

Christian-Albrechts-Universität zu Kiel
Hermann Kantorowicz-Institut für juristische Grundlagenforschung
Kieler Woche Guest Lecture – 21st June 2017

on
RIGHTS AND WILL: THE LAW'S JOURNEY INTO UNEXPLORED SPACE
by
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ADW SPEAKING VERSION: NOT TO BE CIRCULATED

Notes to accompany lecture – see also separate Appendix

DEFINITIONS/PRINCIPAL REFERENCES

ID, IDs:	Intellectual disability/disabilities
2000 Act:	The Adults with Incapacity (Scotland) Act 2000. References to Parts, Sections, Schedules, etc. are to the 2000 Act except where otherwise indicated
MCA 2005:	Mental Capacity Act 2005 (England & Wales)
CRPD:	UN Convention on the Rights of Persons with Disabilities
UN Committee:	United Nations Committee on the Rights of Persons with Disabilities
General Comment:	General Comment No 1 (2014) by the UN Committee entitled “Article 12: Equal Recognition before the Law”
ECHR:	European Convention on Human Rights
Recommendation (2009)11:	Council of Europe Recommendation (2009)11 on principles concerning powers of attorney and advance directives for incapacity
EAP3J:	Essex Autonomy Three Jurisdictions Project: final report available at: http://autonomy.essex.ac.uk/eap-three-jurisdictions-report
Report/Newsletter:	The monthly, online free Mental Capacity Report (formerly Mental Capacity Newsletter). To access it, go to: http://www.39essex.com/resources-and-training/mental-capacity-law/
<i>A-MV v Finland</i> :	<i>A-MV v Finland</i> (Application No 53251/13), decision of 23 rd March 2017 of the European Court of Human Rights: <a 13"]"="" appno":["53251="" href="http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{">http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["53251/13"]}
German decision 26 th July 2016:	Decision of the Federal German Constitutional Court of 26 th July 2016 in the case <i>1 BvL 8/15</i> (see article in November 2016 Newsletter)

Good morning. I am delighted to be with you. Thank you to # for that kind introduction, and thank you to # for inviting me here – to meet you; to be part of Kieler Woche; and to have this opportunity to talk to you about the fundamental reorientation in how we conceptualise and structure law, which we seem to be moving towards. I will speak in English. For some of my current thinking in German, see:

Ward, “Erwachsenenschutzrecht im internationalen Vergleich”, BtPrax 2017 S. 12 ff.

For 50 years I have been fortunate to be personally involved in the developments which I describe. The views you will hear are largely personal views, so I will include the personal background from which they come. Please question, challenge and debate. If you wish, interrupt at any time, though I hope that we shall have time for longer debate at the end. Use German if you prefer – Prof Lettmaier will translate for me – that is how we first worked together, several years ago now.

The reorientation in law which I foresee is driven by modern thinking on the interaction between IDs and the law.

Horizontal and vertical visualisation: IDs relevant to every area of law.

TRADITIONAL POSITION: People with IDs are disqualified from acting and transacting with legal effect, to the extent that they are deemed not capable. Traditional approach: they need protection, third parties need certainty.

What are the principal areas of law which you are all interested in?

Have you already received training in law relating to persons with disabilities? I didn't! See Appendix, item A, Article 13.2.

Important points:

- (1) IDs relevant to any area of legal practice.
- (2) Importance to national economies of ensuring that growing amounts of wealth that are economically inactive when held by ageing population become economically active.
- (3) Compliance with CRPD: See CRPD Article 13.2 (Appendix, item A).

Background to personal involvement.

Scots lawyer, Roman law.

Institutionalisation: old law to new law.

See history shown diagrammatically in Appendix, item L.

1913 – 1984: Plenary statutory guardianship because of a perceived “lasting injury to the community” caused by people with intellectual disabilities being “at large in the population”: all the powers in personal matters of the parent of a young child.

1969: Report on Guardianship by ILSMH: “Serious difficulty arises because the law usually represents incompetence in simple black-and-white terms”.

1973 – 1975: Position papers from American Association on Mental Deficiency.

1975: United States: Developmentally Disabled Assistance and Bill of Rights Act.

1988: Alberta: Dependent Adults Acts, Chapter D-32.

Tutors-dative reintroduced – *Morris, Petitioner* (1986) (unreported – described in Ward, “Revival of Tutors-Dative”, 1987 SLT (News) 69).

Tutors-at-law reintroduced – *Britton v Britton’s Curator Bonis*, 1992 SCLR 947.

