] 2 F.L.R. 276.
[3] As inserted by the National Health Service and Community Care Act 1990, s. 50. See also the Local Authority Social Services (Complaints Procedure) Order 1990, S.I. 1990 No. 2244, the Children Act 1989, s. 26(3), and the Representations Procedure (Children) Regulations 1991 S.I. 1991 No. 894 as amended.
[4] *Ibid.*

the duty owed by the professionals under the retainer from the local authority. Lord Browne-Wilkinson accepted the analogy drawn by the Court of Appeal with doctors instructed by insurance companies. In such a case:

> The doctor does not, by examing the applicant, come under a general duty of medical care to the applicant. He is under a duty not to damage the applicant in the course of the examination: but beyond that his duties are owed to the insurance company, not the applicant . . . In my judgment in the present cases, the social workers and the psychiatrist did not, by accepting the instructions of the local authority, assume any general professional duty of care to the plaintiff children. The professionals were employed or retained to advise the local authority in relation to the well-being of the plaintiffs, but not to advise or treat the plaintiffs.[1]

Not only did his Lordship hold that the professionals owed no duty of care to the child and his mother in the *Newham* case, but he also held that the psychiatrist was immune from liability in negligence by virtue of witness immunity:

> In the present case, the psychiatrist was instructed to carry out the examination of the child for the specific purpose of discovering whether [she] had been sexually abused and (if possible) the identity of the abuser. The psychiatrist must have known that, if such abuse was discovered, proceedings by the local authority for the protection of the child would ensue and that her findings would be the evidence on which those proceedings would be based. It follows . . . that such investigations having an immediate link with possible proceedings in pursuance of a statutory duty cannot be made the basis of subsequent claims.[2]

Lord Nolan dissented on the question of the liability of the psychiatrist and the social worker in the *Newham* case. Although, like the majority, he held the authorities free from vicarious liability, this was on the basis of public policy alone and in the case of the psychiatrist, on the grounds of witness immunity. Lord Nolan did not accept that, "public policy apart", the psychiatrist and the social worker were exempt from a general professional duty of care towards the child. Nor did he agree that the relationship was analagous to that which arises in the contractual and commercial context of an examination by an insurance company doctor of an applicant for life insurance. On this point Lord Nolan agreed with the dissenting judgment of Sir Thomas Bingham MR in the Court of Appeal, who had concluded, on the basis of *Everett v. Griffiths* [1920] 3 K.B. 163 and [1921] 1 A.C. 631 that the psychiatrist did owe a duty to the child.[3] Although he concluded that the claim

---

[1] [1995] 1 F.L.R. 276 at 304 per Lord Browne Wilkinson.
[2] *Ibid.*
[3] (1994) 19 B.M.L.R. 107.

against the psychiatrist was not bad in law, the Master of the Rolls had entertained the gravest doubt about whether it could succeed on the facts.

24.21.2 *Guardians ad litem*

In proceedings involving care and supervision orders (other than education supervision orders) and proceedings under Part V of the 1989 Act, a *guardian ad litem* must be appointed to safeguard the interests of the child, unless the court is satisfied that it is not necessary to do so to safeguard his interests. Guardians ad litem are appointed from panels established by local authorities, and regulations allow local authorities to establish joint panels.[1] Guardians have the right at all reasonable times to examine and take copies of any records held by a local authority or other authorised person, compiled in connection with the making or proposed making of an application under the Act regarding the child being represented, and of any records compiled in connection with any function of the social services committee under the Local Authority Social Services Act 1970. If the proceedings are under Part II of the 1989 Act a court welfare officer provides a report for the court.

24.22 Guardianship of Minors

Sections 5 and 6 of the Children Act 1989 replace sections 3–6 of the Guardianship of Minors Act 1971. A guardian of a child can only be appointed in accordance with section 5.[2] A court may appoint a guardian on the application of the individual who wishes to be guardian, or without an application if the court in family proceedings considers that an appointment ought to be made. A guardian may be appointed if the child has no parent with parental responsibility or a residence order has been made in favour of a parent or guardian of his who has died while the order was in force.[3] A parent with parental responsibility, or an existing guardian may appoint, in writing another person to be guardian in the event of his death.[4] The guardian has parental responsibility for the child.[5] Where a guardian (under the Children Act 1989, not under the Mental Health Act 1983)[6] has been appointed for a child under eighteen, section 28 of the 1983 Act provides that the guardian shall be deemed to be the nearest relative for the purposes of the 1983 Act. (As to the definition and powers of the nearest relative, see paras. **8.01–8.03** *ante*.)

---

[1] s. 41. Guardians ad litem and Reporting Officers (Panels) Regulations 1991, S.I. 1991 No. 2051.
[2] Children Act 1989, s. 5(13).
[3] *Ibid.*, s. 5(1), (2).
[4] *Ibid.*, s. 5(3), (4).
[5] *Ibid.*, s 5(6).
[6] Mental Health Act 1983, s. 28(3).

24.22.1 *Adoption*

The law of adoption is based on the Adoption Act 1976.[1] Section 1 requires every local authority to establish and maintain in their area a service designed to meet the needs, in relation to adoption of children who have been or may be adopted, their parents and guardians, and persons who have adopted or may adopt a child. They may provide the service themselves, or secure that they are provided by an approved adoption society. Local authorities and adoption societies may be referred to as adoption agencies. Section 11(1) of the 1976 Act prohibits a person other than an adoption agency to make arrangements for the adoption of a child, or place a child for adoption, unless the proposed adopter is a relative or the person is acting in pursuance of an order of the High Court. *Re W (a minor) (adoption: mother under disability)*[2] concerned the procedure to be followed when the child's mother lacks the capacity to give an informed consent to her child's placement. The child's mother was rendered incapable by mental disorder of caring for her child, and both the mother and the grandmother, S, agreed that the child should be placed for adoption. It was agreed that the local authority should accommodate the child until the society placed him with prospective adopters. When the matter came before a district judge, he considered that S did not have the necessary status to enable her to oversee the proposed adoption. The judge made a residence order under section 8 of the Children Act 1989, as a means of giving S parental responsibility, even though the intention was that the authority would accommodate him. The matter came before another district judge, who took the view that notwithstanding the residence order, any arrangement between S and the society would contravene section 11(1), and that the only proper route to adoption was via a care order. The judge directed that the local authority's application for a care order should be listed in the High Court. The authority sought leave to withdraw the care order application. Wall J held that there was no lawful impediment to S discussing and making arrangements with the society for the latter to place the child for adoption and she did not need High Court order under section 11(1)(*b*) in order lawfully to carry on those discussions. Although a care order was a wholly appropriate means of achieving the placement of a child for adoption in a case where the parent was under a disability it was not the only means by which that result could properly be achieved. Wall J said that it was highly artificial to make a residence order in favour of a person with whom there is no intention that the child should reside, simply to give that person parental responsibility, and that practice ought to be discouraged.

---

[1] See generally *Clarke Hall and Morrison On Children* London Butterworths 1995, Vol. 2 Division 3 on Adoption.

[2] [1995] 1 All E.R. 282.

24.23 Wardship and the inherent jurisdiction of the High Court

Wardship is an aspect of the inherent *parens patriae* jurisdiction of the High Court. Section 100 of the 1989 Act places important restrictions on the use of wardship and the inherent jurisdiction of the High Court. Section 7 of the Family Law Reform Act 1969, which gave the High Court the power to ward a child into the care of a local authority, is repealed.[1] Section 100(2) provides that:

No court shall exercise the High Court's inherent jurisdiction with respect to children—

(*a*) so as to require a child to be placed in the care, or under the supervision, of a local authority;

(*b*) so as to require a child to be accommodated by or on behalf of a local authority;

(*c*) so as to make a child who is the subject of a care order a ward of court; or

(*d*) for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

A local authority wishing to apply for an exercise of the court's inherent jurisdiction with respect to children must first obtain the leave of the court. The court may only grant leave if it is satisfied that—

(*a*) the result which the authority wish to achieve could not be achieved by the making of any other order for which the local authority would be entitled to apply; and

(*b*) that there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child, he is likely to suffer significant harm.[2]

In *South Glamorgan County Council v. B and W*[3] Douglas Brown J held that the High Court, exercising its inherent jurisdiction could override the wishes of a girl of 15 years even if she was capable of making an informed decision about medical treatment, because it was in her best interests to do so. In *Re HG (Specific Issue Order)*[4] Peter Singer QC held that he did not find the procedure of applying for a specific order as to whether a child should be sterilised by the child through her next friend to be "void of jurisdictional validity." However, a Practice Note subsequently issued by the Official Solicitor has clarified that sterilisation will in virtually all cases require the sanction of a High Court judge and that the procedural and administrative difficulties

---

[1] s. 100(1).
[2] ss. 100(3)–(5).
[3] (1992) 11 B.M.L.R. 162.
[4] [1993] 1 F.L.R. 587.

attaching to application under this section are such that the preferred course is to apply under the inherent jurisdiction.[1]

[1] *Practice Note (Official Solicitor) (sterilisations: minors and mental health patients)* [1993] 2 F.L.R. 222.

