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Abstracts

Two new abstractors contribute in this issue. Ian Purvis, Editor of *EAGLE: Exchange on Ageing, Law and Ethics* which is published bi-monthly by Age Concern England, has kindly agreed to supply annual abstracts on legal topics. His first contribution draws attention to David Carson's article on the England and Wales Law Commission's proposals concerning mentally incapacitated adults. The other new contributor is Julia Johnson from the The Open University who with exemplary initiative has compiled a set of abstracts on 'Social welfare law'. These include another perspective on Carson's article, and later among the Reviews, Donna Dickenson in her review of George Burnell's *Final Choices* also makes reference to the Law Commission proposals.

The Law and Elderly People — Ian Purvis

David Carson, Disabling process: the Law Commission's proposals on mentally incapacitated adults' decision-making, *Journal of Social Welfare and Family Law*, **5**, (1993), 304–320.

In this article the author considers the proposals of the England and Wales Law Commission contained in *Consultation Papers* 128, 129 and 130 published during 1993. As Carson states, the first of the three papers concerns private law issues and contains proposals for the key tests and criteria, such as the test of incapacity and the factors to be taken into account when decisions are taken. A new jurisdiction is proposed, without deciding between a court or tribunal, which could authorise individuals to make decisions on behalf of incapable adults about both their person and their property. The second consultation paper, as the author points out, concentrates upon issues surrounding the authorisation of treatment for mentally incapable adults while the third focuses on public law procedures for protecting such adults, and indeed others, from abuse and neglect. Carson contends that these proposals as they stand require fundamental reconsideration.

The author sets out what he submits to be appropriate criteria for a good law concerned with mentally incapable adults and their problems; that it should promote the dignity of people with mental

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disorders and learning disabilities, enhance ability rather than disability, be inexpensive, preventive and tackle practical problems as well as provide clear practical tests and be accurately monitored and enforced. The Law Commission's proposals do not, asserts Carson, score well against such criteria. As he fairly argues, any new legislation in this area must be expected to provide the legal tests, concepts and framework for many decades, affecting as it will, he suggests, public perceptions. The author argues, indeed, that the actual underlying philosophy of the Commission is flawed in such a way that the proposals fail to meet the criteria he postulates.

The point is further made that the Commission does not propose any legislative action involving the formal recognition of the need for a dynamic which seeks to minimise disability and maximise habilitation and rehabilitation. Next comes reasoned criticism of the adoption by the Commission of mental disorder as a preliminary test of capacity. It is suggested that the approach of the Commission should be not so much to focus exclusively on the possibly mentally incapable person's decision-making abilities but rather, either additionally or alternatively, to focus on the justification for concluding that the individual is incapable.

COMMENT

Much of the response by others to these important consultation documents has been concerned with the minutiae of the proposals, particularly as they affect special interest groups. Carson, however, has in this article criticised the very premises and principles which underpin the papers, albeit recognising, as he does, the constraints upon the Law Commission. While the views expressed may not be shared by all readers, there is an undoubted advantage to be gained from reading this critical examination of the overall approach of the Law Commission to the task in hand and such common philosophy as can be discerned in the proposals set out in these Papers.

Carol Brennan, The right to die, *New Law Journal*, **143**, 6609 (1993), 1041–1042.

In this article Carol Brennan, Principal Lecturer in Law at Oxford Brookes University, examines the future of advanced directives in English Law in the light of the decisions in *ReT* [1992] 4 AllER 649 and *Airedale NHS Trust v. Bland* [1993] 1 AllER 821. In the latter case the

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House of Lords added its authority to the qualified recognition given to advance provision for medical care by the Court of Appeal in *Re T*.

As the author explains, the term 'advance directive' in the health context covers two types of arrangement by an individual in anticipation of possible future eventualities. The first is a written statement, also known as a 'living will', whereby his or her wishes are made known about the kind of medical care to be administered when a point is reached when the patient can no longer communicate such wishes. The second type of 'advance directive' envisaged by Brennan was the appointment of a proxy decision maker to speak for the patient in the like circumstances.

As the author points out neither of these two provisions has legal status in England although they are encountered by doctors in practice and given a measure of informal regard when health care decisions are being made about those who become incompetent. In this article an examination is made of the extensive involvement of the Law in sanctioning advance directives in other legal jurisdictions. The author also discusses what she sees as the trends in social and health care which are bringing this issue to the fore. An interesting discussion follows upon the merits or otherwise of legislation to make advance directives legally binding. The discussion is illuminated by reference to the King's College Centre of Medical Law and Ethics Study, *Advance Directives and AIDS*, experience in other jurisdictions notably in the United States, and by reference to the expressed views of the British Medical Association. Brennan comes down in favour of legislation and reminds us of the proposal in the Law Commission *Consultation Paper* 129 that 'legislation should provide for the scope and legal effect of anticipatory decisions'.

COMMENT

This article is a useful contribution to a vitally important debate of the issues therein ventilated. The author's plea for a full scrutiny and debate of the actual content of any such legislation is a powerful one.

Luke Clements, Community care: legal structure. *Legal Action*, July 1993, 10–12.

This article describes the legal and practical effects on previous legislation of the National Health Service and Community Care Act 1990. The author sees the new act as 'a raft of duties floating over the existing legislation, making key amendments but repealing little'. The

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responsibilities of local authorities, that is to say local social services departments, are discussed in the context of identifying people entitled to assistance and ascertaining those services obtainable as a right or at the discretion of the local authority. The statutory duties and powers of local authorities are helpfully set out in tabular form.

The Social Services Inspectorate guidance on the basic assessment process is set out in some detail and the article goes on to explain the provisions which give rise to a situation where more than one authority may have duties to provide adult care services and underlines the importance of the prevention of 'buck-passing' in such an event.

COMMENT

This lucid and helpful delineation by a practising solicitor of the legal framework of Care in the Community is distinctive and would usefully be read and filed by the many social gerontologists with interests in community care.

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Social Welfare Law — Julia Johnson

David Carson, Disabling progress: the Law Commission's proposals on mentally incapacitated adults' decision-making, *Journal of Social Welfare and Family Law*, 5 (1993), 304–20.

In 1986, Age Concern England, in its important publication *The Law and Vulnerable Elderly People,* drew attention to the inadequacy of legal provisions in England and Wales surrounding the management of property and money of those older people who are unable to manage their own affairs.

> The management of other people's money is fraught with legal and practical difficulties. Powers for delegating financial and other responsibilities are well established but little used. Some procedures do not appear to contain sufficient safeguards. Widely varying practices are followed by individual hospitals, residential care homes, professional advisers and families. There appears to be a gap between what is practical and practised and what is legally correct. In fact, there is often no 'correct' legal procedure.
>
> (Age Concern England, 1986, 95)

It also drew attention to the lack of legal procedures to protect 'vulnerable' older people from various forms of abuse or neglect. During 1993, the Law Commission in England and Wales undertook

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