

Chapter 5.1

Disability overview

Key points

- Disability has two elements. The first is the limitation imposed upon the individual by reason of their physical, mental or sensory impairment. The second is the disadvantage or handicap which this imposes on the individual in their environment.
- Any disadvantage that a disabled person has in society should not be reinforced by the legal system; the individual who cannot cope with the facilities and procedures of the courts is as entitled to justice as those who do not have this disadvantage.
- It is not simply a question of judges being polite and understanding when faced with people whose disabilities are clearly apparent. All members of the judiciary should be able to recognise disabilities when they exist, identify the implications, know what powers they have to compensate for the resulting disadvantage and understand how to use these powers without causing prejudice to other parties.
- If any of the parties, witnesses or advocates involved in court proceedings has a disability which may impair their ability to participate, it is important that this is identified at as early a stage as possible. Steps can then be taken to ensure that any hearings take place in accessible rooms and suitable facilities are available.
- A litigant in civil or family proceedings is treated in a different manner under the court rules only in the case of incapacity. The procedures then ensure that a representative is appointed, compromises and settlements are approved by the court, and there is supervision of money recovered (see Chapter 5.4).

5.1.1 Introduction

The intention of Part 5 – Disability is to provide practical information that may be used when considering the needs of individuals with a wide range of disabilities and impairments, both obvious and hidden, physical and mental. The aim is to enable litigants, defendants and witnesses (and, where appropriate, advocates, jurors and others involved in the court process) with disabilities to participate fully in the process of justice. There is no intention to seek favourable treatment for disabled people but they do need to leave the court believing that justice has been done and that they have been given every opportunity to participate in a fair hearing in whatever capacity. They require to be given the opportunity to express themselves properly and, if a witness, to put their evidence before the court. To achieve this aim each person with a disability must be assessed and treated by the judge as an individual so that their specific needs can be considered and appropriate action taken. Failure to do this may result in a decision being overturned on appeal.

The advice in [the *Equal Treatment Bench Book*] as regards dealing with parties to proceedings with disabilities is important advice which every judge and justice is under a duty to take into account when dealing with such parties.

R (on the application of King) v Isleworth Crown Court [2001] All ER (D) 48 (Jan), CA

Any need for an adjustment to court procedure can usually be assessed quite quickly but the judge must balance this against the need for a fair trial to ensure that justice is done to both sides.

Incidence of disability

The incidence of disability may be more frequent than is generally imagined and many people have more than one disability. The 2001 census showed that almost 9.5 million people have a long-term illness, health problem or disability which limits their daily activities or the work they could do.

Physical disabilities

According to the 1988 Office of Population Censuses and Surveys there were 6.2 million people in England and Wales with physical disabilities.

Mental illnesses

According to the Psychiatric Morbidity Survey, about one in five of the population living in private households reported having some psychiatric disorder. These included anxiety disorders and depressive episodes, and drug and alcohol dependence.

Learning disabilities

According to Mencap, there are over one million people with learning disabilities in the UK, of whom about one-fifth have severe learning disabilities. Also, one in five adults in the UK is functionally illiterate meaning they could not, for example, use the *Yellow Pages* telephone directory.

The Disability Rights Commission estimated that 8.6 million people (one in seven of the population) came within the definition of 'disabled person' in the Disability Discrimination Act 1995.

5.1.2 Empowering disabled people

We now adopt a *social model* of disability which sees the problem as arising from the barriers constructed by society rather than in the physical or mental impairment of the individual – the former *medical model*. Thus, to the wheelchair user the problem is that the court building has steps but no ramp and to the hearing-impaired person the problem is that the court does not have the loop system.

'Care in the community' policies mean that more people with serious disabilities encounter the courts in one form or another and with cut-backs in public funding fewer have a solicitor to compensate for their disability. This points to an increased role for the judge. It is helpful to remember that it is the strongest case that should win, not the strongest litigant.

A general approach

A start is for the judge or tribunal chair to look around the court or tribunal room and consider whether everyone present can participate as required. If there is doubt, such as where a party or witness is elderly or otherwise disabled, a simple enquiry can be made directly or through an usher (e.g. Are you comfortable sitting there? Can you see/hear? Are you warm enough?). It should be made clear that it is acceptable for anyone present to point out if a problem develops during the hearing.

Simply to have shown concern by asking questions will have reassured the person of whom enquiry is made that they are a full participant in the proceedings and established positive expectations that justice is to be done. It also sends the message to others present that this is not a person who may be sidelined. If a negative answer is received it may be possible to resolve the problem by taking relatively simple measures (e.g. moving the person to a different position). Even when a chair is provided in the witness box it is important to ensure that this is of a suitable height and type; the trauma of giving evidence should not be made worse by physical discomfort.

In his article *Equal Access to Justice for Disabled People*, District Judge Ashton highlights a positive approach to people with disabilities or impairments:

It is not sufficient to ensure that wheelchair users can gain access to the courtroom; physical disabilities come in many other forms. Defective vision, hearing impairment and speech defects may all affect an individual's ability to participate in the proceedings unless compensated for by a sympathetic approach and the use of available aids.

He goes on to refer specifically to the issues surrounding the obtaining of evidence from those with mental impairment who are themselves the victims of crimes:

There is concern that the criminal courts are often powerless to punish those who mistreat individuals with mental disabilities because their evidence cannot be heard. ...Ability to take an oath in the witness box and face a confrontation in a courtroom is no longer an acceptable approach to the protection of these people, and it may be that all available evidence should be evaluated and the vulnerable witness treated with the same care as a child.

A positive approach

Do not begin with any assumptions beyond those that are clearly justified by what is immediately and incontrovertibly evident. The person involved should be addressed directly and in a normal manner unless and until it is clear that some other approach should be adopted. Then enquire as to special needs rather than the nature of the disability (e.g. 'Do you need assistance to read this?' rather than 'Is your sight impaired?'). Ascertain as far as possible what functions are affected and what adjustments need to be made. Within any condition there may be varying impairments or stages, so even a general knowledge of the condition and its effects is inadequate to deal with the particular individual appropriately.

People vary in their sensitivity about disclosing their impairment and those with disabilities are often reluctant to 'make a fuss about them', so any questioning needs to be sensitive. They may be embarrassed or self-conscious, yet as judges we need to be aware of how they are coping if we are to ensure that further steps are taken as and when required. At the same time, we must not appear patronising.

Witnesses

A person's physical and mental health and abilities may influence their experience as a witness. Most discussions concentrate upon intellectual disabilities, but physical impairments and mental health problems may also make it difficult for some people to give evidence. These conditions are not mutually exclusive. Physical and intellectual disabilities can be associated (as in the case of infirm elderly people), although they do

not always accompany each other. It is less commonly recognised that intellectual disabilities and physical disabilities may at some point be accompanied by mental illness. A witness who has more than one of these conditions is especially vulnerable.

Disability ‘etiquette’

- Enquire as to what is needed rather than the nature and extent of the impairment.
- Talk directly to the disabled individual even if there is an interpreter, carer or personal assistant and face this person if you can – with lip-reading this is particularly important.
- Avoid embarrassing disclosure of medical histories where possible.

5.1.3 Terminology

In recommending the terminology to be used in relation to disability, it is important to acknowledge that some Acts of Parliament, particularly older ones, use terminology that would now be considered out of date and in some cases inappropriate. Some judicial office-holders will continue to work with those statutory definitions and tests until such time as the legislation is updated. Whilst their findings must continue to be phrased within the technical definitions, this does not justify the wider use of language that may offend and judges should be encouraged to converse in appropriate terms.

The commonly used terms impairment, disability and handicap are frequently treated as if they mean the same thing, but they do not. It is necessary to distinguish the differing aspects of an illness or condition. It is suggested that a correct use of the common terms is as follows:

- an individual may have a condition, an *illness* or a *disorder*;
- this may result in a *disability* which comprises:
 - the limitation imposed upon an individual by reason of their physical, mental or sensory *impairment*, and
 - the *disadvantage* (or *handicap*) which this imposes on an individual in their environment;
- if the disability is of a sufficient degree the individual may be treated as *legally incapacitated* (or *incompetent*) and this may be due to:
 - *mental incapacity*, or
 - *physical inability*, or
 - both.

A disability is not the same as an illness. It is a personal quality in the same way, for example, as is being tall, White, Black or short-sighted.

There are a variety of definitions or tests that may be used in different contexts and it may be important in a legal context to identify the appropriate one.

World Health Organisation definitions (1982)

Impairment

A permanent or transitory psychological, physiological or anatomical loss or abnormality of structure or function.

Disability

Any restriction or prevention of the performance of an activity, resulting from an impairment, in the manner or within the range considered normal for a human being.

Handicap

A disability that constitutes a disadvantage for a given individual in that it limits or prevents the fulfilment of a role that is normal dependent on age, sex, social and cultural factors, for that individual.

Disability Discrimination Act 1995 definitions

Section 1(1) provides that a person is treated as having a 'disability' if he or she 'has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.'

Schedule 1, para. 4(1) states that:

An impairment is to be taken to affect the ability of the person concerned to carry out normal day-to-day activities if it affects one of the following:

- a. mobility;
- b. manual dexterity;
- c. physical co-ordination;
- d. continence;
- e. ability to lift, carry or otherwise move everyday objects;
- f. speech, hearing or eyesight;
- g. memory or ability to concentrate, learn or understand; or
- h. perception of the risk of physical danger.

This definition is not dependent upon being 'registered disabled' with the local authority or in receipt of disability benefits under the social security system. In *Dunham v Ashford Windows* ([2005] All ER (D) 104), the Employment Appeal Tribunal held that general learning disabilities (if sufficiently serious and though not a mental illness) can amount to a mental impairment for the purposes of s.1(1) of the Act.

Use of terms

To use terms as labels, especially in the wrong context, is stigmatising and demeaning to the persons concerned. It also leads to stereotyping (assumptions that may be false).

Avoid:

- comparisons with 'normal' and referring to 'the disabled' or 'the handicapped' as if they were a distinct class;
- referring to someone as 'handicapped' – use instead 'disabled person';
- treating people as if they are medical conditions (e.g. 'epileptic' or 'arthritis') – use instead 'person with epilepsy'.

Terms to avoid:

- 'wheelchair bound' – use instead 'wheelchair user';
- 'suffers from' – use instead 'has' or other more neutral terminology;
- 'mental handicap' – use instead 'learning disabilities' or 'learning difficulties';
- 'mental illness' – use instead 'mental health problem';
- 'the blind' – use instead 'blind people' or 'people who are blind';
- 'the deaf' – use instead 'deaf people' or 'people who are deaf'.

Terms to use:

- 'physical disability', 'sensory impairments', 'partially sighted', 'deaf without speech', 'hard of hearing'.

The phrase 'person with a disability' is the choice of some organisations because it emphasises the person rather than the disability, but 'disabled person' was preferred by the Disability Rights Commission because it reflects the social model (the person is disabled by society – see 5.1.2 above).