F. LITIGATION

24.24 Patients Under the Jurisdiction of the Court of Protection

By section 96(1) of the Mental Health Act 1983 the Court of Protection is empowered to make orders or give directions or authorities for the conduct of legal proceedings in the name of the patient or on his behalf. While the regulation of actions by or against a patient is governed by the rules and practice of a particular court (see paras. **24.25–24.26** below), the receiver should have the approval of the Court of Protection before acting as next friend or guardian *ad litem* in respect of the patient; if he does not get the Court's approval he will act at his own risk as to costs.[1] With certain exceptions, where a person is authorised by the Court of Protection under section 96(1) he is entitled to be next friend or guardian *ad litem* of the patient in any proceedings to which his authority extends (R.S.C. Ord. 80, r. 3(3); County Court Rules 1981, Ord. 10, r. 1(3)).

24.25 The High Court

24.25.1 *Person under disability—the "patient"*

The conduct of proceedings in the High Court in respect of persons under disability (*i.e.* an infant or a patient) is governed by Order 80 of the Rules of the Supreme Court. The term "patient" in Order 80 has a wider meaning than in Part VII of the Mental Health Act, where it refers to a person under the jurisdiction of the Court of Protection (see s. 94 and para. **23.03** *ante*). A "patient" under Order 80 means a person who, by reason of mental disorder within the meaning of the Mental Heath Act, is incapable of managing and administering his property and affairs (R.S.C. Ord. 80, r. 1). The definition merely requires the incapacity and not that the Court of Protection has actually considered the case and taken jurisdiction. If there are existing proceedings in the Court of Protection, application should be made to that Court for the necessary authority under section 96(1) of the 1983 Act (see para. **24.24** above).[2]

24.25.2 *A "patient" must act by his next friend or guardian* ***ad litem***

A "patient", as defined above, may not bring or make a claim in any proceedings in the High Court except by his next friend and may not defend or intervene in any such proceedings except by his guardian *ad litem* (Ord. 80, r. 2(1)). A next friend or guardian *ad litem* of a patient must act by a solicitor (Ord. 80, r. 2(3)). If a patient commences an action alone without a next friend, an application should be made

[1] *Re Nottley* (1938) 3 Jur. (O.S.) 719. An order for payment of costs of litigation will not be made until such costs have been incurred. *Re. Manson* (1852) 21 L.J. Ch. 249.
[2] *Re S. (F.G.) (Mental Health Patient)* [1973] 1 W.L.R. 178.

to stay proceedings, until a next friend is added.[1] The plaintiff's solicitor may incur personal liability for costs if he should commence or continue proceedings for a patient without a next friend.[2] Order 80 is extremely wide reaching; the term "proceedings" embraces every form of civil litigation in the High Court, including an application for leave to bring an action such as under section 139 of the 1983 Act (see paras. **21.25–21.32** *ante*).

24.25.3 *Mental disorder of plaintiff or defendant after proceedings begun*

Where a plaintiff or defendant becomes a patient after the action is commenced, an application must be made to the High Court for the appointment of a next friend or guardian *ad litem* (Ord. 80, r. 3(5)). Once it becomes clear to the defendant that the plaintiff has become a patient he can apply to stay proceedings until a next friend is added or to dismiss the action.[3]

24.25.4 *Powers and appointment of the next friend or guardian* ***ad litem***

A next friend or guardian *ad litem* may, subject to the Rules of the Supreme Court, do anything which is required or authorised to be done by a party (Ord. 80, r. 2(2)).

A next friend or guardian *ad litem* is not appointed by the court except in limited circumstances specified in Order 80, rule 3(4) or (5) or rule 6 (Ord. 80, r. 3(2)). Subject to these exceptions, a person becomes next friend or guardian *ad litem* by putting himself forward in that capacity; when a receiver or other person is authorised by the Court of Protection to conduct proceedings (see para. **24.24** above), he is entitled to act as next friend or guardian *ad litem*.

24.25.5 *The award of damages to a patient in an action in the Queen's Bench Division*

A Practice Direction was issued on 7 September 1990 for cases in which a plaintiff who is a patient within the meaning of Part VII of the Mental Health Act[4] has been awarded damages in an action in the Queen's Bench Division.[5] The Practice Direction states that the transfer

---

[1] *Re Townsend* [1908] 1 Ch. 201.

[2] *Yonge v. Toynbee* [1910] 1 K.B. 215.

[3] *Richmond v. Branson* [1914] 1 Ch. 968, approved in *Russian etc., Bank v. Comptoir etc., de Mulhouse* [1925] A.C. 112.

[4] The term patient is referable to Part VII of the Act, meaning that the person must be incapable by reason of mental disorder of managing and administering his property and affairs. (See para. **23.03** *ante*).

[5] Practice Direction, Queens Bench Division, Court of Protection [1991] 1 All E.R. 436.

of damages will be facilitated if the judgement specifies that the sum be paid into court pending an application by the next friend to the Court of Protection for the appointment of a receiver. The application for the appointment of the receiver may be made in anticipation of an award. The next friend is usually the person to make the application and may also be the most suitable person to act as receiver. A similar provision should be made in an order approving a compromise on behalf of the patient.

24.26 The County Court

The conduct of proceedings in the County Court in respect of a person under disability is governed by the County Court Rules 1981, Ord. 10, which follows the basic scheme of R.S.C. Ord. 80 in the High Court (see para. **24.25** above). Persons under a disability are minors and mental patients (Ord. 1, r. 3). A 'mental patient' is defined in Ord. 1, r. 3 in the same way as "patient" in R.S.C. Ord. 80, r. 1—*i.e.* a person who, by reason of mental disorder, is incapable of managing and administering his property and affairs; a "mental patient" need not be under the jurisdiction of the Court of Protection or a patient in hospital. A "mental patient" may not bring or make a claim in any proceedings except by his next friend; and may not defend or make a counterclaim in any proceedings except by his guardian *ad litem* (Ord. 10, r. 1(1), (2)).

24.26.1 *Appointment of next friend and his liability for costs*

A next friend is not usually appointed by the County Court but puts himself forward in that capacity (see Ord. 10, r. 2). Where a person is authorised by section 96(1) of the 1983 Act by the Court of Protection to conduct proceedings in the name of the mental patient, that person is entitled to be next friend or guardian *ad litem* in any proceedings to which his authority extends, unless some other person is appointed by the County Court (Ord. 10, r. 1(3)). Where proceedings are commenced or a claim made by a mental patient without a next friend the court may on application appoint as next friend a person authorised under rule 2; or the court may order the proceedings to be struck out (Ord. 10, r. 3).

A next friend is liable for costs as if he were the plaintiff (see Ord. 10, r. 2).

24.26.2 *Appointment of guardian ad litem*

No order appointing a guardian *ad litem* is necessary (Ord. 10, r. 5). Where a defendant under disability has no guardian *ad litem* acting for him, the plaintiff must apply to the court for an order that a person named in the application or some other proper person be

appointed as guardian *ad litem* (Ord. 10, r. 6(1)). The person appointed must be a fit and proper person; he must have no interest in the proceedings adverse to that of the defendant; and he must consent to act (Ord. 10, r. 6(2)). If the court is not satisfied that the person proposed by the plaintiff is a proper person, it may appoint any other willing person or, in default of any such person, it may appoint the registrar (Ord. 10, r. 6(4). (Before appointing the registrar it may be desirable to consider appointing the Official Solicitor or a probation officer).

24.27 Actions Against Persons Acting in Pursuance of the Mental Health Act

Section 139 contains wide provisions which have the effect of impeding the right of access to the courts of patients seeking to bring claims against those acting in pursuance of the Mental Health Act. Section 139 is discussed in detail at paras. **21.25–21.32** *ante*.

24.28 Matrimonial Proceedings

The procedures to be adopted where one of the parties to matrimonial proceedings is under a disability is discussed at para. **24.15.1** above.

24.29 Limitation of Actions

24.29.1 *Extension of limitation period in case of disability*

If on the date when any right of action accrued for which a period of limitation is prescribed by the Limitation Act 1980, the person to whom it accrued was under a disability (see next para.), the action may be brought at any time within a period of six years from the date when the disability ceased or the person died (whichever first occurs) even though the period of limitation has expired.[1] A disability occurring after the right of action has accrued and time has begun to run will not stop the limitation period running.[2]

24.29.2 *Disability*

A person under disability for the purposes of the Limitation Act 1980 is an infant or a person of unsound mind.[3] A person is of unsound mind if he is incapable by reason of mental disorder within the meaning of the Mental Health Act 1983 of managing and adminis-

[1] The Limitation Act 1980, s. 28(1). For specified causes of action the six year period is reduced or altered, see s. 28(4), (5), (6). In the case of personal injuries it is three years.