New Zealand: Protection of Property and Personal Rights Act 1988.

Germany: Betreuungsgesetz 1990.

Review of Scots law by Scottish Law Commission, 1991 – 1995.

Major issue: Repeated importation of child law concepts – see Appendix, item L.

“Best interests” approach rejected in Scotland, though subsequently adopted in England – see Appendix, item B.

But – trend in England – *Aintree University Hospital NHS Foundation Trust v James* ([2013] 3 WLR 1299, [2013] COPLR 492) (Supreme Court). Lady Hale: the purpose of the best interests test in the 2005 Act is “*to consider matters from the patient’s point of view*”: and that “*Insofar as it is possible to ascertain the patient’s wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.*”

Principles and definitions in 2000 Act, section 1 – see Appendix, item C.

2000 Act requires a “constructing decisions” approach – see Appendix, item D.

CRPD arrives on the scene – see Appendix, item A.

The General Comment – see Appendix, item E.

PARTICULAR ELEMENTS OF CRPD ARTICLE 12

12.2 – What does “legal capacity” mean?

See definition in Oxford Companion to Law: Appendix, item F

See definition in section 1(6) of 2000 Act: Appendix, item C

12.3 – Support:

Support to exercise legal capacity

Support to express will and preferences

CRPD Article 12.3 is frequently misrepresented as requiring support for decision-making. It does not. It requires support for persons with disabilities “in exercising their legal capacity”. The relevant question (see EAP3J report page 13) is accordingly:

“What measures should be taken to support the exercise of legal capacity, both by supporting persons with disabilities to make decisions themselves wherever possible, and by supporting their ability to exercise their legal agency even in circumstances when they lack the ability to make the requisite decisions themselves?”

The second alternative includes decision-making by representatives appointed by the person, or appointed by a court or other body.

Apply the concept and principles of supported decision-making in both situations.

The provision of support must be subject to the CRPD Article 12.4 safeguards. See section 7 of EAP3J report. They include safeguards against conflict of interest and undue influence.

12.4 – Safeguards:

Respect for rights, will and preferences

The interpretation of this presents major differences. There is agreement that the person with ID must be at the centre of all acts and decisions, and that the element of “will and preferences” should be interpreted where not directly ascertainable: see General Comment paragraph 21 (Appendix, item E) and “constructing decisions” methodology (Appendix, item D). Differences: does “respect” mean “obey”, or “give great weight to”? Should “rights” ever override strongly expressed “will and preferences”?

Examples of situations that arise in practice

Free of conflict of interest

Often better to manage the conflict, than to disqualify the conflicted person

Free of undue influence

See Appendix, item G

Proportionality:

Proportional and tailored to the person’s circumstances

Proportional to the degree to which measures affect the person’s rights and interests

Apply for the shortest time possible:

Subject to regular review by a competent, independent and impartial authority or judicial body

12.5 – Particular rights

INTERNATIONAL DEVELOPMENTS OVER THE LAST 12 MONTHS

June 2016: EAP3J final report

- The Vienna Convention on the Law of Treaties: Arts 31 & 32
- “I am glad that when I was ill my right to life was considered more important than my right to autonomy”
- Inconsistency with *travaux préparatoires*: “substitute decision-making” is not prohibited by, nor even mentioned in, CRPD, and the Drafting Committee remained neutral – it should be neither prohibited nor approved. EAP3J concluded that CRPD does not prohibit the appointment of someone else, such as a guardian, to make decisions, but does address the methodology to be adopted by any such decision-maker.
- Main recommendations: see in particular recommendation 1 (Appendix, item H)

July 2016: German decision 26th July 2016

- Involuntary treatment for breast cancer of woman with mental health issues
- Duty of state to protect its citizens
- Status of views of the UN Committee
- Status of the practices and interpretation of states parties
- Decision to overrule the woman’s refusal of treatment did not violate CRPD and was a situation not addressed by the UN Committee

March 2017: *A-MV v Finland*

- Mentor appointed by court to man with intellectual disabilities refused the man’s wish to move home to the other end of the country
- European Court of Human Rights accepted that the man’s right to a private life under Art 8 ECHR was interfered with: was that interference justified?

“In a context such as the present one, the interference with the applicant’s freedom to choose where and with whom to live that resulted from the appointment and retention of a mentor for him was therefore solely contingent on the determination that the applicant was unable to understand the significance of that particular issue. This determination in turn depended on the assessment of the applicant’s intellectual capacity in conjunction with and in relation to all the aspects of that specific issue”

Capacity must be assessed specifically by reference to the matter in question.

