How is the Mental Capacity Act 2005 working for those who need it?
The primary purpose of the Act is to make provision for decisions to be made on behalf of those who are unable to make their own decisions because of an impairment of, or a disturbance in the functioning of, the mind or brain.

A SINGLE piece of legislation (distinct from Mental Health Act):

TWO fundamental concepts:
- definition of LACK OF CAPACITY
- clarification of BEST INTERESTS

THREE areas of decision-making:
- personal welfare
- health care [now combined with personal welfare]
- property and affairs

FOUR levels of decision-making:
- Person acting reasonably for care decisions (s. 5)
- Attorney under a lasting power of attorney
- Declaration or decision by the Court of Protection
- Deputy appointed by the Court of Protection

PUBLIC GUARDIAN provides support and supervision
**Five General Principles**

Section 1

1. Adults **assumed** to have capacity
   - unjustified assumptions outlawed
   - 'balance of probabilities' approach

2. Individuals **helped** to make own decisions
   - simple explanations

3. Individual may make **unwise** decisions

4. **A 'best interests'** approach to delegated decision-making
   - A check-list that takes into account wishes of individual and views of others
   - not what decision-maker thinks is best

5. **A ‘least restrictive’** approach to intervention
   - delay decision until recover
   - only interfere if needed
   - make decisions at lowest possible level
   - decision preferred to deputy appointment

No more stigmatising as 'Patients'
2

HOW IS THE ACT WORKING?
1967–1992 Solicitor in general practice
1992–2012 District Judge
2000–2007 Deputy Master of (former) Court of Protection
2006–2007 Involved in setting up new Court of Protection
2007–2012 Nominated Judge of Court of Protection

1975–2003 Parent of child with severe learning disabilities
2010–2013 Attorney for 90+ year old mother
2012–?? Retired pensioner

As I become a potential consumer of the jurisdiction my perspective changes:

LESS DEFENSIVE – MORE CRITICAL
What are the expectations?

LAWYERS
- A jurisdiction that integrates with the legal system and is compliant with International Conventions
- A new and expanding field of legal practice

OTHER PROFESSIONALS
- A decision-making procedure that resolves uncertainty
- One that they can understand and participate in

GOVERNMENT
- Resolution of capacity problems with minimum public cost implications
- Compliant with International Conventions

CONSUMERS
- A user friendly process of delegated decision-making
- Resolution of disputes and uncertainty in a timely and economical manner that they can understand
- Empowerment and protection for vulnerable adults

A CONFLICT OF EXPECTATIONS?
Who are the consumers?

ELDERLY PERSONS WITH DEMENTIA
- The largest class – no cure and progressive deterioration

THOSE WITH OTHER FORMS OF MENTAL ILLNESS
- May have fluctuating capacity

PERSONS WITH AN ACQUIRED BRAIN INJURY
- Some have large damages awards

ADULTS WITH A LEARNING DISABILITY
- May have capacity for some decisions

ALSO THE FAMILY AND CARERS OF SUCH PERSONS
What challenges must be faced?

Our Court of Protection has grown and matured over its first 7 years and hopefully now found a permanent home, but its credibility is at stake.

As the Mental Capacity Act 2005 approaches its 10th anniversary our once ground breaking jurisdiction faces significant challenges from:

- European Convention on Human Rights
- UN Convention on the Rights of Persons with Disabilities
THE COURT OF PROTECTION
The new Court of Protection

Three Courts under One Name

1 Former court of the same name
   - property and financial affairs only
   - meeting the continuing need

2 Legal vacuum
   - less serious personal welfare case
   - meeting the previously unmet need

3 Inherent jurisdiction of the High Court
   - serious medical treatment decisions
   - the Rolls Royce of the court system

Not old wine in a new bottle – a completely new vintage
Inherent Jurisdiction

“The inherent jurisdiction survives the enactment of MCA 2005 to supplement its protection for those who, whilst 'capacitous' for the purposes of the Act, are incapacitated by external forces - whatever they may be - outside their control from reaching a decision.”

LBL v RYJ and VJ [2010] EWHC - Macur J

If the ‘diagnostic threshold’ was removed those vulnerable adults now being protected by the inherent jurisdiction could be dealt with by the Court of Protection.

But has the Court adopted too medical an approach to this concept? Might the ‘... disturbance in the functioning of the mind’ be a consequence not only of internal factors but also external forces such as fear, oppression or overwhelming cultural pressures?

That interpretation would bring some, if not all, of the cases now being dealt with under the inherent jurisdiction within the ambit of the Court of Protection.

It is a nonsense to create a specialised court to deal with vulnerable adults and then have to supplement it elsewhere.
Access to Justice

Is the Court of Protection accessible to those who need it?

1. LEGAL AID: Withdrawal of public funding is counter-productive because, even though the Court is only the tip of a large iceberg, it is the ultimate means whereby the effectiveness of the jurisdiction can be tested and controlled.

2. UNREPRESENTED PARTIES: Legal costs are beyond the reach of most people so courts must adjust their procedures to accommodate them. An early directions hearing, possibly by telephone to save expense but ideally with the parties present, may result in progress.

3. MODE OF TRIAL: the allocation to track approach in the Civil Procedure Rules 1998 has much to commend it, and an inquisitorial 'small claims' hearing may be sufficient. Few cases set a precedent or require an adversarial hearing.

4. ADR: A contested hearing is the last resort, but the prospect frequently leads to alternative methods of dispute resolution. The Public Guardian should provide conciliation or mediation.