[2] *Purnell v. Roche* [1927] 2 Ch. 142; *Owen v. De Beauvoir* (1847) 16 M. & M. 547, 567, per Parke, B. See the 1980 Act, s. 28(2) for a particular application of this principle.

[3] *Ibid.*, s. 38(2).

tering his property and affairs.[1] (As to the definition of mental disorder see para. **9.01** *ante*). Whether a person is of unsound mind is a question of fact in each individual case. Note that mental disorder is not in itself sufficient; the person must also be incapable of administering his property and affairs. In *Dawson v. Spain-Gower*,[2] for example, even though a person was invalided out of the Navy on the ground of mental ill health, it did not necessarily mean that he was incapable of managing his own affairs. In this case he had pursued his grievances against the Naval authorities with great skill and it could not be said that his condition was so serious as to place him under a legal disability.

However, a person need not be under the jurisdiction of the Court of Protection to be under a legal disability. Clearly if he is under the Court's jurisdiction he is conclusively presumed to be under a disability because the Court has already found him to be so incapable. A mentally disordered person is conclusively presumed to be under a disability by operation of the 1980 Act:[3]

(*a*) while he is liable to be detained or subject to guardianship under the Mental Health Act 1983 (otherwise than while remanded to hospital for report under s. 35 or absent from hospital in the Channel Islands or Isle of Man under s. 89); or

(*b*) while is receiving treatment as an in-patient in any hospital (defined in s. 145(1); see para. **3.02** *ante*) or mental nursing home (see para. **5.02** *ante*) as an informal patient (or under s. 35 or 89) directly following a period during which he was liable to detention or subject to guardianship under mental health legislation.

24.29.3 *Successive disabilities*

When a right of action has accrued to a person under disability accrues, on the death of that person while still under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person.[4] Thus if a right accrues to A. who dies while still under a disability, and the right of action then accrues to B., who is also under a disability, B. then has only six years from A.'s death before the action is barred.

Where a person, in whom a cause of action has vested, was, at the moment of vesting, under one disability, for example infancy, and, at

---

[1] *Ibid.*, s. 38(3) amended by the Mental Health Act 1983, s. 148, Sch. 4, para. 55. As to how liberally the courts might construe unsoundness of mind see *Penrose v. Mansfield* (1971) 115 S.J. 309.

[2] October 18, 1988, C.A. (Transcript: Association).

[3] *Ibid.* (as so amended).

[4] *Ibid.*, s. 28(3).

or before the cessation of that disability, becomes of unsound mind, times does not begin to run until the last of his disabilities has ended.

24.29A Persons Under a Disability Against Whom an Injunction is Sought

If a person with a disability is capable of understanding the nature and consequences of an injunction it may be appropriate to make the order. It appears that the standard of understanding is set low. Many people with mental illness are capable of understanding the purpose of a court order. However, if the person is unable to understand the nature and consequences of an injunction it may be inappropriate to make an order. If the person is already liable to detention under the Mental Health Act, the better course is to rely upon the powers in the Act.[1]

[1] *Wookey v. Wookey; Re S. (a minor)*, *The Times*, April 2, 1991 (Transcript: Association) 27 March 1991, CA. Butler-Sloss LJ. referred to the M'Naghten Rules which might be used in contempt proceedings. The M'Naghten Rules provide a very narrow definition of insanity which usually apply only to the most seriously mentally disordered persons. (See para. **13.03** *ante*.) In *Page v. Page* (Contempt of Court: Mental Capacity) (1999) 2 F.L.R. 897, the Court of Appeal again upheld the decision of the judge at first instance to order an injunction/power of arrest against the respondent, as the respondent did not fall within the criteria which were set out in the M'Naghten Rules and had the necessary understanding in relation to the injunction and power of arrest.

G. CORRESPONDENCE OF PATIENTS

24.30 To Whom Does Section 134 Apply?

24.30.1 *Informal patients*

There is no longer any power under the Act for opening, inspecting or withholding the post of informal patients.[1]

24.30.2 *Patients detained in local hospitals*

Post sent **by** a patient detained in a local hospital can be withheld **only** if the person it is addressed to has requested that communications by the patient should be withheld (s. 134(1)(*a*); see next para.). Post sent **to** a patient detained in a local hospital may not be inspected, opened or withheld under any circumstances. Specific provisions are made for special hospital patients because of the security requirements necessary in a special hospital (see paras. **24.31** *et. seq.*, below; as to special hospitals, see paras. **3.04–3.13** *ante*).

24.31 Out-going Post

A postal packet[2] addressed to any person by a detained patient and delivered by the patient for dispatch may be withheld from the post office **only** in either of the following circumstances (s. 134(1)):

24.31.1 *Addressee requests that correspondence should be withheld* (s. 134(1)(*a*))

The post of a detained patient may be withheld if the person to whom it is addressed has requested that communications to him by that patient should be withheld. Any request for these purposes must be made by notice in writing given to the managers of the hospital (as to which see para. **24.35** below), the medical practitioner in charge of treatment, or the Secretary of State for Social Services. This provision applies to patients detained in **any hospital**; it also applies even where a Member of Parliament or some other "privileged person" makes a request that the patient's correspondence to him should be withheld (see para. **24.33** below).

---

[1] *Cf.* Mental Health Act 1959, s. 134 (repealed).

[2] By s. 134(9) of the 1983 Act, a "postal packet" takes on the same meaning as in s. 87(1) of the Post Office Act 1953: "a letter, postcard, reply postcard, newspaper, printed packet, sample packet, or parcel, and every packet or article transmissable by post, and includes a telegram". Section 134(9) also specifies that s. 134 has effect notwithstanding the provision of s. 56 of the 1953 Act which is concerned with the criminal diversion of letters from addresses.

24.31.2 *Correspondence likely to cause distress or danger* (s. 134(1)(*b*))

This provision applies only to patients detained **in a special hospital** and not to patients in any other hospital. (As to special hospitals, see paras. **3.04–3.13** *ante*). The post of a special hospital patient may be withheld if the hospital managers (see para. **24.35** below) consider that the postal packet is likely to either (*i*) cause distress to the person to whom it is addressed or to any other person other than a person on the staff of the hospital; or (*ii*) cause danger to any person.

The "danger" criterion is quite clear and would apply, for example, if the patient were conspiring to escape or to cause violence. The "distress" criterion, however, is vague particularly as it applies to those who have not requested that the patient's post should be withheld under section 134(1)(*a*) (see para. **24.31.1** above). It could hardly be said, for example, that writing to a voluntary organisation such as MIND or MENCAP would cause distress to the staff of that organisation. Arguably, if the "distress" criterion were to be used in relation to the same recipient of the correspondence with any regularity, and it was reasonably clear that the recipient was not distressed, then the question could arise as to the genuiness of belief of the managers. The managers could withhold post only if they held a *bona fide* belief, founded upon some evidence, that the statutory criteria are fulfilled in the particular case.

It is to be noted that if a postal packet is addressed to certain "privileged" individuals such as M.P.s it cannot be withheld from the Post Office under either the "danger" or the "distress" criterion. Such correspondence can only be withheld if the individual specifically makes a request under section 134(1)(*a*) that correspondence addressed to him should be withheld (see para. **24.33** below).

24.32 In-coming Post

In-coming post can be inspected and withheld if it is addressed to a patient detained in a **special hospital**. Such correspondence can be withheld from the patient only if, in the opinion of the hospital managers, it is necessary to do so in the interests of the safety of the patient or for the protection of other persons (s. 134(2)). These are specific criteria envisaging that the correspondence could do some tangible harm to the patient or others. Simple distress to the patient would be insufficient to justify withholding of the postal packet. It is to be noted that in-coming post sent by a "privileged" person such as an M.P. cannot be withheld (see the next para.).

24.33 "Privileged" Correspondence

Post addressed by a patient to, or sent to a patient by or on behalf of, specified persons, cannot be interfered with in any way. The

only circumstances where such post could be withheld is where the "privileged" person himself makes a request under section 134(1)(*a*) that post dispatched by a detained patient addressed to him should be withheld from the post office (see para. **24.31.1** above). The persons or authorities which have a "privileged" position under section 134(3) of the Act are:

any Minister or Member of either House of Parliament;

the Master or any other officer of the Court of Protection or any of the Lord Chancellor's Visitors;

the Parliamentary Commissioner for Administration;

the Health Service Commissioner or a Local Commissioner;

a Mental Health Review Tribunal;

a health authority;

a local social services authority;

a Community Health Council or a probation and after-care committee;

the managers of the hospital in which the patient is detained;

any legally qualified person instructed by the patient to act as his legal adviser;

the European Commission or Court of Human Rights.