“[T]he Court is satisfied that the impugned decision was taken in the context of a mentor arrangement that had been based on, and tailored to, the specific individual circumstances of the applicant”

To be ECHR-compliant, powers under any appointment must be tailored to the individual's specific circumstances. Use of standard sets of powers is not ECHR-compliant.

“[T]he impugned decision was reached on the basis of a concrete and careful consideration of all the relevant aspects of the particular situation.”

In relation to any proposed intervention, the whole circumstances must be taken into account.

“[T]he decision was not based on a qualification of the applicant as a person with a disability. Instead, the decision was based on the finding that, in this particular case, the disability was of a kind that, in terms of its effects on the applicant's cognitive skills, rendered the applicant unable to adequately understand the significance and the implications of the specific decision he wished to take, and that therefore, the applicant's well-being and interests required that the mentor arrangement be maintained.”

Intervention must be based not on the existence of a disability, but on assessment of specific relevant cognitive skills in relation to understanding of the matter in question.

“The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under circumstances where his or her individual qualities or situation place the person in a particularly vulnerable position.”

In each particular case, it is necessary to balance respect for dignity and self-determination against protecting the individual and safeguarding the individual's interests. The degree of vulnerability of the individual is relevant.

“The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was also consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being.”

The following procedural requirements must be satisfied for any intervention contrary to the will of the individual to be ECHR-compliant:

- The individual should be involved at all stages of proceedings, and should be heard in person to put forward his wishes. [Comment: In formal proceedings this probably requires separate legal representation to submit, and advocate, the individual's own rights: a role distinct from, and potentially in conflict with, that of a safeguarder or curator *ad litem*.]
- The intervention must be subject to review by competent, independent and impartial domestic courts. [Comment: This requirement would probably be met by a tribunal with judicial status, but any such court or tribunal requires to be sufficiently specialised to have the necessary competence in adult incapacity matters.]

The court held that neither Art 8 of ECHR, nor the right to freedom of movement under Art 2 of Protocol 4 to ECHR, had been violated.

A-MV v Finland may be taken as authoritatively confirming exactly the same approach as was proposed in EAP3J.

The emerging limitations upon the views of the UN Committee do not detract from the imperatives of compliance with CRPD and with the main thrust of the assertions of the UN Committee, particularly as to the meaning and application of the obligation to respect the rights, will and preferences of the individual.

ECHR

Issues of deprivation of liberty under Article 5 (see Appendix, item I) are a further major challenge in relation to people with IDs.

Incompatibility between ECHR Article 5 and CRPD Article 14.

POWERS OF ATTORNEY AND ADVANCE DIRECTIVES

Of major importance in supporting principles of autonomy and self-determination, and in relation to the requirement for support for the exercise of legal capacity, but apparently hardly “on the radar” of the UN Committee.

Issues of balance between autonomy and protection both at time of granting, and time of operation.

Review of implementation of Recommendation (2009)11.

Powers of attorney: incorporation of supported decision-making and co-decision-making provisions.

Advance directives: binding and non-binding, scope for development of both.

THE FUTURE: CONCEPTS OF “WILL”

What does it mean, and what should it mean going forward?

Many concepts of “will”:

In the German decision 26th July 2016 – “free will”, “natural will”, “original free will” and “the when-necessary-supported-will of the person with a disability”

Switzerland: “expressed will”, “presumed will” and “hypothetical will”

THE FUTURE: RESOLVING THE CONTRADICTION, AND REVERSED JURISPRUDENCE

From my old overhead slides in the 1970s:

“minimum necessary special provision, accurately related to need”

“no unnecessary imposition of special provision”

“special provision = discrimination”

“protection = disqualification”

Developed into the concept of infinitely variable balance between autonomy and protection.

Contradictions viewed as incompatibility among requirements of CRPD:

Article 5: prohibits discrimination against persons with disabilities

Article 12: requires recognition of legal capacity in all matters on an equal basis

Article 16: requires protection against exploitation and abuse

It is suggested that meeting any two of these requirements will violate the third: protection against the vulnerabilities resulting from IDs requires discrimination, and so forth.

OBJECTIVES: Minimise disqualifying effect of IDs:

(a) By providing maximum support.

(b) By altering legal environment to reduce exclusivity related to individual capabilities.

Inclusive legal systems making maximum contribution to inclusive societies.

1993: "A Contradiction and a Vision" – see Appendix, item J.

2013: Exposition of "reversed jurisprudence" – see Appendix, item K.

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