Reaching agreement between members of a dysfunctional family vying for control may not achieve the 'best interests' of the incapacitated person.
The ‘secret court’

- There will always be those who, having exhausted or rejected the appeal process, seek publicity to ventilate their grievance. They only put forward their side of the case and omit aspects that may have been seen by the Court as determinative. Certain elements of the press are all too willing to present this, with some embellishment, as a serious injustice.

- Those newspapers that condemn the Court of Protection as a secret court interfering in the lives of decent people would, on another day, criticise a system that allowed a vulnerable person to be exploited or abused. They cannot have it both ways!

- Judges must provide reasoned judgments, anonymised in their discretion.

- Restricted access by the press is available but cases will still be reported in an unbalanced way according to a pre-determined agenda.

If I were involved in a dispute about the future of my elderly parent or learning disabled son I would not wish this to take place in a public arena and would question the motives of anyone who did.
4

THE HUMAN RIGHTS ACT 1998
It always seemed to me that the Human Rights Act 1998 created a climate in which legislation to facilitate decision-making for those who lacked the capacity to make their own decisions became a necessity. None of us realised that the need went further than this and that:

1. any care arrangements that deprive individuals of their liberty require a system of authorisation prescribed by law;
   - Article 5 – the protection of liberty, which may affect detention in a care home or hospital or elsewhere
   - Article 8 – respect for private and family life, home and correspondence

2. the individual may need to be a party to any proceedings with an independent litigation friend and lawyers;
   - Article 6 – the right to a fair trial, which concerns participation and ensuring an independent and impartial tribunal

Who pays for this and how can the Official Solicitor cope?

Are Human Rights now a threat to our jurisdiction?
DoLS

Clearly there are dangers if a person can be detained in a hospital or care home on the grounds that they lack capacity especially if there is no-one able and willing to challenge this detention. [The Bournewood Gap]

The European Court of Human Rights held that if such detention amounted to a deprivation of liberty there was a breach of human rights:

*HL v UK* [2004] 1 FLR 1019

The Government had to comply so new DEPRIVATION OF LIBERTY SAFEGUARDS were introduced from 1st April 2009

(Mental Health Act 2007 amending Mental Capacity Act 2005)

The safeguards ensure that it is in the person’s best interests to be deprived of liberty, not that the particular care provision is in his or her best interests
Our son Paul spent many years in the ‘Bournewood Gap’ before 2007. Would DoLS have made a difference?

Paul died in the ‘Bournewood Gap’ in 2004 at the age of 28 years due to inadequate care. Would DoLS have saved him?

The Safeguards are important to prevent adults from being detained when there is no lawful justification for this. But:

- they are merely a distraction for those who inevitably need intensive care and supervision in their best interests.
- they are designed to reassure society and lawyers that personal human rights have not been infringed whilst failing to ensure that suitable care provision has indeed been achieved.
- scarce resources that should be directed towards better care provision are being diverted into justification for that care.

What does a Judge do if satisfied that deprivation of liberty is justified but concerned about the care provision?

In making a ‘best interests’ decision for the individual the Court may be restricted to the options put forward by the funding authority.
5 UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES
Article 12  
- Equal recognition before the law

I always regarded our mental capacity jurisdiction as a reasonable adjustment that, far from discriminating against mentally disabled people, enables them to enjoy a lifestyle comparable with that of people without this impairment.

'Discrimination' has since evolved into 'equality' and there has developed the notion that any form of differential treatment is discriminatory. This leads to two consequences:

1. the 'diagnostic threshold' should not be used as a pre-requisite for admission to the jurisdiction because it discriminates against disabled people.
2. supported decision-making must be the norm and delegated decisions on a best interests basis are unacceptable

I agree that the 'diagnostic threshold' is inappropriate, but for a different reason!
How far can support go?

- We are all subject to influences and it is only undue influence that the law seeks to control, but the threshold for what is undue reduces as the individual becomes more vulnerable.
- There are dangers in insisting that support is given to an incapacitated individual to the extent that the decision reached is deemed to be that of the individual.
- The family member has a conflict of interests whereas the impartial supporter is not aware of all relevant factors.
- The decision will inevitably be that of the supporter so we end up with delegated decision-making without the framework of best interests.

It is not realistic to assume that there are impartial supporters available who can facilitate decisions without influencing those who lack capacity.
How can we become compliant?

- Under our jurisdiction:
  - People with capacity make their own decisions;
  - People with impaired capacity have supported decision making;
  - People who lack mental capacity have decisions made for them in their best interests (*the stage where the Convention offers little guidance*).

- Our jurisdiction should:
  - treat external forces as being within the ‘diagnostic threshold’;
  - place more emphasis on support at all stages;
  - treat the wishes of the individual (to the extent ascertainable) as a dominant factor in determining best interests;
  - direct the available resources into the delivery of care; and
  - rely upon ‘whistle blowing’ with judicial resources being reserved for those situations where intervention may be required.

This could be achieved by judicial interpretation of our existing legislation.
6
CONCLUSION
1. Some theorise about rights and autonomy and others worry about vulnerability and protection - it depends upon your perspective.

2. Applying lofty principles with impeccable legal logic in a society with limited public resources may not be in the best interests of vulnerable people.

3. The Mental Capacity Act lays down principles and the Court of Protection handles disputes and uncertainty but a legal jurisdiction cannot provide all the answers.

4. Attitudes within families and society need to change and the implementation of the jurisdiction is helping to achieve this.

5. Those who lack capacity to make their own decisions are dependant on others and what really matters is whether there are people who care about their welfare and there is adequate funding to meet their needs.
A dream or a nightmare?

The structure is there but it all depends on how we now implement it. Pragmatic or legalistic?