5.1.4 Trial management and disability

Trial management is concerned with how a hearing may best be managed where a party, witness, defendant, juror or advocate has a disability which might become a consideration. It is based on common sense and common courtesy which judges, in any event, will apply to the management of the hearing. More detailed guidance on steps that must or can be taken is offered in the following chapters. A customer services officer should be available at each court to consider disability issues.

The overall aim must be to ensure that the disability does not amount to a handicap to the attainment of justice. The person who has difficulty in coping with the facilities and procedures of the courts is as entitled to justice as those who know how to use the legal system to their advantage. There are many potential sources of discrimination and not being heard or being misunderstood by the judge is just as discriminatory as an inability to access a court building.

Key elements for people with disabilities

- Likely to need more time – so a longer time estimate may be required for a trial.
- May not be able to hear, read or be understood or fully comprehend what is taking place.
- Will be using up much of their energy to cope with the disability and therefore tire more easily.
- The stress of coming to court may exacerbate symptoms and some disabilities may make it impossible to attend court at all.

Pre-trial planning

People with disabilities are frequently encountered in the courts but this is invariably treated as a 'one-off' and there is no co-ordinated approach. Making any special arrangements in advance will save time and embarrassment at the hearing. There is scope in both civil and criminal trials to identify at the pre-trial stage whether anyone involved has special needs. The forms used by the court and completed by the parties should make enquiry so that the administration know when facilities to accommodate disabilities are required and the judiciary realise when special directions are needed. Advisers should be encouraged to tell the court that a litigant or witness has special needs.

It may be easy to compensate for a disability, but in some instances special facilities or procedures are needed and this requires advance planning or specialist knowledge. Accessibility consultants should be available for this purpose. If in doubt as to what is required, ask the disabled person directly. Advance planning and the adoption of a wider range of options will not only ensure a more just outcome but also result in more efficient use of court time.

Criminal proceedings

In criminal cases the plea and directions hearing is the best place to address potential problems. Ideally, the 'pro-forma' form used by the court could contain a dedicated box in which parties would be obliged to identify and address such questions, giving an indication of what support would be useful. It is at this stage that the provisions of the

Youth Justice and Criminal Evidence Act 1999 should be considered and appropriate directions given in anticipation (e.g. 'special measures' directions). There is a power to make orders that the costs of the provision of an interpreter should be met out of Central Funds and this could be addressed at an early stage.

Civil justice reforms

The rules governing family proceedings were already more interventionist, but the introduction of a new procedural code by the Civil Procedure Rules 1998 represented a change of culture in the civil justice system. Proceedings are henceforth governed by the *overriding objective* of enabling the court to deal with cases justly which means:

- ensuring that the parties are on an equal footing;
- saving expense;
- dealing with cases in ways which are proportionate to the money involved, importance of the case, complexity of the issues and financial position of each party;
- ensuring that cases are dealt with expeditiously and fairly;
- allotting to cases an appropriate share of the court's resources.

The court must seek to give effect to the overriding objective and the parties are required to help. Instead of leaving them to progress litigation, the judge now acts as 'case manager' and adopts an interventionist role. This includes encouraging the parties to co-operate, deciding how the issues can best be resolved and fixing timetables. In addition, hearings should be dealt with without the need for the parties to attend at court if possible.

As the intention is to ensure that the parties are on an equal footing there is much in these reforms of potential benefit to people with disabilities or other disadvantages. Whilst there is no specific mention of a duty to address the personal needs of litigants and the emphasis may appear to be upon financial inequality, the overriding objective is wide enough to encompass other personal handicaps and the judge in managing cases should take these into account.

Implications

What would be helpful is for any special needs to be identified at the preliminary stages and for procedures to meet any difficulties or disadvantage to be in place at the commencement of the hearing. The court staff should check with any person with a disclosed disability (or their solicitor or representative) whether what is being proposed is appropriate. Often attending court or a tribunal venue can impose considerable stress on a person with a disability and consideration should be given to the number of pre-trial hearings which are held and how these might be managed or limited. This may especially apply in family cases where reviews are held more frequently than in other forms of litigation. Options now available include telephone conferences or the use of video links.

The hearing

Measures which can be taken at the hearing to ensure that vulnerable litigants and witnesses are fairly heard have two main aims:

1. to reduce the fear and trauma of attending court;
2. to ensure that the quality of evidence suffers as little as possible.

Listed in the box below are some general points. They are only broad indications owing to the need to treat each person as an individual. It is important to be aware of the impact of the proceedings generally on the person with the disability. This means looking out for signs of stress, discomfort, fatigue or lack of concentration. If possible, though within the confines of the need to be fair to both sides and the requirements of a fair trial, action should be taken to alleviate the situation after an enquiry of the person with a disability. But support cannot be forced on people, even when it is felt to be in their best interests, and a person with a disability may refuse an offer of assistance.

Measures that can be taken at the hearing

- Have a carer near to the witness box or the dock.
- Have frequent breaks. Concentration may be impaired or there may be a need to eat or drink more frequently (e.g. to restore blood sugar levels) or take medication and then allow time for this to work (e.g. the use of an inhaler by a person with breathing difficulties). A person using a wheelchair may become stiff and uncomfortable.
- Ensure that persons with mental health problems or learning disabilities have things explained to them slowly or more than once. They may be especially nervous and under stress. Consider the order in which evidence is heard so that they are not kept waiting longer than necessary. It may be helpful if wigs and gowns are removed.
- Consider the layout of the courtroom and whether this is likely to cause discomfort.
- Permit a person with visual impairment to be accompanied by a guide dog. Experience has shown that this does not result in problems, but the dog may need to have water or a walk.
- Consider the stress placed on persons with a hearing impairment of concentrating and communicating in a different environment through an interpreter, and the length of time that it is reasonable to expect an interpreter to work without a break.

- Consider how to cope with the various types of equipment that a person may need to use in order to communicate. This may be slower and more tiring than other forms of communication.
- Be aware of the powers to prevent inappropriate questioning.
- Ensure that fresh drinking water is available and the room is not too crowded or stuffy.

Adjournments

If a hearing before a court or tribunal needs to go part heard or be adjourned as a result of the need to make reasonable adjustments for a person with a disability, it is good practice to record that this is the reason for the extended hearing or adjournment.

Jurors and disability

There will be occasions when a disabled person is called for jury service. Guidance is provided in s.9B of the Juries Act 1974 which states that it is for the judge to determine whether or not a person should act as a juror. The presumption is that they should so act unless the judge is of the opinion that the person will not, on account of disability, be capable of acting effectively as a juror, in which case that person should be discharged.

There have been many cases in which persons who are blind have served on juries. In *Re Osman* [1996] 1 Cr App R 126, Sir Lawrence Verney, Recorder of London, said that a person who is profoundly deaf and unable to follow the proceedings in court, or deliberations in the jury room, without the assistance of an interpreter in sign language should be discharged from jury service pursuant to s.9B because such a person could not act effectively as a juror and it would be an incurable irregularity in the proceedings for the interpreter to retire with the jury to the jury room. The same reasoning would apply if a person called for jury service required the full-time attendance of a carer. In a case in Liverpool, a disabled person's carer was allowed to sit near to this person in the courtroom but when it came to retiring the carer remained outside the jury room and the other members of the jury attended to their colleague's needs.

The Disability Discrimination Act 1995 does not apply because jury service is not deemed to be a 'service to the public'. The fundamental problem appears to be the presence of a thirteenth person in the jury room, because no evidence has ever been presented that a deaf juror is less able to assess the demeanour of a witness. Legislation would be required to overcome this obstacle.

5.1.5 The statutory environment

The main statutory provisions directly bearing upon disability in the courtroom are:

- the Disability Discrimination Act 1995 (the DDA);
- the Human Rights Act 1998 (the HRA);
- the Youth Justice and Criminal Evidence Act 1999.

See section 1.6.6 for a more detailed description of the legislation regulating discrimination against disabled people.

The Disability Discrimination Act 1995 (the DDA)

This legislation affects courts and tribunals in two ways: first, they must comply with it, and second, the civil courts and employment tribunals are expected to try claims under the DDA. Part III (in particular, s.19–21) makes it unlawful to discriminate against disabled persons in the provision of, *inter alia*, facilities and services and provides civil remedies for unlawful acts.

Compliance by the courts

The courts are not exempted from these provisions; they provide legal services and can find themselves in breach of this legislation if they do not take into account the needs of disabled people. This applies to the building and facilities provided in the court and to the role of the court staff, but it is not clear whether there is immunity for judicial acts as distinct from administrative arrangements. The DDA places a duty on service providers to take reasonable steps to change any practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which they provide to other members of the public. Regulations under s.21 of the DDA require the court to take such steps as are reasonable, in all the circumstances, to provide auxiliary aids or services which make it easier for disabled persons to use their services. For example, it may be an unlawful act not to provide an interpreter for a deaf witness or large print (or Braille if requested) for a person whose sight is impaired. There has been a successful claim against HM Courts Service where a judge proceeded with a hearing after a party complained that the loop system did not work and he could not hear.

Claims dealt with by the courts

Most civil claims are dealt with on the small claims track in the county courts because of the level of damages. Employment tribunals deal with the majority of cases as these arise in an employment context. Through these cases, judges are becoming aware of the realities of life for people with disabilities and the standards that are being set are open to critical comment in the public domain.

The Human Rights Act 1998 (the HRA)

The HRA has also had an impact on both the work of the courts and tribunals and the way in which they are conducted. It provides considerable support for litigants with disabilities and this is likely to produce many new arguments and challenges to the traditional ways of doing things. UK law, whenever possible, is to be interpreted in a way that is compatible with the rights contained in the European Convention on Human Rights. In addition, under s.6 of the HRA, it is unlawful for a public authority to act in a way which is incompatible with the Convention.

Article 14 of the Convention prohibits discrimination in the enjoyment of all other rights on any ground. The right to a fair trial contained in Article 6 is likely to have the single largest impact in the area of disability and the administration of justice. It is in this context that awareness of the issues which disability may raise in the management of a trial becomes important. Proceedings have not only to be fair, but to be seen to be fair by all concerned.

The Youth Justice and Criminal Evidence Act 1999

Part 11 of this Act deals with the giving of evidence or information for the purposes of criminal proceedings and makes provision for 'special measures' to be taken in respect of 'eligible witnesses' who are defined as witnesses the quality of whose evidence is likely to be diminished by reason of defined circumstances. These circumstances are:

- (a) that the witness:
 - (i) suffers from mental disorder within the meaning of the Mental Health Act 1983, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
- (b) that the witness has a physical disability or is suffering from a physical disorder.

The 'special measures' which may be taken include:

- the giving of evidence by means of a live link or by means of a video recording;
- the examination of a witness through an interpreter or other person approved by the court as an 'intermediary';
- the provision of such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability, disorder or other impairment which the witness has or suffers from.

It may be appropriate to adopt these measures in other types of proceedings.

Chapter 5.2

Physical disability

Key points

- Physical disabilities come in many forms.
- Any physical disability may affect the ability of the individual to participate in a court hearing whether as litigant, defendant or juror (in a criminal trial), witness or advocate.
- The judge is responsible for the conduct of the hearing and should ensure that people with physical impairments are able to participate to the full extent required of them whilst avoiding prejudice to other parties.