Perhaps the most important addition in this list to that contained in the 1959 Act is the inclusion of a legally qualified person instructed by the patient to act as his legal adviser. "Legally qualified persons" is arguably wider than "barristers and solicitors"; if Parliament intended strictly to limit section 134(3) to "barristers and solicitors" it could have used those terms, as it does in other statutes. Perhaps the most likely interpretation is that legal qualifications are only those granted by the Law Society or the Bar Council. Solicitors without a current practicing certificate from the Law Society or barristers who are not in any chambers probably could receive "privileged" correspondence; the concept of acting as a "legal adviser" is quite wide.

24.34 Power to Open and Inspect Post

The hospital managers (see next para.) may inspect and open any postal packet for the purposes of determining if the criteria in section 134(1) or (2) apply and, if so, whether or not it should be withheld. Further the power to withhold a postal packet includes the power to withhold anything contained in it (s. 134(4)). The question arises whether this sub-section permits the managers indiscriminantly to open any or all post sent to, or by, special hospital patients, except for "privileged" correspondence. Presumably there is some correspon-

dence where the contents are so unlikely to fulfil the statutory criteria that there would not even be a *prima facie* question raised as to whether its contents would potentially meet those statutory criteria which would allow the postal packet to be withheld. (The example of post sent to a mental health charity has already been given as an example where it would be implausible to suggest that its contents would cause distress to the staff of the voluntary organisation; see para. **24.31.2** above). It is suggested that opening and reading the postal packet should be based only upon a *bona fide* belief that the contents of the particular packet might reasonably come within the remit of section 134(1) or (2). The mere fact of opening correspondence and reading its contents, even if it is not subsequently withheld, is an invasion of privacy; and, while there is no legally enforceable right to privacy in this context in English law,[1] good professional practice would dictate that great care and consideration should be given each time a decision is taken to open and read a patient's correspondence.

24.35 The Functions of Hospital Managers

The term "hospital managers" is defined at para. **6.01** *ante*. Section 134 is concerned with the manager of the special hospitals who is the Secretary of State for Social Services (see para. **3.05** *ante*). The functions of hospital managers under section 134 are to be discharged on their behalf by a person on the staff of the hospital appointed by them for that purpose, and different persons may be appointed to discharge different functions (s. 134(7)). Note that the managers "shall" (not "may") appoint a member of staff to exercise their functions. The managers should not indiscriminately appoint a large number of staff who would be given wide powers to interfere with patients' correspondence. Ultimate responsibility for carrying out these functions rests with the managers; appointed staff act only as the delegated agent of the managers.

24.36 Review Procedures

24.36.1 *Duty to record the inspection of post*

Where under section 134(4) any postal packet is opened and inspected (see para. **24.34** above), but nothing is withheld under section 134(1) or (2) the person who opened it (who acts on behalf of the managers, see para. **24.35** above) must record in writing: that the packet had been opened and inspected; that nothing was withheld; and his name and the name of the hospital. Before resealing the packet, he

[1] But see Article 8 of the European Convention of Human Rights which guarantees the right to respect for correspondence. See generally, *Golder v. the United Kingdom* [1975] 1 E.H.R.R. 524; *Reed v. the United Kingdom* [1982] 25 Decisions and Reports, p. 5 (a friendly settlement); *Silver v. the United Kingdom*. Judgment of the European Court of Human Rights, March 25, 1983.

must place the record in the packet. Thus where a postal packet has been opened, the recipient will know that it has been read.[1]

Where a postal packet or anything contained in it is withheld under section 134(1) or (2) (see paras. **24.31** and **24.32** above) the hospital managers (see para. **24.35** above) must record that fact in writing. The person appointed by the managers must record the following information in a register kept specifically for the purpose: that the packet or anything contained in it has been withheld; the date it was withheld; the grounds on which it was withheld; a description of the contents of the packet withheld or any item withheld; and his name. This written register kept by the hospital on behalf of the managers can be used if the patient or others seek a review of the decision taken to withhold the postal packet or any of its contents (see para. **24.36.3** below). If the postal packet is not withheld, but some of its contents have been withheld the person appointed must record facts similar to those kept in the register and must place that record in the packet before resealing it.[2] This will enable the recipient to know whether something in the packet has been withheld.

24.36.2 *Notice required when post is withheld*

Where a postal packet or anything contained in it is withheld under section 134(1)(*b*) or (2) (see paras. **24.31.2** and **24.32**) the person appointed by the managers must within seven days give written notice of that fact to the patient and, in the case of in-coming post, to the person (if known) by whom the postal packet was sent. The notice required must include a statement of the grounds on which the packet or anything contained in it was withheld; and the name of the appointed person and the name of the hospital.[3] (However, where something contained in the postal packet was withheld and a note was placed in the packet before resealing it according to reg. 17(2)(*b*) (see para. **24.36.1** above) then that is considered sufficient notice of the grounds for the decision and the name of the person appointed and the hospital).[4] The notice also must contain an explanation of the review process set out in section 121(7) and (8) (s. 134(6)). (See next para.)

24.36.3 *Review of decisions to withhold postal packets*

There is no formal process to review the power of the person appointed by the managers to open and inspect a postal packet to determine whether it comes within the remit of section 134(1) or (2) (see s. 134(4), and para. **24.34** above). However, as the person

---

[1] Mental Health (Hospital, Guardianship and Consent to Treatment) Regulations 1983, S.I. 1983 No. 893, reg. 17(1).
[2] *Ibid.*, reg. 17(2).
[3] *Ibid.*, reg. 17(3)(*a*).
[4] *Ibid.*, reg. 17(3)(*b*).

appointed is acting on behalf of the managers (see para. **24.35** above), he must comply with reasonable instructions given by the managers.

There is a formal review process specified in section 121(7) and (8) in cases where the person appointed by the managers actually withholds the postal packet or anything contained in it under section 134(1)(*b*) or (2); the review procedures do **not** apply to out-going post withheld under section 134(1)(*a*) where a person requests that communications by the patient addressed to him should be withheld (see para. **24.31.1** above).

By section 121(7) and (8) the Mental Health Act Commission (as to which see para. **22.07** *ante*) must review any decision to withhold a postal packet (or anything contained in it) under section 134(1)(*b*) or (2). The Commission must first receive an application, in the case of out-going post under subsection 1(*b*), by the patient; or, in the case of in-coming post under subsection (2), either by the patient or the person who sent the postal packet. Any such application must be made within six months of the receipt by the applicant of notice that the packet or any of its contents has been withheld (as to notice see para. **24.36.2** above). The application need not be made in any particular form but can be in any form or manner the Commission will accept; the application should be delivered or sent to an office of the Commission (for the addresses see para. **22.04** *ante*). The applicant should furnish the Commission with a copy of the notice required to be sent under section 134(6) (see para. **24.36.2** above).[1]

Upon receiving an application the Commission should determine whether the managers properly withheld the postal packet. The Commission has the power to direct the production of such documents, information and evidence as it may reasonably require[2] in order to make their decision. The discretion exercised by the Commission is not fettered by any specific criteria; its decision is not limited to reviewing whether the managers acted reasonably. Rather, the Commission can review the matter afresh, on the facts available to the Commission when it makes its determination, and decide whether the packet should, or should not, be withheld. The hospital managers must comply with a direction given by the Commission not to withhold the postal packet (s. 121(8)).

[1] *Ibid.*, reg. 18(1), (2).
[2] *Ibid.*, reg. 18(3).

H. EMPLOYMENT

24.37 The Disability Discrimination Act 1995

The Disability Discrimination Act 1995 introduced a wide-ranging reform of the law replacing the provisions made for disabled employees in the Disabled Persons (Employment) Act 1944.[1] The 1944 Act contained provision for employers to employ a specific "quota" of registered disabled employees. Where employers did not meet the quota they were required to allocate vacancies for that purpose.[2] The employer was required not to employ other than a disabled person if, immediately after such engagement, the quota would not be met. The Disability Discrimination Act 1995 is much broader in its scope than the 1944 legislation. In contrast to its predecessor it provides a cause of action for disabled employees who are discriminated against on the basis of their disability and also extends to discrimination outside the employment context in relation to the provision of, for example, goods and services and education. The Disability Discrimination Act 1995 applies to all employers who have 15 or more (full or part time) employees[3] (although some professions are explicitly excluded from the scope of the legislation).[4] The Act extends to employees/apprenticeships/self-employed persons who contract personally to do work.[5] It is unlawful for an employer to discriminate in arrangements for selecting applicants, terms on which employment is offered, dismissal, opportunities offered for training, promotion, a transfer or any other benefits and any other "detriment".[6] The Act has also been interpreted to apply to the selection of employees for redundancy.[7] In addition the statute provides that where one person knowingly aids another to undertake an action which is unlawful under the Disability Discrimination Act then they are treated as themselves undertaking that unlawful act.[8]

The Disability Discrimination Act operates alongside a Code of Practice.[9] Breaches of the Code by itself does not constitute discrimi-

[1] See generally D. O'Dempsey and A. Short *Disability Discrimination: The Law and Practice*, FT Law and Tax Practitioner Series: London (1996) and B. Doyle *Disability Discrimination*, Jordans, London (1996).