5.2.1 Introduction

Physical disability may comprise impaired mobility and dexterity, sensory impairment (poor sight or hearing) or impaired ability to communicate. Any associated pain may be aggravated by the stress of the proceedings. There are many chronic and degenerative conditions that especially affect elderly people.

Implications for the court

The ability of an individual to participate in court proceedings may be affected in many ways.

- Impaired mobility may make it difficult to enter the building or cope in a particular courtroom.
- Impaired hearing makes it difficult to identify what is going on.
- Impaired vision may make it difficult to read documents or identify who is speaking.
- Communication limitations may prevent others from understanding the individual.
- Limited concentration spans or the need for regular medication may make it impossible to remain in court for more than a limited period.
- Some disabilities may make it impossible to attend court at all.

Steps should be taken at an early stage to ensure that suitable adjustments to the normal arrangements are made so as to avoid an adjournment when the impairment becomes apparent. Not all of these adjustments can be made by the administration and in some instances directions will be required from a judge. Ideally the forms used and enquiries made would provide a specific opportunity for parties to disclose any relevant disability at an early stage but this is not always the case.

Vulnerability of witnesses

Witnesses with physical disabilities will feel vulnerable in various ways.

Pain, discomfort and stress

This may well be increased by the pressures of court procedures and the need to concentrate for long periods.

An unfamiliar environment

The need to adjust to the court environment and the public nature of the proceedings may have an adverse effect.

Fatigue

Trying to cope with an impairment in a new situation can be stressful and tiring.

Information

The Court Service maintains a directory of disabled facilities available in different courts and reference may be made to this at any court office.

5.2.2 Practical measures

General

When the situation is drawn to the attention of the court there are many imaginative ways in which steps may be taken to cope with a physical or sensory impairment. Examples are set out below but not all will apply to criminal trials.

Steps that can be taken

- Transfer the case to a court in the area where the disabled party resides.
- Transfer the hearing to a venue with disabled access or arrange for it to take place other than in the usual court or tribunal room (e.g. in the litigant's home or a nursing home).

- Be aware of the problems of a person using a wheelchair if they are constantly required to look up.
- Ensure that there are facilities for the hard of hearing (e.g. the loop system).
- Arrange for an interpreter or allow a carer to be present.
- Permit representation in a form that might not otherwise have been permitted.
- Produce all documents in large print or Braille. A direction may be given at an early stage in the proceedings that any documents or communications be sent to the disabled party in a large font produced on the word-processor or after enlargement on a photocopier.
- Allow a longer time estimate, shorter hearings or more frequent breaks.
- Arrange for the evidence of a disabled witness to be taken prior to the hearing or by telephone or video link.
- Introduce yourself to a person who has a visual impairment and make sure they understand the layout of the court and where everyone is sitting.
- If the person has a speech or language impairment concentrate on what they are saying and try not to guess what they want to say. If necessary, ask them to repeat the sentence and then repeat what you understand to gain confirmation.

Place of trial

Access

Clearly it is sensible to ensure that any hearing takes place in a courtroom or chambers to which the parties and any witnesses (or advocates) can gain access, and this should not overlook where necessary the ability of such persons to park a vehicle and be conveyed to and enter the court building. Difficult journeys and the need to stay overnight should also be taken into account, and such factors may dictate that the hearing take place in the locality of an elderly, infirm or disabled party or witness.

Facilities

The facility to accommodate the individual in the room itself is also important and it may be necessary to reposition people in the courtroom. A party using a wheelchair will feel marginalised if not able to see everyone in the room and will suffer prejudice if not able to reach documents and make notes.

Attendance by non-parties

A physically disabled person who is neither a party nor a witness may wish to attend a particular hearing, perhaps involving a member of the family or a friend, but be unable to gain access to the usual venue. If a party to the proceedings is unwilling to raise the matter with the court with a view to transfer to an accessible venue, it may be that a direct approach to the judge should receive sympathetic consideration.

Need to attend court

In civil proceedings the court now controls the issues on which it requires evidence and the way that evidence is given (see generally CPR Part 32). A statement or pleading verified by a 'statement of truth' may be treated as evidence of the facts stated if it has been duly served on the other parties. It may only be necessary for the party or witness to attend a hearing to give evidence if cross-examination is required. It follows that the court may take into account the disability or infirmity of a potential witness when deciding whether oral evidence is required from that source.

Taking evidence elsewhere

Where it appears necessary for the purposes of justice, the court may order the examination on oath of any person at any place in England and Wales (CPR r.34.8–34.12 or in family proceedings RSC Order 39 r.1 and CCR Order 20 r.13). This procedure, which is known as taking depositions, allows the evidence of a party or witness who is unable to attend the trial to be taken in advance and, if necessary, elsewhere. The person being examined can, if necessary, be assisted by an interpreter. The power is discretionary but an order will usually be made (and is often made by consent) where the witness:

- is too old to attend a trial;
- is so ill or infirm that there is no prospect of being able to attend the trial;
- might die before the trial.

It follows that when a witness is too infirm to attend the hearing arrangements may be made for that person's evidence to be taken in advance in a manner that suits the circumstances. This could be in a local court before the district judge, or in the individual's own home or a nursing home before an independent solicitor appointed for the purpose. There should be little difficulty in arranging this because there are over 750 deputy district judges who practise as solicitors throughout the country and one could be appointed for the purpose, although professional fees would have to be paid.

Carers

Have in mind that family carers may have difficulty finding someone else to take over the caring role. It helps if they can be given set times for the beginning and end of the hearing.

Trial not in a courtroom?

The procedure for taking evidence by deposition may not be adequate where a party (as distinct from a witness) is unable to attend the hearing yet needs to participate therein. The doubt as to whether a case could be tried other than in a courtroom has been resolved for civil proceedings by r.2.7 CPR which provides that a court may sit anywhere. As regards family proceedings, in the High Court a judge can adjourn a trial to such place as they think fit (RSC Order 35 r.3 relied on under FPR 1.3) and a similar approach may now be adopted in the county court, but that may not be the same as arranging the whole trial elsewhere.

It follows that where the circumstances render it expedient in the interests of justice the court may, instead of making an order for the examination of a witness, arrange the trial at or adjourn it to the place where the party or witness is, so as to allow that person to participate in the trial itself. This could be the individual's own home or a nursing home or some other suitable place.

Communication*Facilities*

Some courtrooms have the loop system for the hard of hearing. Persons who are hard of hearing may be better able to cope at a hearing in the judge's chambers rather than a large courtroom. Background noise can exacerbate hearing problems so it may be necessary to change rooms.

Time estimates

It is often the case that any hearing must proceed at a slower pace, or with more regular adjournments, when a person with disabilities is involved. The need for regular medication or attention to bodily functions, or shorter concentration spans, may alone dictate this. Not only should the modified pace be recognised by all concerned during the hearing, but also longer time estimates should be allowed in advance so that sufficient court time is available. A balance should be maintained because this increases costs and may deny allocation to the fast track in civil proceedings.

Interpreters

Regular use is made of interpreters and translators during proceedings involving parties or witnesses who do not understand the English spoken or written word, and there is no reason why they should not also be relied upon when there is some other form of communication difficulty. This includes the use of sign language, lip speakers or Braille and even new methods of communicating through a computer. There is a shortage of trained courtroom interpreters and palantypists for deaf litigants and it is generally necessary to

book one a month in advance of the court hearing. This needs to be borne in mind when adjournments are ordered. Sign language interpreters are specifically mentioned in s.21 of the Disability Discrimination Act 1995, and their availability should not necessarily be limited to the giving of evidence. They may now be provided by the court when required.

It is not impossible to contemplate a situation where an elderly person who was competent to give evidence could neither read an affidavit nor hear it being read, and other methods of communication should then be investigated.

5.2.3 Representation

Parties with sensory impairments or physical disabilities who cannot afford a solicitor may need to be supported when presenting their cases.

McKenzie friends

During a hearing of civil or family proceedings any person may accompany an unrepresented party as a friend to take notes, quietly make suggestions and give advice, but this does not extend to acting as an advocate. The ‘friend’ can be excluded if unsuitable (e.g. someone pursuing their own or an unsuitable agenda).

Where a party is elderly, disabled or inarticulate it is always open to the judge to seek assistance from any such person present in court who clearly has the confidence of the party. This is not the same as allowing such a person to act as a representative in the proceedings.

Lay representatives

It may be appropriate for parties who have difficulty representing themselves to be permitted to have their case conducted by a representative of their choice. This person will have no right of audience but the judge may confer such right, although only in exceptional cases in the absence of the party. In the ‘small claims’ track under the Civil Procedure Rules a lay representative has a right of audience in the presence of the party. The important point is to ensure that the party desires the representative to be heard and that the representative is acting in the best interests of the party – there are those who seek to pursue their own agenda.

For further guidance on unrepresented parties, see Chapter 1.3.

Chapter 5.3

Mental disability

Key points

- A mental disability may arise due to mental ill-health, learning disability or brain damage.
- Adjustments to court procedures may be required to accommodate the needs of persons with mental disabilities whether as witnesses, litigants in civil/family proceedings or defendants in criminal proceedings.
- Only mental incapacity (as distinct from the mere existence or a history of a mental disability) will generally have legal significance in civil and family matters – see Chapter 5.4.
- Lack of mental capacity may also be significant in criminal prosecutions (i.e. Is the accused fit to plead?) and sentencing options may be affected by the mental state of the defendant.
- The judge is responsible for the conduct of the hearing and should ensure that people with mental disabilities can participate to the fullest extent possible whilst avoiding prejudice to other parties.

5.3.1 Introduction

In the conduct of proceedings mental disability should be considered in the same way as physical disability when it does not render a litigant ‘incapable’ to the extent that they were formerly treated as a *patient* – now a ‘*protected party*’ (see Chapter 5.4). In practice, it can be much more difficult to understand the problems experienced by those with mental health problems in accessing the courts and putting their point across. This may lead to erroneous perceptions, such as that the person is being awkward or untruthful and inconsistent. In fact, the problem may come down to a difficulty in communication or understanding.

5.3.2. Categories of mental disability, implications and terminology

A mental disability may arise due to:

- mental ill-health;
- learning disabilities;
- brain damage.

There is a fundamental difference between a mental health problem and learning disabilities (previously referred to as 'mental handicap' and in an educational context more often referred to as 'learning difficulties').

Mental ill-health

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

Learning disabilities

People can be learning disabled when they have a brain that will not develop or function normally. There is no cure, although education and training, coupled with a disability awareness culture, assists individuals to become independent members of society able to fulfil their personal potential.

The causes of learning disabilities are varied and in many cases unknown, but fall into the following general categories.

Genetic abnormalities

The best-known example is Down's Syndrome but there are many others. In some, medical intervention at an early stage can lead to near normal development. In others, the right adjustments in educational methods and adult working life can enable individuals to use their abilities more fully.

External causes

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

Non-specific abnormalities

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

Until recently, identification tended to be based upon level of intelligence as identified by the IQ score (*intelligence quotient*). Such assessment is of little use to care workers who prefer to classify people according to their degree of independence, which involves consideration of levels of competence in performing skills such as eating, dressing, communication and social skills. Nor should it be relied upon by lawyers who wish to establish whether the individual is capable of making a reasoned and informed decision (for the test of *capacity* – see section 5.4.2).

Brain injury

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

The physical, observable effects of brain injury may be limited; many people, particularly children and young people, will not experience any physical consequences of brain injury. However, damage to the frontal lobe of the brain may give rise to impairments of various cognitive functions that may need particular accommodation in the context of courts and tribunals because of problems related to memory, concentration, and understanding fast speech, among other things.

Damage caused during developmental years (e.g. during childbirth) are generally classified as a learning disability.

Implications

Being diagnosed (or 'labelled') as being within one or more of these categories does not necessarily result in lack of mental capacity. For example, not everyone with cerebral palsy will lack capacity to make decisions and an individual may be sectioned under the provisions of the Mental Health Act yet not a 'protected party' (formerly a patient) pursuant to the civil court rules (see section 5.4.3) because the criteria are different.

Even if a person has grown out of their condition, the history of an invisible disability still entitles them to the protection of the Disability Discrimination Act 1995 and the stress of court proceedings can trigger old symptoms previously overcome.

Terminology

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

Learning disability

In England and Wales the legal term for this condition used to be 'mental subnormality', whereas in Scotland it was 'mental deficiency', in the USA 'mental retardation' and in Ireland 'mental handicap'. In 1983 the term 'mental impairment' was adopted in England but the following year the Scottish legal system chose 'mental handicap'. 'Learning disability' and 'intellectual impairment' are increasingly being used, but these may not yet adequately convey the meaning in society.

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

Mental disorder

The term mental disorder, which is often relied upon in legislation and by the courts, is defined by the Mental Health Act 1983 as:

mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind (s.1(2)).

...nothing in the definition is to be construed as implying that a person may be dealt with as suffering from mental disorder by reason only of promiscuity, immoral conduct, sexual deviancy or dependence on alcohol or drugs (s.1(3)).

The term is thus extremely wide, comprising any identifiable disorder or disability of mind and including the three categories identified above. There is no threshold, so the severity of the mental disorder is not assessed and the question is merely whether it exists. But being irrational, immoral, eccentric or under the influence of drink or drugs will not by itself be sufficient. In case of dispute, medical evidence is required to confirm the diagnosis of a specific mental disorder.

5.3.3 Mentally disabled witnesses

Evidence

In civil and family proceedings evidence may only be given by an individual who is considered by the judge to be competent to give evidence. Evidence may be admitted as to the capacity of the witness in general terms, but not as to the likelihood of the witness being able to give a truthful account. Unlike criminal proceedings, the oath is not obligatory so there is no requirement of ability to understand the nature and consequences of taking the oath. Much may depend upon the approach of the individual judge, and this may depend upon understanding of mental disability, tolerance and prejudices.

Vulnerability

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

Memory

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

Communication skills

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

Response to perceived aggression

Some people with mental disabilities are especially sensitive to negative emotion and may be suggestible. They may respond to rough questioning by trying to please the

questioner. Others may respond with tearfulness or panic and be traumatised by the legal process of cross-examination. For responses to be reliable, questions should be kept simple and non-threatening.

Practical measures

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

Place of trial

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

Communication

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

Facilities

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

Rights of audience

The exercise of discretion to allow a McKenzie friend or personal advocate may be appropriate in the same manner as for people with physical disabilities (see section 5.2.3 earlier).

Taking evidence from a witness with a mental disability

- Speak more slowly, use simple words and sentences, and do not go on too long without a break.
- Avoid 'yes/no' answers and questions suggesting the answer or containing a choice of answers which may not include the correct one.
- Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change, but the same question may be asked at a later stage to check that consistent answers are being given.
- Do not move to new topics without explanation (e.g. 'can we now talk about') or ask abstract questions (e.g. ask 'was it after breakfast' rather than 'was it after 9.00 am').
- Do not make assumptions about timing and lifestyles – a tag to link the question may be helpful (e.g. a TV programme or phone call).
- Allow a witness to tell their own story and do not ignore information which does not fit in with assumptions as there may be a valid explanation for any apparent confusion (e.g. the witness may be telling the correct story but using one or more words in a different context at a different level of understanding).
- Advocates often do not have the necessary understanding of particular mental impairments (e.g. learning disabilities) to formulate questions in a way that the witness can understand – it may be necessary to explain something more than once using simple language.
- Always ensure that witnesses are treated with due respect and are not ridiculed if they are unable to understand the way questions are being asked.

Chapter 5.4

Mental capacity

Key points

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

5.4.1 Introduction

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

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

Approaches

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

1. Outcome

Determined by the content of the decision (e.g. if it is foolish the maker must lack capacity).

2. Status

Judged according to the status of the individual such as age (e.g. over 90 years), a medical diagnosis (e.g. senile dementia) or place of residence (e.g. being in a mental hospital).

3. Understanding

The ability of the individual to understand the nature and effect of the particular decision is assessed.

The outcome approach is flawed because we are all entitled to be foolish and the status approach was abandoned long ago (at one time women lacked capacity). A test based on understanding is generally appropriate, although the outcome of decisions or the individual's status may result in capacity being questioned and the appropriate test should then be applied. But detention under the Mental Health Act 1983 does not automatically deprive the patient of decision-making capacity.

Appearance

Whilst the law is concerned with what is going on in the mind, society tends to be concerned with the outward manifestations. We should never make assumptions.

- The difference between ability and capacity must be recognised, as it is not unusual for communication difficulties to create a false impression of lack of mental capacity.
- A person's appearance (perhaps the consequence of physical disabilities) can create an impression of lack of mental capacity which is not justified.
- Observance of the conventions of society or communication skills can disguise lack of capacity (e.g. a learnt behaviour pattern).

Criteria

When making assessments different professions apply different criteria.

- **The medical profession** is concerned with diagnosis and prognosis, and health authorities are increasingly being relieved of the responsibility to care for those with mental disabilities who do not respond to conventional medical treatment.
- **Care professionals** classify people according to their degree of independence, which involves consideration of levels of competence in performing skills such as eating, dressing, communication and social skills.
- **The lawyer** is concerned with legal capacity, namely whether the individual is capable of making a reasoned and informed decision, and able to communicate that decision.

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

5.4.2 Assessment of capacity

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

Presumptions

There is a presumption that an adult is capable until the contrary is proved, but this may be rebutted by a specific finding of incapacity.

- If a person is proved incapable of entering into contracts generally, the law may presume such condition to continue until it is proved to have ceased, although there may be a lucid interval.
- If an act and the manner in which it was carried out are rational, there is a strong presumption that the individual was mentally capable at the time.
- Eccentricity of behaviour is not necessarily a sign of incapacity and care should be exercised before any assumption is made.

Determining capacity

Where doubt is raised as to mental capacity the question to ask is not 'Is he (or she) capable?' or even 'Is he (or she) incapable?' but rather 'Is he (or she) incapable of this particular act or decision?' It may be necessary to determine the issue of capacity at a separate hearing.

Note in particular that:

- Capacity is an issue of fact, though it is necessary to identify and apply the appropriate legal definition or test.
- Capacity depends upon understanding rather than wisdom, so the quality of the decision is irrelevant as long as a person understands what they are deciding.
- Capacity must be judged for the individual in respect of the particular decision or transaction at the time it was taken or is to be taken.

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

Evidence

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

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

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

Implications

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

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

Guidance

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

5.4.3 Civil and family proceedings

Rules

Special procedures have applied in respect of proceedings by and against a 'person under disability' (as defined). These ensure that a representative is appointed, compromises and settlements of claims are approved by the court, and there is supervision of any money recovered. The procedures are to be found in the following rules:

- Family Procedure (adoption) Rules 2005, Part 7;
- Court of Protection Rules 2007, Part 17;
- Civil Procedure Rules 1998 (CPR), Part 21;
- Family Proceedings Rules 1991 (FPR), Part IX;
 - Rules of the Supreme Court 1965 (RSC), Order 80;
 - County Court Rules 1981 (CCR), Order 10;
- Insolvency Rules 1986, Part 7, Chapter 7.

Although as regards civil proceedings, the RSC and CCR have been replaced by the CPR, the last version of those old rules will supplement the FPR for family proceedings until the new Family Procedure Rules are implemented. The rules deal with proceedings involving children (variously described as ‘minors’ and ‘infants’) and ‘patients’ as parties, although in the CCR the inappropriate term ‘mental patient’ was used. Both categories are deemed incapable of conducting their own proceedings, the former due to age and the latter due to personal factors other than age (old age by itself is not a barrier to conducting proceedings). We are only concerned here with adults.

The expression ‘person under disability’ is no longer used and, following implementation of the new mental capacity jurisdiction, a person should not be stigmatised as a ‘patient’ so the term has been replaced by ‘protected party’ and a new definition introduced.

Patient/protected party

Old definition

The term patient has for many years been used for: ‘a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs.’

A similar definition was used to establish the jurisdiction of the ‘old’ Court of Protection to administer the property and affairs of ‘patients’ (i.e. under Part VII (s.93–113) of the Mental Health Act 1983). The definition in the CPR concluded with the words ‘...his own affairs’ but it is unlikely that any distinction was intended.

This was a three stage test: (i) did the party have a mental disorder (the term is widely defined and the threshold not high); (ii) was the party incapable; (iii) was the incapacity due to the mental disorder?

The need for a ‘mental disorder’ acted as a screening process to exclude mere eccentricity and the effect of alcohol or drugs, but the term remains widely defined (for an explanation see Chapter 5.3). Whilst incapacity by itself might result in a transaction being unenforceable, it was only when it was by reason of mental disorder that the law took away personal powers and enabled these to be delegated. A diagnosis of mental disorder was required, but this did not necessarily result in a finding of incapacity – an

assessment still had to be made. If the judge found that a party was incapable of managing their affairs by reason of their conduct in or giving rise to the proceedings, the question became whether this is by reason of a mental disorder and medical evidence was generally required.

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

New definition

Following the Mental Capacity Act 2005, the term in the CPR and FPR has changed to *protected party* and the definition has become:

'a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings.'

Section 2 of the 2005 Act provides that:

'... a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

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

Implications

Assessment of capacity

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

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

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

Guidance has been given in the *Masterman-Lister* case (see above):

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

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

- Recognise a problem, obtain and receive, understand and retain relevant information, including advice.
- Weigh the information (including that derived from advice) in the balance in reaching a decision.
- Communicate that decision.

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

Need for a representative

A party who is incapable of conducting the particular proceedings must have a representative to do so, whether bringing the proceedings or defending them. The general term for this representative is now *litigation friend* but was previously (and remains for family proceedings) *next friend*, if bringing the proceedings, or *guardian ad litem*, if responding. Any doubt should be resolved as a preliminary issue before proceedings are allowed to continue.

There is no procedure for the appointment of a litigation friend in the magistrates' court for family proceedings and when this requirement may arise the case should be transferred up to the county court.