[2] S. 7.

[3] This figure was amended from 20 employees from 1st December 1998 by The Disability Discrimination (Exemption for Small Employers) Order 1998, S.I. 2618. In contrast to the Sex Discrimination Act, in assessing the number of employees reference is not to be made to an "associate employer" nor will the existence of, for example, subsidiaries of the respondents be taken into account; *Hardie v. C.D. Northern Ltd.*, E.A.T. [2000] I.R.L.R. 87.

[4] Armed forces, prison officers, firefighters, police officers, members of the ministry of defence police, British Transport Police, Royal Parks Constabulary, UK Atomic Energy Authority, employment on a ship/aircraft/hovercraft, admission as partner to partnerships (s. 64(5)(*a*)).

[5] S. 68.

[6] S. 4.

[7] *Morse v. Wiltshire CC* [1998] I.C.R. 1023.

[8] S. 57.

[9] The Code is issued under s. 53(1)(*a*) of the Disability Discrimination Act 1995.

nation.[1] However, where proceedings are brought for an alleged act of discrimination and any provision of the Code appears to the tribunal to be relevant to the question it will be taken into account.[2] The Employment Appeal Tribunal has indicated that a purposive approach should be taken to the legislation and that also explicit reference should be made to the Code and to any relevant provision of Guidance issued by the Secretary of State.[3]

A disability under the 1995 Act refers to an individual who "has or has had, a physical or mental impairment which has a substantial and long term adverse effect on his or her abilities to carry out normal day to day activities".[4] In the debates in Parliament upon the legislation the government minister, William Hague stated that

> "the terms physical and mental are intended to be seen in their widest sense and should comprehensively cover all forms of impairment."[5]

The legislation makes reference to mental impairment which will include for example, learning difficulties and also any mental illness as long as this is "clinically well recognised".[6] The aim of this provision was to ensure that while conditions such as schizophrenia[7] and manic depression can be included, claims "based on obscure conditions unrecognised by reputable clinicians" were to be prevented.[8] While there is no definition of mental impairment the Act does provide that it does not have the same meaning as that of s. 1(2) Mental Health Act 1983 and it appears that the 1995 Act will encompass a broader range of conditions than contained in the 1983 Act.[9] Certain conditions are expressly excluded; a tendency to start fires/to steal/to physical or sexual abuse/exhibitionism/voyerism are not treated as impairments under the Act.[10]

For the purposes of the statute a "substantial adverse effect" on day to day activities is one which is more than minor or trivial.[11] Adverse effects are long term if they have lasted 12 months/are likely to last at least 12 months/are likely to last for the rest of the life of the person affected.[12] In considering adverse effects the tribunal will take into

---

[1] S. 74(4) and see also *Foster v. Hampshire Fire and Rescue Services* (1998) 43 B.M.L.R. 186.

[2] S. 47(6).

[3] *Goodman v. Patent Office* [1999] I.R.L.R. 4.

[4] S. 1(1).

[5] Hansard Report SC E, 2nd February 1995, col. 71.

[6] Sched. 1, para. 1(1).

[7] See now e.g. *Goodwin v. Patent Office* [1999] I.R.L.R. 4.

[8] Per William Hague Hansard Report SC E, 7th February 1995, col. 100.

[9] S. 68(1), Disability Discrimination Act 1995.

[10] Disability Discrimination (Meaning of Disability) Regulations 1996, S.I. No. 1836. Also note that addictions to substances such as alcohol and tobacco are not themselves included (reg. 3(1)) although the consequent manifested effects of such addictions may be covered.

[11] Hansard Report SC E, 2nd February 1995.

[12] Sched. 1, para. 2(1)(*a*).

account the typical duration of the particular impairment together with the age of the person and their general state of health. But if, at the date of the act complained of, the impairment had not had and was not likely to have a substantial adverse effect upon normal day to day activities for at least 12 months or for the rest of the persons life, that person would not have been a disabled person at that time. Normal day to day activities include mobility, manual dexterity, and physical co-ordination.[1] The disability should be considered not solely by reference to the date of the alleged discriminatory act. It should consider the adverse effects of the applicant's hearing up until and including the date of the tribunal hearing.[2] Where medical evidence regarding disability may be rejected, it is impermissible for a tribunal to totally disregard it and to instead make a judgment on the basis of how the appellant appeared when giving evidence.[3]

Progressive conditions may be included within the scope of the legislation, though they are not defined.[4] Where a person has a progressive condition they will be covered by the statute from the moment the condition has some effect on their day to day activities, though this effect may not necessarily be substantial at that time.[5] In addition the condition must be likely to lead to substantial impairment on their day to day activities in the future.[6] Persons who suffer from conditions which fluctuate may be included if the effects are likely to recur in a period extending beyond 12 months after the first occurrence.[7]

Discrimination is defined as being either less favourable treatment or as a failure to provide "reasonable adjustment".[8] Harrassment may be included within the scope of the legislation, although it is not explicitly mentioned because it may be seen as "any other detriment".[9] (It should be noted that positive discrimination is not unlawful under the Act.)[10] In assessing whether discrimination has occurred the comparator may be a person who does not fulfil all the requirements of the job but whose inability to fulfil that criteria did not relate to disability but there may be circumstances in which the tribunal determines that the only actual/hypothetical comparator is one who suffers from a disability.[11]

---

[1] Sched. 1, para. 4(1). *Davis v. Metropolitan Police Service* (1999) E.A.T./519/99.
[2] *Greenwood v. British Airways plc* [1999] I.C.R. 969.
[3] *Kapadia v. London Borough of Lambeth* [2000] I.R.L.R. 14.
[4] Although there are some examples given such as cancer and multiple sclerosis, Sched. 1, para. 8(1)(*a*).
[5] Sched. 1, para. 8(1)(*b*)(*a*).
[6] Sched. 1, para. 8(1).
[7] Sched. 1, para. 2(2).
[8] S. 5–6.
[9] S. 4(2)(*d*).
[10] Though note this is limited in the case of local authorities by the Local Government and Housing Act 1989, section 7.
[11] *Clark v. Novacold Ltd.* [1998] I.C.R. 1044 and *Kent County Council v. Mingo* (1999) E.A.T. (unreported).

If the employee can establish that the employer has treated him/her less favourably for a reason related to the disability then the burden under section 5(1) moves to the employer to establish that the treatment was justified. It is the case under section 5(3) that treatment can only be justified in a situation in which the reason for that treatment is both material to the particular circumstances and substantial. This is a question of degree. For example, the Code gives the following illustration

> "A factory worker with a mental illness is sometimes away from work due to his disability. Because of that he is dismissed. However, the amount of time off is very little more than the employer accepts as sick leave for other employees and so is very unlikely to be a substantial reason."[1]

Where the employer provides a valid reason it would be for the employee to show that this reason was not the real reason for the action.

Section 6 of the 1995 Act requires employers to make "reasonable adjustments". This applies when an employer knows or could reasonably be expected to know that the individual has a disability and that the person as a result is placed at a substantial disadvantage by work arrangements/premises.[2] An employer discriminates if he unjustifiably fails to comply with his obligation of "reasonable adjustment". Guidance as to what constitutes reasonable adjustments is provided in the Act.[3] This includes making adjustments to premises such as structural/other physical adjustments etc. It also includes allocating some of the employees duties to another person. Other factors include altering the employee's working hours or assigning him/her to a different place of work, allowing the individual time off for rehabilitation/assessment or treatment. The crucial test is reasonableness. It is also the case that conduct is not unlawful if it is undertaken under statutory authority as where adjustments infringe the Health and Safety at Work legislation.[4] Reasonable adjustments may of course be costly. The significance of the cost is related to what the employer may have to otherwise spend:

> "It would be reasonable for an employer to have to spend at least as much on an adjustment to enable the retention of a disabled person—including any retraining—as might be spent on recruiting and retraining a replacement."[5]

The time for which the employee is likely to be with the company is relevant. "It is more likely to be reasonable to make an adjustment with significant costs if the employee is going to be in the job for some

---

[1] *Code of Practice for the Elimination of Discrimination in the Field of Employment against Disabled Persons or Persons who have had a Disability*, HMSO (1998), para. 4.6.
[2] S. 6(6)(*b*).
[3] S. 6(3).
[4] S. 59, Disability Discrimination Act 1995.
[5] Code of Practice, para. 4.24.

time."[1] It should be noted that there are a number of schemes in existence which can provide financial assistance to the employer in such a situation.