Conduct of the proceedings

The representative potentially has the rights of audience of a litigant in person but in a substantial claim may not be regarded as suitable if he does not instruct a lawyer. The duty of the representative was defined by a Practice Direction to the CPR as:

fairly and competently to conduct proceedings on behalf of (the) patient. He must have no interest in the proceedings adverse to that of the ... patient and all steps and decisions he takes in the proceedings must be taken for the benefit of the ... patient.

However, this has been removed with the amendments that follow the 2005 Act.

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

Appointment

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

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

Injunctions

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

Consequences

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

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

5.4.4 Decision making and mental incapacity

Background

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

- Agency – for example a bank mandate or ordinary power of attorney.
- Specific – for example an appointee for state benefits or litigation friend for court proceedings.
- Statutory – the jurisdiction of the (former) Court of Protection and enduring powers of attorney.
- Trusts – either a bare trust or settlement.

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

The new mental capacity jurisdiction

Overview

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

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

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

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

A *Code of Practice* provides guidance for the courts, professionals and those concerned with the welfare of mentally incapacitated adults and a *Public Guardian* is appointed to supervise and promote the new jurisdiction.

Fundamental concepts

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

Incapacity

Section 2(1) sets out the definition of a person who lacks capacity:

‘A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.’

This is a two-stage test, because it must be established first, that there is an impairment of, or disturbance in the functioning of, the person’s mind or brain (the diagnostic threshold); and secondly, that the impairment or disturbance is sufficient to render the person incapable of making that particular decision.

Capacity is thus decision-specific but it does not matter whether the impairment or disturbance is permanent or temporary. A person is unable to make a decision if unable to:

- understand the information relevant to the decision,
- retain that information,
- use or weigh that information as part of the process of making the decision, or
- communicate his decision (whether by talking, using sign language or any other means).

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

Best interests

The Act sets out a checklist of factors which must be considered in deciding what is in a person’s best interests, aimed at identifying those issues most relevant to the individual who lacks capacity (as opposed to the decision-maker or any other persons). Not all the factors in the checklist will be relevant to all types of decisions or actions, but they must still be considered if only to be disregarded as irrelevant to that particular situation. They include:

- consideration of all relevant circumstances,
- whether the person will at some time have the required capacity,
- encouraging the person to participate in the decision,
- the person’s past and present wishes and feelings,
- the beliefs and values that would be likely to influence the person’s decision,
- the views of others who should be consulted.

Decision-making

There are three areas of decision-making (although the second and third are combined in the legislation):

1. Personal welfare
2. Health care
3. Property and affairs.

There are four levels of decision-making:

1. A person acting under a 'general authority to act' (with restrictions) and an obligation to pay for 'necessary' goods and services.
2. An attorney under a lasting power of attorney.
3. The Court of Protection making decisions or declarations.
4. A deputy appointed by the Court.

General principles

There are five general principles:

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

The new public bodies*Court of Protection*

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

Most applications are dealt with 'on paper' by district judges at Archway in London but hearings may be before nominated district judges sitting in regional courts at Bristol, Cardiff, Birmingham, Newcastle and Manchester/Preston, with nominated circuit judges and High Court judges hearing more important cases and appeals. The new Court of Protection Rules 2007 promote active case management drawing on the Civil Procedure Rules 1998.

Public Guardian

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

- To maintain a register of lasting powers of attorney (and the former enduring powers that still remain valid).
- To maintain a register of deputies.
- To supervise and receive security from deputies.
- To receive reports from and hear representations about attorneys and deputies.
- To provide reports to the Court and arrange reports from visitors.
- To administer the Court of Protection (with which there must be close collaboration).

The new jurisdiction

There will be a wider range of cases under the new jurisdiction and a consequent increase in the volume of cases. The unmet need will emerge and there will be a new variety of outcomes. It is hoped that the Court will prove more accessible, but alternative dispute resolution is likely to be imposed prior to contested hearings. There will be a constant struggle to maintain the balance between protection and empowerment of these potentially vulnerable people, but the Court and the Office of the Public Guardian will attain greater prominence and have a wider influence.

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

- Enduring powers of attorney previously executed will still be effective but since 1 October 2007 only lasting powers of attorney may be completed and registration of these will not point towards lack of capacity.
- The new Court of Protection will be able to deal with the full range of decision-making on behalf of adults who lack capacity in accessible local courts.
- Serious medical treatment decisions will be dealt with by Family Division Judges in the Court of Protection under the statutory jurisdiction rather than by the self created declaration procedure.
- There will be a closer working relationship between the Court of Protection and the civil courts with nominated judges becoming a resource for other judges when they encounter mental capacity issues.
- Cases in the county courts involving a significant mental capacity element may be transferred to a suitable nominated judge as a 'specialist' and a nominated judge may sit in a dual jurisdiction.
- A discrete body of law will develop in regard to the assessment of capacity with a more professional approach towards decision-making issues.

Chapter 5.5

Specific Learning Difficulties

Key points

Specific Learning Difficulties:

- are a family of related conditions; many people show signs of more than one profile;
- must not be confused with learning difficulties / learning disabilities which affect all areas of daily living and correlate with low intelligence;
- are underdiagnosed and little understood by the legal profession, with the result that individuals may well appear before the courts without their condition being identified.

5.5.1 Introduction

The aim of this Chapter is to enable the judiciary to attain the aspirations laid out in the Key Points of Chapter 5.1 in relation to Specific Learning Difficulties, and in particular to be able to:

- recognise them;
- identify their implications in a court setting; and
- understand what should be done to compensate for areas of disadvantage without prejudicing other parties.

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

Dyslexia is the best known Specific Learning Difficulty. It was first identified in 1896 by Dr Pringle-Morgan who coined the term *congenital word blindness*. *Dyslexia* and *Specific Learning Difficulties* were used interchangeably until recently, when awareness grew of a range of conditions which have distinguishing features but share some areas of difficulty. Specific Learning Difficulties is now generally used as an umbrella term to cover Dyslexia, Dyspraxia / Developmental Co-ordination Disorder, Dyscalculia and Attention Deficit Disorder.

Acquired Dyslexia, following brain injury, trauma or infection, is far less common and will generally be documented, following medical assessments.

Changing terminology can lead to confusion: ‘people with Learning Difficulties’ usually refers to those with generalised as opposed to specific difficulties; they are not under consideration here (see 5.3 on Mental Disability).

Disability or Difference?

Fair treatment involves taking account of differences. This is a helpful starting point. The social model of disability sees certain situations as giving rise to a disability, such as a building with steps when one is a wheelchair user. In a similar way, aspects of court procedures can cause difficulty to someone with Specific Learning Difficulties. It is therefore appropriate to make reasonable adjustments to offset the effects of a disability in compliance with the Disability Discrimination Act 1995.

Terminology

It is in line with the more positive climate of recent years that people with Specific Learning Difficulties now tend to refer themselves as having Specific Learning Differences (both terms are generally abbreviated to SpLDs). Some adults, however, regard a label containing the word Learning as inappropriate since they are no longer in school or college and favour Processing Differences. They are obliged to accept the term disabled as a gateway to certain entitlements, such as the Disabled Students’ Allowances.

Although Specific Learning Difficulties are neurological in origin, they do not fit easily into the category of mental disability as outlined in Chapter 5.3 or mental impairment in the definition of disability in the Disability Discrimination Act 1995 (however the notes for guidance that accompany the legislation do include references to dyslexia, see s.A8).

5.5.2 Overview of Specific Learning Differences

Range of Conditions

The Glossary to this Part includes a number of Specific Learning Difficulties, namely Attention Deficit (Hyperactivity) Disorder, Dyscalculia, Dyslexia, Dyspraxia (also known as Developmental Co-ordination Disorder). Since a number of key problem areas are associated with more than one Specific Learning Difficulty, good practice has now established that these conditions should not be considered in isolation.

It should be noted that autistic characteristics can co-exist with Specific Learning Difficulties. Asperger Syndrome requires particular consideration due to acute difficulties with social interaction, which are not always apparent.

Causes

Specific Learning Difficulties are congenital, largely heritable conditions which may affect the development of a range of cognitive, motor and attentional skills; they are life-long in their effects and characterised by weaknesses in key areas of functioning which contrast with normal or above-average abilities in unaffected areas.

Characteristics

The overall profile of difficulties varies considerably from person to person as does the extent to which they are affected – only those who experience a substantial and long-term adverse effect are covered by the Disability Discrimination Act. However the needs of many more should be considered in the conduct of court proceedings.

The range of difficulties include:

- a weak short-term memory;
- a poor working memory - this shows itself as the inability to hold on to several pieces of information at the same time;
- poor organisation and time management; particular difficulties estimating the passage of time;
- difficulties processing information efficiently; this could relate to written texts, oral responses or listening skills – there may be a ‘penny dropping’ delay between hearing something and understanding it;
- presenting information in a logical sequential way;
- word-finding problems, lack of precision in speech, misunderstandings and misinterpretations;
- lateness in acquiring reading and writing skills – even though these may become adequate there are residual problems, such as the struggle to extract the sense from written material and an inability to scan or skim through text;
- retaining sequences of numbers or letters and muddling left and right;
- retaining sequences of numbers or letters and muddling left and right;
- limited awareness of the consequences of their speech or actions;
- inconsistencies and ‘bad days’ when thinking skills function badly and coping skills break down.

In addition to the above, many people with Specific Learning Difficulties experience Visual Stress. Symptoms include continually losing the place, perceived distortions when reading so that the letters appear to move or become blurred, and a dazzling glare from white paper.

Some people are unaware that they have a Specific Learning Difficulty and struggle without understanding the underlying reason for their problems.

Coping strategies

By adulthood, most individuals with Specific Learning Difficulties have developed an array of coping and compensatory strategies, the operation of which require sustained effort and energy. However, compensatory strategies are likely to break down under conditions of fatigue or stress. It is important to take into account, therefore, that the effects of an impairment may be more evident under certain conditions (Morgan and Klein 2000).

The leading UK expert on dyslexia, Emeritus Professor Tim Miles, revised his publication *Dyslexia and Stress* in 2004, extending its scope to contain a chapter on stress factors and the courts (Miles 2004). The point is made that the disruptive effects of stress are more severe in people with Specific Learning Difficulties compared with the ordinary population, considerably impairing their ability to cope. Another expert, Dr Harry Chasty, once stated: A dyslexic appears completely incompetent in situations of stress.

Positive aspects

Professor Miles describes people with Specific Learning Difficulties as having an unusual balance of skills; these can include good spatial skills, creative thinking, intuitive understanding of how things work (Miles 1993). Research has now reinforced the finding that the brains of people with Specific Learning Difficulties operate differently from those of the rest of the population and show anatomical differences in some cases. This difference often manifests itself as an unexpected combination of competence and incompetence.

5.5.3 Implications for the courts

Court hearings make heavy demands on language skills and require an ability to process information reasonably quickly and efficiently. Reliable memory, sequencing abilities and concentration are also necessary. Weaknesses in these areas fall within the profiles associated with Specific Learning Difficulties.

Case study

I lost a child care battle this week due to my severe dyslexia. I experienced total disorientation, visual and audio isolation. I could hear things going on but nothing seemed to register or make sense. Important questions were garbled and distorted and in some cases the questions didn't even register. I had an overwhelming sensation of being in a tunnel.

I was asked (unexpectedly) to recall events of several years ago in detail. The order of how I recalled the events was vital to my case. However, I was unable to access my memories of the events clearly and what I did manage to remember I was unable to express in a chronological order or with any clarity.

This was interpreted as an evasiveness and I was criticised heavily for not being able to 'keep to my story'.

The impact of Specific Learning Difficulties in a court setting

The following problem areas have been reported by people with Specific Learning Difficulties who have experience of court or tribunal proceedings:

- a build up of stress, due to long delays at the hearing;
- impossibility of following the cut and thrust of court exchanges;
- difficulty coping with oblique, implied and compound questions;
- failure to grasp nuances, allusions and metaphorical language;
- difficulties giving accurate answers relating to dates, times or place names;
- problems providing consistent information on sequences of actions;
- inability to find the place in a mass of documentation, as directed;
- impossibility of assimilating any new documentation at short notice;
- coping with a room full of strangers in unfamiliar settings;
- maintaining concentration and focus;
- feelings of panic, resulting in the urge to provide any answer in order to get the proceedings over with as quickly as possible;
- anxiety that use of inappropriate tone may create a misleading impression;
- an experience of sensory overload from the lights, bustle and distractions.

People also expressed concerns about how their behaviour might be perceived: inconsistencies could imply untruthfulness; failure to grasp the point of a question could come across as evasive; lack of eye contact could be misinterpreted as being 'shifty' and an over-loud voice might be regarded as aggressive. The overriding worry was that a loss of credibility would occur when they did not 'perform' as expected.

A tendency to muddle appointment times and dates together with difficulty locating an unfamiliar venue also gave rise to anxiety.

5.5.4 The conduct of court hearings

Until the legal profession is thoroughly versed in the issues raised by Specific Learning Difficulties, it is unlikely that the majority of solicitors will provide standard documentation on the needs of clients with Dyslexia, Dyspraxia, Attention Deficit Disorder, Dyscalculia and Autistic Spectrum Disorders, together with pertinent information on how an individual's symptoms are likely to disadvantage him or her in the courts. Where documentation is produced, this is likely to be as a result of pressure from the client together with the support and expertise of one of the national support organisations.

Reports from litigants, witnesses and defendants with Specific Learning Difficulties concur that, even when they manage to supply information about their condition, their needs are not routinely met and the experience of coming before the courts is traumatic.

Trial management aims to recognise and accommodate any aspects of disability that could cause difficulty in court and place the affected individual at an unfair disadvantage. A directions hearing is the best stage at which to consider requirements arising out of special needs and discuss how to implement special arrangements.

Pre-trial planning

If Specific Learning Difficulties are indicated on court pro-formas, both the court administration and the judiciary should act on this information, requesting further documentation or arranging a directions hearing to discuss needs, as appropriate. It may be necessary to bring in a specialist in this area in order to draw up documentation.

Rather than making assumptions based on generic information on Specific Learning Difficulties or prior knowledge of previous cases, decisions concerning trial management should be based on the individuals concerned, and their particular needs in so far as these are reasonable; ideally this should be backed up by documentation from appropriate experts. People with Specific Learning Difficulties are generally able to give a coherent account of their problem areas and how they cope with these, so it is essential to consult them. Likely outcomes are discussed under heading 5.5.5.

It is useful to enquire about concentration and expected attention span so that breaks can be scheduled in if necessary. It is also likely that help will be needed to locate information in the court bundle. In some cases lighting and temperature will be an issue. Some people will also encounter Visual Stress and be unable to read easily (if at all) from black text on a white background.

The aims of these pre-trial directions are threefold:

- to identify difficulties that are likely to arise in court hearings and procedures;
- to clarify the individual's needs;
- to arrive at a proportionate response.

Expert witnesses

Expert witnesses should be directed to consider the impact of Specific Learning Difficulties on the situation under consideration before the courts. This is unlikely to have been brought out in earlier reports by specialist tutors, psychologists or psychiatrists. Resulting documentation submitted to the courts should include a summary of previous assessment reports, a clear statement of the difficulties the client is expected to face in court hearings (based on a recent re-appraisal) and recommendations for reasonable adjustments.

Taking evidence from adults with Specific Learning Difficulties

It is of paramount importance that adults with Specific Learning Difficulties are reassured, where appropriate, that:

- documentation relating to their areas of difficulty has been circulated;
- they are allowed to seek clarification at any stage by asking for a question to be repeated or re-phrasing it to check understanding;
- they can take their time when considering responses;
- misunderstandings on their part will not be treated as evasiveness;
- inconsistencies will not be regarded as indications of untruthfulness;
- they are not expected to rely on their memory alone for details of dates, times locations and sequences of events;
- they can inform the judge when they are no longer able to maintain concentration;
- they will not be expected to skim through and absorb new documentation or locate specific pieces of information in the court bundle.

At all times it is essential to distinguish between people with Specific Learning Difficulties and those with generalised Learning Difficulties / Learning Disabilities.

Communication issues

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

Once 'mental overload' has been reached, the individual is unable to participate in the process and requires a break and the opportunity to recover. In order to cope with these types of problems, advocates and judges must show patience, understanding and flexibility.

As regards written communication, this should always be in plain English and font size should be at least 12 point. Location details should include local landmarks and public transport information. A contact phone number should be clearly indicated. Communications in electronic form are very helpful for those who rely on speech recognition software; this option should be available.

Unrepresented parties

Representing oneself is highly inadvisable for people with Specific Learning Difficulties. The difficulties of doing so should be made clear and information on legal advice provided. If the individual still decides to go ahead, clear written guidelines should be provided on court procedures and terminology. The presence of a McKenzie friend in civil or family proceedings should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise. Witness Intermediaries may also work with people with Specific Learning Difficulties; this service is no longer restricted to criminal cases, but a fee may be charged in family and civil cases.

Both litigants in person and those seeking legal aid should be directed to a source of help, due to the complexity of the form-filling (an established dyslexic difficulty).

5.5.5 Promoting fairness and good practice

The Disability Discrimination Act 1995, Part III emphasises the duty on all service providers – including the courts – to take reasonable steps to change any practice which makes it impossible or unreasonably difficult for people with disabilities to make use of a service provided to other members of the public.

The Ministry of Justice is also working towards this aim, by refining its Disability Equality Scheme after consultation with people who have a wide range of disabilities, including those with Specific Learning Difficulties.

'Fairness' has to be based on a thorough understanding of the issues, in this instance the effects of the interrelated conditions generally known as Specific Learning Difficulties. 'Good Practice' is based on responses to these issues, in this case how Specific Learning Difficulties impact on an individual's experience of the courts. The key elements of this response are summarised below.

Key elements of good practice

- Identify issues at the pre-trial stage.
- Obtain reliable documentation in advance.
- Do not make assumptions about an individual on the basis of his specific learning difficulty.
- Reasonable adjustments (backed up by documentation) should be agreed with the individual and put in place prior to the hearing.
- Provide reassurance at the start of the hearing.
- Encourage the individual to request clarification at any stage, to take time to consider their responses and to refer to notes as necessary.

Measures to reduce the impact of Specific Learning Difficulties

During hearings, judges should be vigilant for signs of Specific Learning Difficulties. In cases where no documentation has been provided, they may become aware that Specific Learning Difficulties are a factor in individuals who have chosen not to disclose their difficulties or who have not been given the opportunity to discuss them. Many more people, however, have never had their difficulties recognised or assessed.

Research points to high numbers of people with Specific Learning Difficulties being caught up in the criminal justice system. A study by Dyslexia Action and the Learning & Skills Council (2005) across a range of prison establishments, flagged up 20% with a 'specific' disability affecting learning and employment prospects. It is easy to see how unaddressed difficulties in childhood can lead to school failure, truancy, delinquency and criminal convictions. Those with Attention Deficit (Hyperactivity) Disorder and Speech and Language Difficulties are particularly vulnerable.

In all situations where supporting documentation is absent, the key issue is the inability of the individual to cope in the courts and the consequent effect on the quality of their evidence if no accommodations are made. The challenge facing the presiding judge is to determine what measures can be taken to enable the hearing to proceed in a fair and equitable manner.

Example of supporting documentation

An illustration of documentation relating to a woman with Specific Learning Difficulties is reproduced below. The difficulties that could affect her court appearance are stated and reasonable adjustments are recommended.

Outline of Ms X's Dyspraxic and Dyslexic Difficulties

Ms X has been assessed as Dyspraxic and Dyslexic with particular difficulties in the following areas:

- working memory skills i.e. holding pieces of information in one's head while undertaking a task or during a process of consideration;
- short-term memory skills e.g. recalling information (without referring to notes);
- visual processing and analysis at speed / on demand;
- sequencing dates in chronological way;
- multi-processing tasks;
- maintaining concentration and focus in a busy environment;
- sensitivity/intolerance of background noise;
- finding her way to an unfamiliar venue.

Ms X's difficulties mean that she is liable to become overwhelmed and experience stress.

Reasonable adjustments are appropriate, as follows:**1. In court room exchanges**

- Ask single rather than compound / multi-clausal questions.
- Allow thinking time before pressing for a response.
- Allow Ms X to request that questions to be repeated or rephrased and/or permit her to check understanding by rephrasing them herself without censure or (implied) criticism.
- Take working memory difficulties into account i.e. give Ms X time to check back with her notes, especially when relating to particular dates and sequences of actions.
- Make allowances if Ms X has difficulty answering concisely.

2. When referring to written information

- Allow Ms X to have an assistant to locate information in the court bundle as directed.
- Be aware that she has particular problems interpreting/commenting on data in chart form.

3. Digesting new information

- Ms X should not be presented with new information and expected to absorb the import of it on the spot.
- She ideally requires a quiet space to study new documentation.

4. Additional factors

- Ms X cannot remain focused beyond an hour without a break to restore concentration. She has to expend a lot of effort following complex arguments and is easily distracted.
- When subject to stress, Ms X has extreme difficulty processing information.

It is important that the reasonable adjustments be confirmed in advance of the hearing, in consultation with Ms X. In cases where information is lacking, and a diagnostic assessment has not been undertaken, the individual should be asked to outline anticipated difficulties. Accommodations can then be discussed.

References

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Chapter 5.6

Glossary: disability

Information on a more comprehensive range of disabilities is available on the website: www.enablelink.org

Attention Deficit (Hyperactivity) Disorder/AD(H) D

AD(H)D has three major aspects:

Inattention/distractibility difficulty focusing on tasks or listening for a sustained period of time and becoming easily distracted by external stimuli or one's own thoughts.

Impulsivity a lack of inhibition which could show itself as the need for instant gratification, blurting out inappropriate comments, interrupting excessively or having difficulty awaiting turn, together with erratic and unpredictable behaviour. Traits also include failing to foresee outcomes of one's actions and lack of forward planning.

Hyperactivity comprising excessive activity – both physical and mental.

Common characteristics also include failing to pay attention to detail, not listening when spoken to; failure to respond to feedback; having difficulty organising tasks and activities; difficulty getting started on or finishing tasks; frequently losing or forgetting things; fidgeting and moving around incessantly; often talking excessively or intruding on others.