The Act is enforced by claims being brought before an employment tribunal[2] and damages will be assessed by reference to the principle of damages in tort[3] which can include claim for injury to feelings.[4] Disability discrimination has now been included in those circumstances in which an additional award may be given where an employer fails to comply with an order for reinstatement and re-engagement which brings awards for disability discrimination in line with those made under the Sex Discrimination Act 1975 and the Race Relations Act 1976.[5] Where compensation is awarded under the Disability Discrimination Act 1995 an additional award cannot be made for unfair dismissal in such a situation.[6]

Disability Rights Commission

The Disability Discrimination Act 1995 established the National Disability Council[7] with a mission statement "to eliminate discrimination against disabled people". It had the task of advising the Government in relation to issues concerning elimination of discrimination and the operation of the Disability Discrimination Act and its codes of practice. However, in contrast to the Commission for Racial Equality and the Equal Opportunities Commission, it was an advisory body and it had no power to investigate complaints from individuals on employment matters or to bring proceedings. The Disability Rights Commission Act 1999 abolished the National Disability Council[8] and established a new Disability Rights Commission with more extensive powers. This is a non-departmental public body composed of between 10 and 15 commissioners, appointed on a personal capacity rather than as the representatives of particular organisations.[9] The commissioners are to hold office between 2 and 5 years.[10] The Act provides for the appointment of a chairman and one or two deputy chairmen from amongst the commissioners.[11] The Commission is required to submit an annual report which sets out its work during that year, and includes a general survey of developments in areas within the functions of the Commission and proposals for the activities of the Commission during the current year.[12]

---

[1] *Ibid.*, para. 4.26.
[2] S. 8.
[3] S. 8(3).
[4] S. 8(4).
[5] Employment Rights (Dispute Resolution) Act 1998, s. 14.
[6] *Ibid.*
[7] Sections 50–52, Disability Discrimination Act 1995.
[8] Section 1(4) and see "Promoting disabled people's rights: Creating a Disability Rights Commission fit for the 21st century", Cm. 3977 (1998), H.M.S.O.
[9] Schedule 1, para. 2.
[10] Schedule 1, para. 3(2).
[11] Schedule 1, para. 6(1).
[12] Schedule 1, para. 16(2).

The duties of the Commission are to work towards the elimination of discrimination against the disabled,[1] promote the equalisation of opportunities for the disabled[2] and take those steps which it considers appropriate in the context of encouraging good practice in the treatment of the disabled.[3] The Commission may also provide advice and recommendations to Government ministers and agencies, and support or undertake research.[4] It has, in addition, the task of preparing codes of practice under the Disability Discrimination Act.[5]

The Commission has the power to undertake formal investigations, either under its own volition[6] or where directed to do so by the Secretary of State.[7] These may be general or they may relate to a named party. Where, during such an investigation, the Commission is satisfied that an individual has committed or is committing an unlawful act, then it may serve them with a non-discrimination notice.[8] "Unlawful act" covers discrimination under the Act but may be extended beyond this by order of the Secretary of State.[9] The non-discrimination notice will give details of the unlawful act and require the person on which it is served not to commit any further acts or require them to cease the conduct of a particular action which is on-going.[10] The notice may provide that an "action plan" be drawn up in order to secure compliance with the specified requirements.[11] Alternatively, it may make recommendations as to the steps which the person may be reasonably expected to take to comply with the non-discrimination notice.[12] There is a right of appeal from a non-discrimination notice within a period of six weeks to an employment tribunal or, in the case of non-employment matters, to a county court.[13] This right commences the day after the notice has been served. An appeal may be upheld if the notice is unreasonable or the decision to issue it has been based upon an incorrect finding of fact. If an appeal is allowed, a notice may be quashed or varied. The Commission is also to keep a register of non-discrimination notices which become final, *i.e.* when the time for an appeal expires or the appeal is dismissed, withdrawn or abandoned.[14] In cases of persistent discrimination, the Commission may also apply to the court to restrain the person from doing the unlawful act. The Commission has the power during a period of five years after the notice has been issued

[1] Section 2(1)(*a*).
[2] Section 2(1)(*b*).
[3] Section 2(1)(*c*).
[4] Section 2(2)(*a–c*).
[5] Section 9 inserting section 53A into the Disability Discrimination Act 1995.
[6] Section 3(1).
[7] Section 3(2).
[8] Section 4(1).
[9] Section 4(6).
[10] Section 4(1)(*a*)(*b*).
[11] Section 4(3).
[12] Section 4(2).
[13] Schedule 3, para. 10(1).
[14] Schedule 3, para. 13.

to apply to the county court for an order requiring that the notice be served.[1]

There is an alternative to this non-discrimination notice procedure which is known as an agreement in lieu of enforcement action.[2] Under such an agreement, the Commission decides not to take any relevant enforcement action and the parties agree not to commit any further unlawful acts and also to take such action as may be specified in the agreement.[3] This is a new power and is one not currently available to the Equal Opportunities Commission or to the Commission for Racial Equality. The agreement is legally binding, although the Commission may only enforce it through an application to a county court.[4]

As with the Equal Opportunities Commission and the Commission for Racial Equality, the Disability Rights Commission has the power to assist applicants bringing proceedings under the legislation.[5] Where any costs are subsequently awarded to the person assisted, then the Commission can recover the expenses which related to providing assistance.

24.38 Dismissal of Mentally Disordered Persons from Employment

24.38.1 *Incapacity*

An employee who has been dismissed because of what s/he believes to be unfair grounds may also bring a claim for unfair dismissal under the Employment Rights Act 1996 before an employment tribunal.[6] An employee may be held to have been dismissed fairly where the dismissal relates to the capability/qualifications of the individual.[7] In such a situation, in contrast to certain other grounds for dismissal under the legislation, there is no burden on the employer to establish fairness, instead the position is neutral and the assessment is a question of fact for the tribunal. Factors taken into account include "skill, aptitude, health or any other physical or mental quality".[8] A mentally disordered employee, therefore, can be dismissed not because of the mental disorder itself, but only if it is of such a nature or degree which makes the person incapable of performing the job in question. Before dismissing the employee, he should be offered a job more suitable to his state of health if such a job exists, but there is no duty to create a new job for him.

If there is any doubt about the employee's medical condition or its

---

[1] Para. 12.
[2] Section 5.
[3] Section 5(2).
[4] Section 5(8).
[5] Section 7.
[6] S. 94, 98–99.
[7] Employment Rights Act 1996, s. 98(2)(*a*).
[8] S. 98(3)(*a*).

consequences, the employer should obtain the relevant information, with the employee's necessary consent, from his doctor or obtain another medical assessment. The employer should request the doctor making the examination to give his assessment of the employee's condition in the light of his hours and conditions of work. Further, the employee must be consulted before the dismissal to see if he can provide further relevant information regarding his alleged incapacity.[1]

The requirement of obtaining an adequate medical assessment was illustrated in *Halton Borough Council v. Hollett*[2] where the Employment Appeal Tribunal decided that it was unfair to dismiss a bipolar manic depressive without taking steps to obtain the necessary psychiatric reports.

An employer cannot dismiss a person with a background of mental illness simply because he disapproves of his conduct (*e.g.* arriving late for work). In such cases the proper ground for dismissal (if it can be proved) is misconduct, and not health.[3]

Where an employee may have had some considerable time away from work due to ill health, and has then been dismissed, as the Employment Appeal Tribunal in *Spencer v. Paragon Wallpapers* stated, the basic issue is whether an employer can be expected to wait longer for that employee to return to employment.[4]

24.38.2 *Failure to disclose history of mental illness*

In *O'Brien v. The Prudential Assurance Co. Ltd.*[5] an employee was dismissed when it was discovered that he had a history of mental illness. When he originally applied for the job as district agent for an insurance company he made no mention of the past illness despite specific questions being asked about his mental health during a medical examination. His history of mental disorder came to light when he applied for a life assurance policy from his employer. The Employment Appeal Tribunal held that the dismissal because of his background of mental illness which he deliberately withheld was a fair dismissal.[6] It

---

[1] *East Lindsey District Council v. Daubney* [1977] I.C.R. 566. But if consultation would have made no difference it may be dispensed with. *Taylorplan Catering (Scotland) Ltd. v. McInally* [1980] I.R.L.R. 53, EAT.

[2] [1988] EAT/559/87, 26 September 1988.

[3] In *Chandler, v. Surrey County Council* (Industrial Tribunal, Case No. 22760/77) a teacher, because of a history of mental illness, was temporarily employed. He was absent periodically without informing the school. The County Medical Adviser, without examining him, recommended his dismissal on the grounds of mental ill health. It was held that he was unfairly dismissed because the school's real reason for the dismissal was misconduct rather than health. This ground had not been put forward as a ground for dismissal.