If no hyperactivity is present, the term **Attention Deficit Disorder/ADD** should be used. People with this condition have particular problems remaining focused so may appear 'dreamy' and inattentive, often missing key points.

Alzheimer's Disease

The most commonly encountered symptoms of this progressive disease involve lapses of memory, difficulty in finding the correct words for everyday objects and mood swings. In its later stages, the disease can also involve a loss of inhibitions, with individuals adopting an unsettling behaviour pattern such as becoming lost, undressing in public or making inappropriate sexual advances.

Perhaps the behaviour that is most likely to affect court appearances is that of repetition. This may take the form of repetitive questioning, phrases or movements and other repetitive behaviour. The stress of a court environment may produce a catastrophic reaction, when the person becomes extremely upset or distressed. The majority of individuals are over 70 years of age and may also be affected by some of the common infirmities associated with old age. A close relative or carer is likely to accompany the individual.

Autistic Spectrum Disorder (ASD)

Autistic Spectrum Disorder (ASD) is used as an umbrella term to include people with a range of diagnoses such as autism, atypical autism, high functioning autism, Asperger Syndrome, semantic pragmatic disorder and pervasive developmental disorder. The number of males affected far outnumbers females.

People with autistic spectrum disorders have difficulty in three key areas:

1. *Poor communication skills:* including difficulty understanding instructions or retelling an incident; words are taken literally.
2. *Impaired social skills:* difficulty understanding socially acceptable behaviour and taking account of the needs of others, little or no empathy, inability to 'read' body language.
3. *Inflexible thinking:* difficulty coping with change, over-reliance on routines difficulty following rules (except those they have adopted, which will be followed unswervingly).

One result of this mindset is that people with ASD are not good at creating, telling and sticking to lies. Some people with ASD have difficulty in sensory perception; this might affect their sense of touch, smell, vision, hearing, proprioception (how to react appropriately to the surrounding environment) and vestibular (balance and body posture) sensations. The unusual behaviours seen in autism, such as aversion to textures, motor planning difficulties and self-stimulatory behaviour are due to difficulties in sensory perception. Lack of eye contact is common. More seriously, an obsessive interest may lead them into trouble.

People with **Asperger Syndrome** do not have the accompanying learning difficulties associated with autism; their speech may be fluent and they may have learned to largely conceal their problems. However social interaction always remains very challenging and they live with a very high level of stress. Being slow to process spoken information, they may produce a panic reaction when pushed to respond, such as verbal or even physical abuse. Individuals with ASD will require frequent breaks and the services of a specialist (such as a mentor trained by the National Autistic Society) to facilitate communication. Closed questions are easier to cope with than open ones but questions written and submitted in advance would be even better.

Brain injury

Traumatic or acquired brain injury is caused at least initially by outside force, but includes the complications which can follow. The consequences can be:

- Physical – a problem with movement, balance and coordination, a loss of sensation, tiredness, headaches, speaking and swallowing disorders, epilepsy and incontinence.

- Cognitive – problems with memory, the ability to concentrate and to pay attention to more than one task at a time, particularly when tired or under stress, speed of processing information, including understanding fast speech, difficulties in planning and problem solving and with language skills.
- Emotional and behavioural effects, such as agitation, anger and irritability, lack of awareness and insight, impulsivity, depression and anxiety.

There is, of course, a whole range in the degree to which a person with brain injury may be affected in any of these ways.

For more information, see the website for Headway, the brain injury association at www.headway.org.uk.

Cerebral palsy

This disability is generally caused by insufficient oxygen getting to the brain at birth. People with cerebral palsy may experience disorders of movement, posture and communication problems, as well as hearing and sight difficulties. In some cases, their speech cannot be readily understood and a speech and language therapist or someone familiar with the speech patterns of the individual may be needed to interpret responses. A communication aid, such as a speech synthesiser or word board, may be required.

Individuals with cerebral palsy have usually had limited access to the community, particularly those with learning disabilities and severe physical disabilities, and it is important to take that into account when evidence is being given. Those with learning difficulties can become easily confused with complex questions and any simplification of proceedings is an advantage. Fatigue will affect concentration and the co-ordination of movement, so frequent breaks may be required.

Cerebral vascular accident (CVA) – commonly called a ‘stroke’

A CVA is caused by a clot or haemorrhage in an area of the brain which can suddenly affect an apparently healthy individual in many different ways. These can include weakness or paralysis of an arm and/or leg on one side of the body, twisting of the face, loss of balance, disturbance of vision, difficulty in swallowing, disturbance of speech, difficulty in understanding and in using appropriate words, and loss of control of the bladder and/or bowels.

For some individuals communication can be a great problem and can take the form of not being able to pronounce words or put them in the right context or order. Individuals may also be unable to understand what is being said. Stress and fatigue can make all symptoms worse. Frequent short breaks should be taken, especially when incontinence is a problem. Some individuals require a wheelchair and others may need a carer. Carers

may need to help with interpretation. The individual needs to be treated with dignity and respect despite physically embarrassing circumstances.

Chronic obstructive pulmonary disease (COPD)

COPD, or lung disease, refers to a number of disorders that obstruct the airways. Examples include chronic bronchitis, bronchiectasis, emphysema and pulmonary fibrosis. The main symptom is shortness of breath accompanied by coughing or wheezing. Individuals may need to use inhalers at regular intervals to relieve discomfort, particularly if under stress. Inhalers take a little time to work and some cause palpitations and slight dizziness so a short break may be needed. Severe cases may use a portable oxygen cylinder.

Diabetes

Diabetes arises when insufficient insulin is secreted by the pancreas to control or process the sugars in the blood stream. It can be controlled by diet alone, tablets or by the administration of insulin by injection. The amount of medication or insulin taken will vary with each individual.

It may be necessary for the diabetic person in court to test their blood sugar level as frequently as every two hours. Occasionally it is difficult to achieve a perfect balance, and the blood sugar levels may fall below the normal level. The person concerned then has what is called a hypoglycaemic attack or hypo. These symptoms commonly include palpitations and profuse sweating, as well as a display of irritability. In extreme cases, the speech may become slurred and the individual may appear drunk. A hypo develops quickly and is treated by taking sugar in order to restore the blood sugar levels as fast as possible. Most diabetic people carry some form of food on them for this purpose. If extra sugar is not taken quickly, loss of consciousness can occur and, in those circumstances, an ambulance should be called immediately.

Diabetes can be a cause of long-term complications, such as visual impairment or blindness, or physical disability resulting from amputation of part of the lower limbs.

Down's syndrome

Down's syndrome is the result of a genetic defect. The condition is associated with a low IQ and individuals will not be able to understand court proceedings without simple explanations and, possibly, the use of diagrams. Individuals may be accompanied by a close relative or carer used to interpreting needs, as communication abilities vary widely.

Dyscalculia

Dyscalculia is an inability to understand simple number concepts and to gain basic number skills. Research indicates that this is due to a deficit in the cognitive system that deals with numerical representation. There are likely to be difficulties dealing with numbers at very elementary levels and consequently with learning number facts and procedures, telling the time and dealing with money and financial matters.

Dyscalculia may exist independently as a specific cognitive deficit, or it may co-exist with other Specific Learning Difficulties. Numerical processing is complex and the deficits of dyslexia and dyspraxia (short term memory, sequential abilities, retrieval of basic facts, language processing, speed of processing and visual spatial ability) commonly affect the acquisition of numeracy skills.

Dyslexia

Dyslexia often manifests itself as a difficulty with reading, writing and spelling. Even where literacy skills have been mastered, problems remain with skimming through or scanning over text and retaining what has been read. Spelling is likely to remain erratic.

The core challenges, however are the rapid processing of language-based information and weaknesses in the short-term and working memory. Questions should therefore be asked singly, and thinking time allowed to assimilate the information and produce a considered response. Associated problem areas are organisation, time management, visual perception (see **Visual Stress**), sequencing ideas, retrieving words efficiently, sustaining attention, and numeracy. By adulthood many dyslexic people have equipped themselves with an array of coping strategies, diverting some of their energy and ability into the operation of these systems, but thereby leaving themselves few extra resources to call upon when they have to deal with situations that fall within their areas of weakness. Inconsistencies and inaccuracies may occur in their evidence and they would benefit from receiving questions in advance. Short breaks would also be justifiable.

Dyslexia can also be linked to a range of skills including innovative thinking, entrepreneurship, creativity and high-level visual spatial abilities.

Dyspraxia/Developmental Co-ordination Disorder

Dyspraxia is an impairment or immaturity of the organisation of movement. Associated with this may be problems of planning and executing actions. This is evident when working with language tasks as well as in practical spheres such as organisation and multi-tasking. People with dyspraxia may be slow and hesitant, poorly co-ordinated with poor posture and balance, even giving the impression that they could be drunk. They can appear anxious, easily distracted and have difficulty with social interaction and judging how to behave in company. Finding their way to an unfamiliar venue is challenging.

There may also be problems with the following:

Speech and language: speech may be unclear, due to poor control of mouth muscles; pace and volume of speech may also be affected.

Communication: including incorrect perceptions and difficulty conveying ideas; laborious, immature and awkward handwriting.

Social skills: difficulties include judging socially acceptable behaviour, understanding others' needs, a tendency to take things literally.

Short term memory, sequencing skills: weaknesses in these areas affect organisational ability, decision making, retrieving information from the mind 'on the spot'.

Time management: poor understanding of time or the urgency of situations.

Managing change and new routines: people with dyspraxia lack the flexibility and the ability to re-organise and re-schedule tasks.

Dyspraxia also affects sensory integration, with the result that it is difficult coping in a busy environment with too much sensory stimulation; there may be a feeling of being overwhelmed by the complexity of information and tasks that have to be processed simultaneously. A tendency to react to all stimuli without discrimination leads to 'overload' and, in some cases, over-sensitivity to noise, touch and light.

Receiving likely topics for cross examination in advance would be helpful, together with clear directions, a contact phone number and a point of contact on arrival.

Epilepsy

Epilepsy is a highly individual condition and each individual should be dealt with according to their needs. In general, a person with epilepsy will have seizures or fits when medication fails them. During a seizure some individuals may black out, whilst others experience a number of unusual sensations or movements. Seizures generally last only for a few seconds (*petit-mal* or absence seizures) or a few minutes (*grand-mal* or tonic-clonic seizures). The former causes the individual to stop what they are doing, stare, blink or look vague before carrying on. The latter causes unconsciousness and, upon coming around, a period of drowsiness, confusion and headaches. In this instance, individuals will have no recall of what has happened.

Seizures can impair the memory of past events. Allowance may need to be made for this difficulty if a recent seizure has occurred. A minority of individuals may have neurological symptoms, learning disability and, but rarely, behavioural problems.

Stress can provoke seizures in some individuals and, therefore, the stress of a court environment may have an adverse effect on a person with epilepsy.