[4] [1977] I.C.R. 301.

[5] [1979] I.R.L.R. 140, EAT.

[6] The ground for dismissal was not "incapacity" but for "some other substantial reason". See s. 57(1)(*b*) of the 1978 Act.

appears, therefore, that when specific questions are asked concerning a past history of mental illness, the applicant must answer truthfully.

24.38A Access to Medical Records

The Access to Medical Reports Act 1988 establishes a right of access by individuals to medical reports relating to themselves for employment or insurance purposes. The doctor does not have to allow access when, in his opinion, the disclosure would be likely to cause serious harm to the physical or mental health of the individual or others or would indicate the intentions of the doctor with respect to that individual.

The rights of patients to access to their health records are governed, in the case of electronically stored material, by the Data Protection Act 1984 section 21 as modified by the Data Protection (Subject Access Modification) Health Order 1987,[1] and in the case of manually stored records by the Access to Health Records Act 1990. The Access to Personal Files Act 1987 complements the rights of access of individuals under section 21 of the Data Protection Act 1984 to electronically stored personal data about them. It plays the same role in relation to local authority records as does the Access to Health Records Act 1990 in relation to manually stored health records. (For a fuller discussion of these provisions, see paras. **20.34–5** *ante*.)

24.38B Employer Duty to Provide a Safe Work Environment

The employer has a general duty to provide a safe system of work for all employees. Where it is reasonably foreseeable that an employee might suffer mental ill-health because of the conditions of employment, the employer has a duty of care not to cause the employee psychiatric damage.

In *Walker v. Northumberland County Council*,[2] a local social services authority was found to be liable in negligence for failure to provide an employee with a safe workplace, including protection from psychological harm. The plaintiff was employed by the defendant as a social services officer. He suffered a nervous breakdown due to the stress and pressures of work; he informed his employer and asked that his job responsibilities be diminished. They were not changed and he subsequently suffered a second breakdown and was forced to retire. The court held that where it is reasonably foreseeable that an employee might suffer a breakdown, the employer is under a duty of care to provide a safe system of work and not cause the employee psychiatric damage due to the volume or nature of his work.

---

[1] S.I. 1987 No. 1903.

[2] Queen's Bench Division [1995] 1 All E.R. 737, 16 November 1994.

I. DRIVING LICENCES

24.39 Application by a Disabled Driver

By section 87(1) of the Road Traffic Act 1972 an applicant for a driving licence must state whether he is suffering or has at any time suffered from a **relevant disability** or a **prospective disability**.[1]

"**Relevant disability**" means any prescribed disability or any other disability likely to cause the driving of a vehicle by the applicant to be a source of danger to the public.[2] Among the disabilities which are prescribed[3] for the purposes of s. 87(1) of the 1972 Act is severe mental handicap as a result of which the applicant is subject to guardianship under the Mental Health Act 1983 or is either resident in accommodation provided by, or by arrangement, with a local authority or is otherwise receiving care from a local authority.[4]

If it appears from the applicant's statement, or if on inquiry the Secretary of State for the Environment is satisfied from other information from whatever source, that the applicant is suffering from a relevant disability, he **must** refuse to grant a licence.[5] Thus, only a very small proportion of mentally disordered people (*i.e.* severely mentally handicapped people who suffer from a prescribed disability) are automatically disqualified from holding a driving licence. Most mentally disordered people must be assessed on the facts of the particular case to determine whether they are likely to be a source of danger to the public if allowed to drive. Presumably this would involve not only the effects of the mental disorder on the capacity to drive safely but also the effects of the treatment such as when a patient is taking major or minor tranquillisers (as to which see para. **20.05** *ante*).

A "**prospective disability**" means any other disability which, by virtue

---

[1] "Disability" includes disease. Road Traffic Act 1972, s. 87(6).

[2] *Ibid.*, s. 87(1)(*a*); Road Traffic Act 1974, s. 13(1), Sch. 3, para. 2(1).

[3] As to those suffering from epilepsy, see Motor Vehicles (Driving Licences) (Amendment) (No. 3) Regulations 1982, S.I. 1982 No. 423.

[4] Motor Vehicles (Driving Licences) Regulations 1981, S.I. 1981 No. 952, reg. 22(1)(*b*). This was a consolidating measure which referred to arrangements made by "local health authorities" under s. 12 of the Health Services and Public Health Act 1968; the Department of Transport failed to recognise that this provision was replaced in the National Health Service Act 1977. Reg. 22 also refers to "severe subnormality" which is a term no longer employed in mental health legislation. There is a new consolidation pending where it is planned either to omit a provision equivalent to reg. 22(1)(*b*) and rely on the general test for withdrawing a licence on grounds of medical unfitness which would be a source of danger to the public, or to update the provision.

[5] Road Traffic Act 1972, s. 87(2). For an instance of such a refusal in the case of a mentally handicapped person see *Edwards v. Griffiths* [1953] 2 All E.R. 874, [1953] 1 W.L.R. 1199, D.C. Note that a licence cannot be refused on account of a prescribed disability if the applicant has at any time passed a driving test and his disability has not arisen or become more acute since that time and was, for whatever reason, not disclosed at that time. (Road Traffic Act 1972, s. 87(3)).

of its intermitent or progressive nature or otherwise, may become a relevant disability in the course of time.[1] Presumably this could include, for example, certain long-term and disabling forms of schizophrenia.

24.40 Information as to Disabilities

If at any time during the period for which his driving licence remains in force a licence holder becomes aware that he is suffering from a relevant disability or prospective disability which he has not previously disclosed to the Secretary of State for the Environment, or that a disability which has been disclosed has become more acute since the licence was granted, he must immediately notify the Secretary of State in writing of the nature and extent of his disability.[2]

If the Secretary of State has reasonable grounds for believing that the applicant for, or holder of, a licence may be suffering from a relevant or prospective disability, he may by notice in writing require him to authorise the release of any relevant medical information, submit to a medical examination, or submit to a driving test. If the person fails to comply with a requirement contained in the notice or fails the driving test, the Secretary of State may refuse to grant, or he may revoke, a licence.[3]

If in proceedings for an offence committed in respect of a motor vehicle it appears to the court that the accused is suffering from a relevant or prospective disability, the court must notify the Secretary of State.[4] If an authorised insurer refuses a motor insurance policy on health grounds the insurer must notify the Secretary of State.[5]

24.41 Revocation of Licence for Unfitness

If the Secretary of State for the Environment is at any time satisfied on inquiry that the licence holder is suffering from a relevant disability and that the Secretary of State would be required to refuse an application for the licence made by him at that time, he may serve written notice on the licence holder revoking the licence.[6] It is then the duty of a person whose licence is revoked to deliver up the licence to the Secretary of State forthwith after the revocation.[7]

24.42 Appeal against Refusal or Revocation of Licence

A right of appeal is given to a person who is aggrieved by the refusal of the Secretary of State to grant a licence, or by his revocation

---

[1] *Ibid.*, s. 87(1)(*b*); Road Traffic Act 1974, Sch. 3, para. 2(1).
[2] *Ibid.*, s. 87A (added by the Road Traffic Act 1974, s. 13(1), Sch. 3, para. 3).
[3] *Ibid.*, s. 87A(5) (as added in previous note);
[4] *Ibid.*, s. 92(1); Road Traffic Act 1974, Sch. 3, para. 7(1).
[5] *Ibid.*, s. 92(2) (added by the Road Traffic Act 1974, Sch. 3, para. 7(2)).
[6] *Ibid.*, s. 87(5); Road Traffic Act 1974, s. 13(1) Sch. 3, para. 2(4).
[7] *Ibid.*, s. 87(5), (5A) (as added by the Road Traffic Act 1974, Sch. 3, para. 2(5)).

of a licence because of the driver's disability. Such a person, after giving the Secretary of State notice of his intention to do so, may appeal to a magistrates' court, and the court may make such order as it thinks fit. Such an order is binding on the Secretary of State.[1] On appeal, the correctness of the decision of the licensing authority that the applicant was suffering from a relevant disability may be inquired into.[2]

[1] *Ibid.*, s. 90(1).
[2] *R. v. Cardiff J. J., ex parte Cardiff Corpn.* [1962] 2 Q.B. 436.

J. PERSONAL COMMUNITY CHARGES

24.43 Exemption from Personal Community Charge

The Local Government Finance Act 1988 created community charges payable by most adults. The Act exempts specified persons from payment of the charge. These include those detained in hospital under an order of a court; and those detained under section 136 of the Mental Health Act in a place of safety. (Sch. 1(2)(4)).