Hard of hearing (deaf)

There are three main groups of hearing-impaired people, who can collectively be referred to by the term deaf. The capital 'D' in 'Deaf' refers to people whose first language is sign, and who define themselves as members of the Deaf community. The lowercase 'd' refers to all other deaf people who have usually acquired a hearing impairment post-lingually, and who use a mix of communication forms. Deaf/blind people constitute a third group. Deafness affects people in many different ways, ranging from a relatively small amount of hearing loss to complete loss of hearing. It also affects the extent to which people can use their voices and may result in speech which is difficult to follow. It leads to an emotional state of social isolation. Deaf people may be blunter or more demonstrative than hearing people and demonstrative gestures should not be misinterpreted as over-theatrical or as signs of rudeness. Background noise is very stressful for a person who is hard of hearing.

Courtrooms should be fitted with an induction loop, which should also be fitted in the reception areas. The use of sign interpreters, lipspeakers and palantypists, along with a combination of communication methods such as hearing aids should all be considered. It should be remembered that anything said in open court will need to be interpreted. British Sign Language (BSL) is the indigenous language of people in Great Britain who were born deaf or who became deaf early in life. It has its own syntax and grammar, so do not assume that someone who uses BSL can read documents as English may not be their first language. Sign Supported English (SSE) is used by some deaf people for whom BSL is not the first language. It is not an independent language but uses English word order with BSL manual signs. Lipspeakers are trained hearing people who repeat what a speaker is saying without using their voice so that lipreaders can lipread them. They are mainly used by deafened people. Palantype is a speech-to-text system that gives a word-for-word record of what is being said using a phonetic keyboard.

Heart disease

Heart disease affects the heart muscle or the blood vessels of the heart. Examples of heart disease include congenital heart disease, coronary artery disease, angina, hypertension and heart valve pulmonary stenosis. Heart disease can cause shortness of breath, often aggravated by activity or stress, as well as fatigue, weakness and mental confusion. To relieve pain and other symptoms individuals may need to use a GTN spray. After use a short break may be needed as it can cause palpitations and headache.

HIV and AIDS

People living with HIV (human immunodeficiency virus) often face multiple discrimination as HIV is over-represented in the gay and bisexual community and amongst Black Africans. In fact, the majority of prosecutions for the reckless transmission of HIV have concerned heterosexual transmission.

Meaning of the terms HIV and AIDS

The terms HIV and AIDS (Acquired Immune Deficiency Syndrome) are often used synonymously. This is wrong; they do not mean the same thing.

When the immune system becomes weak as a result of HIV, it is unable to fight off certain infections and diseases, such as TB. These infections or diseases are known as 'AIDS-defining diseases'. Dying of an AIDS-related illness has become less common in the UK due to the advancements in HIV treatments.

The National AIDS Trust (NATEXpress) found that some people including judges are not aware of the difference between HIV and AIDS and were not aware of medical developments over the last 10 years which enable those who are HIV positive to lead normal lives. Some misconceptions are set out below.

- One cannot be infected by AIDS. AIDS-defining illnesses only develop as a consequence of the damage caused to the immune system by the HIV virus.
- HIV treatment does not merely alleviate symptoms but it restores and maintains the immune system, suppresses the replication of HIV in the body and often enables the individual to live a long and relatively normal life. AIDS-related illness has become much less common in the UK due to advancements in HIV treatments.
- HIV can be controlled by taking one pill a day.
- Research shows that HIV-positive individuals on effective antiretroviral therapy (with a suppressed viral load for six months) and without sexually transmitted infections are sexually non-infectious.
- There are common misconceptions about how HIV is passed between people. For example, it is unlikely to be passed by biting or spitting.
- Where appropriate treatment is not available, the position of those needing such treatment is clearly very different.

Incontinence

The inability to control natural functions or to rely on bags and pads may be exemplified by fidgety behaviour, inattention and a general unease. Stress can make matters considerably worse and cause embarrassment. Arrangements could usefully be made for the individual to give an agreed signal when a break is required.

Inflammatory bowel disease

Crohn's disease and ulcerative colitis come under this general heading. The main symptoms in the former case are abdominal pain and diarrhoea, whilst in the latter bleeding will also occur. General ill-health, the frequency and urgency of bowel action and nagging abdominal pains may sometimes lead to short temper, anxiety and despondency. It would, therefore, be necessary for a pre-arranged signal to be agreed with the court officials if an urgent trip to the toilet was necessary.

Laryngectomy

Laryngectomy is the removal of the larynx (voice box), usually as a result of cancer. Individuals have to relearn how to speak. It may be easier in court if questions and answers were kept to a minimum and, if necessary, for writing facilities to be made available.

Mental health problems

One in four people in the course of a year have mental health problems and when these become long-term and are severe they become a disability. Such problems are made worse by stress. Such problems can cover a broad spectrum of conditions such as manic depression, depression, post-traumatic stress, anxiety and schizophrenia. People diagnosed as mentally ill are having feelings or behaving in ways which are distressing to themselves or others. They may have hallucinations, delusions and thought disorders. It is a myth that people with mental health problems are dangerous and violent; they are far more likely to harm themselves than other people.

The effect of going to court could cause the individual to go blank, panic or cry. In the extreme, a court appearance for certain individuals could be extremely harmful, causing them to commit suicide. Most mental health problems are likely to have an effect on giving evidence as a witness in court. Because of the variety of patterns of behaviour, and their impact on the veracity of the evidence, this is a situation where the judge needs to make a particularly careful assessment of the individual and how best to deal with them in the witness box. Many people with mental health problems are reliant on a caring and placid environment for maintaining their stability and can be thrown off balance by medication changes or sudden distressing experiences. They are highly sensitive and need special care and protection to feel safe. Their medication may lead to embarrassing side effects (e.g. sweating or tics).

Motor neurone disease

This is a progressive degenerative disease affecting the motor neurones. In the vast majority of cases, intellect and memory remain intact. The classic symptoms of the disease in its early stages include stumbling, weakened grip, cramps and a hoarse voice which can sound extremely slurred. Inappropriate or excessive laughing or crying can

also occur, conditions over which the individual has no control. In an advanced stage, there will be a loss of function of the limbs and a weakness and wasting of muscles of the trunk and neck. Such a condition will lead individuals to eventual total dependence on others. Fatigue is common, especially if much effort has to be put into communication.

Multiple sclerosis (MS)

This disease manifests itself in many ways. Thus there can be visual damage where the optical nerves are affected and movement can be restricted where parts of the brain or motor nerves are affected. MS affecting the sensory nerves can result in numbness or tingling. Many people with this diagnosis are only mildly affected throughout their lives, whilst a few deteriorate rapidly. Most individuals experience something in between these two extremes.

An individual who is required to go to court will need frequent breaks. As the symptoms vary widely, the court should be made aware of the individual's needs so that any extra aids or assistance can be organised. If not a wheelchair user, an individual will need somewhere to sit down and rest. In some cases, extreme heat can cause a relapse so the use of a fan or air conditioning in the courtroom during summer would be beneficial. Visits to the toilet may need to be frequent and drinks of water should be available.

Myalgic Encephalomyelitis/Chronic Fatigue Syndrome

This is a multi-systemic illness of uncertain cause, classified by the WHO as a neurological disease. It has a variety of symptoms, the severity of which vary from mild to debilitating. Those severely affected may be wheel-chair users. All have a significant degree of persistent or recurrent fatigue exacerbated by physical and mental exertion (post-exertional malaise). Other symptoms include some or all of the following: widespread pain in the muscles and joints, headaches, poor and unrefreshing sleep, impaired concentration and short-term memory, difficulties with information processing and word retrieval, hypersensitivity to light and noise. Although people with ME may not appear unwell, travel to a tribunal or court venue will have been taxing and sitting in an ordinary chair is often uncomfortable. Limited mental stamina will also be a factor when participating in proceedings; breaks may be necessary to restore concentration

Panic attacks

Panic attacks can take a variety of forms and vary considerably in their severity. Some of the usual symptoms which may affect those feeling stress due to a court appearance are: breathing difficulties, severe chest pains, agitation, fear that they are about to collapse or even die, shaking and, in extreme cases, loss of eyesight. The difficulty is that these attacks may last for a few minutes or a few hours, during which time the individual will find it difficult to concentrate and may be incoherent. The individual may be on medication or may have other methods of controlling their problem. The judge will need to discuss the issue with the individual to decide whether a break would assist the situation.

Parkinson's disease

This disease results when the brain no longer produces enough of a substance called dopamine which is necessary for movement. It does not occur only in older people; the average age of diagnosis is 56. Symptoms vary from person to person and may include tremor, especially in the hands, slowness of movement, fatigue, drooling, constrained handwriting and softness of voice. Breaks may be necessary during a courtroom appearance.

Spina bifida and hydrocephalus

Most people born with spina bifida (a malformation of the spine) have hydrocephalus (water on the brain). They have sustained some impairment of the brain function but may have a normal intellect and be able to hold down a job, marry and have children. The evidence of brain impairment lies in slow thought processes and delay in answering questions. Memory processes may take longer to record information, so that statements and facts have to be repeated. There is a great eagerness to please and agree, which occasionally leads to incorrect decisions being made.

There is a tendency to take things absolutely literally, so that statements and questions must be clear and unambiguous. Despite a seemingly confident flow of speech, responses may not necessarily be by way of original thought. Change can provoke considerable stress for some individuals. It is worth noting that the range of mobility of individuals is wide, from unaided to wheelchair users.

Spinal cord injury

Severe spinal injury can leave the individual with paralysis below the point of injury. They may perspire heavily and have spasms, as paralysed limbs move at odd times and in odd ways. Severe cases can result in people having to use a breathing machine, which results in soft and fragmented speaking and gulping breaths. Individuals will fidget a great deal, mainly to relieve pressure on the skin. Whilst most individuals are wheelchair users, many are independent. Prearranged signals reduce embarrassment where a break is required.

Stroke

See under Cerebral vascular accidents (above).

Thalidomide victims

People with thalidomide disabilities are usually limb disabled. Some have either no or very short arms and occasionally this applies to the lower limbs, in which case they will be wheelchair users. Some individuals have hearing impairments.

Visual impairment

There are over one million people who have become blind or partially sighted. Some people with impaired vision can see enough to read slowly and hesitantly, though they may have difficulty crossing the road.

The appropriate method of communicating with a visually impaired person in a courtroom should be established at the outset. Various methods are available, including Braille, large print, audio tape, screen readers and disk. It is good practice for persons when speaking to identify themselves. On arrival at court, the layout of the courtroom should be explained. If a guide dog is accompanying the visually impaired person it must be allowed to enter the court. Many people may also come with a personal assistant or guide.

Visual stress

The term Visual Stress describes a cluster of difficulties with reading due to visual perceptual dysfunction. It is often described as a 'discomfort with reading'. The condition is associated with dyslexia (and, to a lesser extent, dyspraxia,) migraines and epilepsy. In its more extreme form it is marked by a sensitivity to bright light, caused by the glare from white paper. Words may appear to move around on the page, or become blurred. Common symptoms also include frequently losing the place, omitting and misreading words, together with fatigue and/or headaches when reading. Treatment can usually alleviate the effects to some extent. In addition the following points of good practice are helpful: use of tinted paper, adequate spacing, left justification of text, font size no less than point 12 and avoidance of capitalisation for whole words and phrases.