The Act also exempts severely mentally impaired people (Sch. 1(2)(4)).[1] The person must have a certificate from a registered medical practitioner stating that he is severely mentally impaired and fulfils the criteria specified in the Schedule and in the Personal Community Charge (Exemptions) Order 1989, S.I. 1989, No. 442.

The Act also exempts persons who have their sole or main residence in a hospital, mental nursing home or residential care home; those detained under Part II of the Mental Health Act in a hospital or mental nursing home; and those detained under section 46 (detention during Her Majesty's Pleasure), 47 (transfer to hospital of prisoners) or 48 (removal to hospital of other prisoners) of the Mental Health Act (Sch. 1(2)(8)(9)).

[1] The 1988 Act defines "severe mental impairment" as a state of arrested or incomplete development of mind which involves severe impairment of intelligence and social functioning, or a permanent injury to the brain resulting in the same condition (Sch. 1(2)(4))).

K. ACCESS TO MEDICAL RECORDS

24.44 Patient's Right of Access

A health authority does not have an absolute right (any more than a private doctor) to deal with medical records in any way it chooses; it must act at all times in the best interests of the patient. At common law a patient has no right of access to his medical records, so a former patient seeking records for hospitalisations from 1966–1970 (predating the Data Protection Act 1984 or Access to Health Records Act 1990) had to be satisfied with the authority's offer to provide the records to a medical practitioner who would then decide if release of the records to the patient was in his best interests and not detrimental to his health.[1] (See also paras. **20.34–20.35** *ante*.)

[1] *R. v. Mid Glamorgan Family Health Services Authority and another, ex parte Martin*, [1995] 1 All E.R. 356, 1 W.L.R. 110, 21 B.M.L.R. 1, 1 F.L.R. 283, Court of Appeal (Civil Division) 29 July 1994.

L. DISABILITY DISCRIMINATION

24.45 Disability Discrimination and the Provision of Goods, Services and Premises

The Disability Discrimination Act 1995 imposes new duties upon the providers of goods services and premises to disabled persons.[1] Services include hotels, boarding houses, banking, access to loans or credit, services of professions/trade and local/other public authorities.[2] Some service providers are excluded such as education,[3] youth services provided by a local education authority, the provision by voluntary organisations of social, cultural and recreational activities, some examination and assessment services and facilities for research student and any service so far as it consists of the "use of any means of transport."[4] Access to stations however is included.[5] Treatment constitutes discrimination under the Disability Discrimination Act 1995 if a person treats a disabled person less favourably than he treats or would treat other persons to whom that reason does not or would not apply and they cannot show that this treatment was justified.[6] Justification must be subjective in that the provider of services must believe that the actions were "justified" and it must also be reasonable for the provider to hold that belief. Justifications include such criteria as the actions may endanger the health and safety of others.

An action may be justified where the disabled person lacks capacity to enter an enforceable agreement or give an informed consent and thus the actions are reasonable.[7] It is to be presumed that a person should be treated as having capacity unless this is established to the contrary. Where a person has fluctuating capacity that should not mean that they are automatically regarded as incapable. It may also be the case that an individual has capacity to comprehend one matter while not comprehending another.[8] While English law contains no doctrine of informed consent it is to be presumed that the test in *Sidaway v. Bethlem Royal Hospital Governors* would be applicable, namely that the provision of information could be referable to what a responsible body of professional medical opinion would provide.[9] The operation of the provision beyond this context is uncertain. Conduct may be also justified under the section if it can be shown that it is necessary because

[1] S. 19. See generally D. O'Dempsey and A. Short, *Disability Discrimination: The Law and Practice*, F. T. Law and Tax Practitioner Series: London (1996), Part 3.
[2] S. 19(3).
[3] The Disability Discrimination (Services and Premises) Regulations 1996, S.I. No. 1836.
[4] S. 19(5).
[5] Hansard Report SC.
[6] S. 20.
[7] S. 20(4).
[8] See for example, *In the Estate of Park* [1954] P 112, in which a man was held to have capacity to marry but not to execute a will.
[9] [1985] A.C. 871.

the provider would otherwise be unable to provide the service to members of the public or if the treatment was necessary because the service provider would otherwise be unable to provide the service to the disabled person or other member of the public.[1] Finally, discrimination may be justified if it is the case that the terms reflect the greater cost to the service provider in providing services to a person who is disabled. It should be noted that specific provisions apply regarding insurance where less favourable treatment is deemed justified where this on the basis of information concerning relevant information concerning the risk assessment of the insured and is reasonable regarding the information given/other relevant factors.[2] Similarly there are specific provisions in relation to guarantees because the disability results in what is a higher level of wear and tear.[3]

Disability for the purposes of these provisions is defined as in the context of employment.[4] As in the employment context the burden of proving that the treatment was justified is on the service provider. The statute also provides that providers of services must make reasonable adjustments to prevent disadvantage resulting to those with disabilities, although here, in contrast to the provisions of the legislation which relate to employment it is not necessary to establish that the actions were justified rather this will be a matter to be determined with regard to what is or is not reasonable in the individual situation.[5]

The provisions relating to goods and services, such as the duty to adjust[6] are being brought into force in stages. From 2nd December 1996 it has been unlawful to refuse services, offer lower standards of service or offer a service on worse terms to a disabled person.[7] From October 1999 service providers will be required to take reasonable steps to alter those policies/practices which have the effect that it is impossible/unreasonably difficult for a disabled person to use a service. Also they will be required to take reasonable steps to provide auxiliary aids and services which will enable the disabled person to use services and they must deal with the problem of a physical barrier by providing a service by what is a reasonable alternative method. Subsequently, from 2004, providers of services will be required to take "reasonable steps" to remove, alter or provide reasonable means of avoiding physical

[1] The *Code of Practice Rights of Access Goods Facilities Services and Premises*, HMSO (1995) at paragraph 5.12 gives an example outside the context of mental health which may illustrate the effect of this provision which is that ground floor rooms only may be offered by a hotel for use by wheelchair users if the other floors are not so accessible.

[2] Disability Discrimination (Services and Premises) Regulations 1996, S.I. No. 1836 (Regs. 2–4).

[3] *Ibid* (Reg. 5).

[4] See para. **24.37** above.

[5] S. 21(1).

[6] S. 20(2).

[7] Disability Discrimination (Services and Premises) Regulations 1996, S.I. No. 1836. See also the Code of Practice "Rights of Access—Good, Facilities, Services and Premises", (HMSO 1996).

features which mean that it is impossible or unreasonably difficult for the disabled person to use a service.

The Disability Discrimination Act 1995 also makes specific provision regarding provision of access to public service vehicles and taxis. Certain of these provisions, such as those relating to taxis are not yet in force.[1] Consultation will be undertaken later this year on draft regulations relating to bus services. Regulations have already been issued under the 1995 Act relating to the provision of rail services.[2] Application may be made by the train operator for exemption from these provisions.[3]

24.46 Disability Discrimination and the Disposal and Management of Premises

The Disability Discrimination Act 1995 now also makes it unlawful to discriminate or to victimise disabled persons in the disposal or management of premises.[4] This is similar to the provisions which relate to employment and the provision of goods and services although there is no duty to make adjustments regarding such disposal/management. Premises, for these purposes, cover all types of land.[5] There are some exclusions for example, in relation to the disposal of premises small dwellings are excluded where the occupier resides and continues to reside or shares accommodation with other persons present on the premises who are not part of their family.[6] As with the provisions of the 1995 Act discussed earlier (para. **24.37**) discrimination on the basis of disability regarding the disposal or management of premises is unlawful unless it can be shown that this is justified. The defendant must show that one of the conditions in s. 24(3) has been fulfilled namely that the treatment is necessary to ensure that a person's health/safety is not endangered, that the disabled person is not capable of entering into an enforceable agreement/giving informed consent and as a result treatment is reasonable or that it is necessary for the disabled person or other occupiers of the premises occupying part of the building to make use of the benefit/facility or for the occupiers of other parts of premises to use the facility and in addition that it is reasonable to hold this opinion. The provisions will impact upon decisions regarding management of premises based on irrational prejudices regarding those with mental illness. Terms in leases with attempt to exclude the Act or require a person to act in a manner which would contravene Part III of the Act are void.[7]

---

[1] S. 32.

[2] Rail Vehicle Accessibility Regulations 1998, S.I. No. 2456. These came into force on 1st November 1998.

[3] The Rail Vehicle (Exemption Application) Regulations 1998, S.I. No. 2457.

[4] Ss. 22–24 and see particularly D. O'Dempsey and A. Short *Disability Discriminations: The Law and Practice*, FT Law and Tax Practitioner Series: London (1996) at chapter 12.

[5] S. 68(1).

[6] S. 23(2)(*a*).

[7] S. 26(1)(*a*).

THIS PAGE IS DELIBERATELY LEFT BLANK