Chapter 23

THE PATIENT'S PROPERTY AND FINANCIAL AFFAIRS

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A. MANAGEMENT OF THE PROPERTY AND AFFAIRS OF PATIENTS BY THE COURT OF PROTECTION

23.01 Background

Powers over the affairs of persons under mental disability derive from the Royal Prerogative which probably arose in the early years of Edward I (1275–1306).[1] The *Statute de Prerogativa Regis* (17 Edw. II. (1339) St. I. cc. 9, 10) recognised the existence of the Prerogative and imposed limits on its operation: "The King shall have the custody of the lands of natural fools [presumably people who today would be designated as mentally handicapped], taking the profits of them without waste or destruction, and shall find them their necessaries, of whose fee soever the lands be holden; and after the death of such idiots he shall render it to their right heirs. . . ." (c. 9). The Statute also required the Crown to control the estates of those "whose wit had failed them" (presumably people who today would be designated as mentally ill). The profits of the estate would be used to care for the mentally ill people and their household, with any surplus being retained when and if they returned to their right mind. On their death the estate would pass to their heirs (c. 10).

In both cases there was a prohibition against disposal of property in order that "their heirs shall not be disinherited". But there was a marked difference in the treatment of idiots and lunatics. In the case of idiots or natural fools the Crown had to provide only for the maintenance of the patient (no mention was made of his household) and could, although as time went by it seldom did, retain any surplus income for its own. In the case of a lunatic or person of unsound mind the Crown had expressly to provide for him and his household, and could take nothing for its own use.

Until the Lunacy Regulation Act 1862 (25 and 26 Vict. c. 86) there was no provision for the administration of patients' estates unless they were persons "of unsound mind so found by inquisition". The inquisition was exercised by a high officer of the state, not necessarily, but usually, the Lord Chancellor, to whom the care and commitment of the persons and estates of persons under mental disability were granted by letters patent under the Sign Manual. In 1540 the Court of the Kings' Ward was created which exercised the Royal Prerogative until its abolition in the reign of Charles II. Thereafter this jurisdiction was

[1] Para. **23.01** provides only a very brief account of the historical background. For the full study see H. Theobald (1924) *The Law Relating to Lunacy* 1–63, Stevens and Sons, London. See also E. R. Taylor (1978; 10th ed, with 2d. cum. supp. 1982) *Heywood & Massey, Court of Protection Practice*, Stevens and Sons, London (hereafter referred to as *Heywood* and *Massey*); *The Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency* 1954–57 (1957) Cmnd. 169, HMSO, London, paras. 146, 255, 776–7, 846–52 (hereafter referred to as the Percy Commission).

exercised at various times by the Lord Chancellor, the Master of the Rolls and the Lord Justices.

The use of inquisition meant that a person's unsoundness of mind had to have been judicially established by inquiry, and once this had happened the patient's estate could be managed by committee.[1] The 1862 Act (s. 12) introduced the concept of "unsoundness of mind not so found". This was applied to people whose unsoundness of mind was established to the satisfaction of the Judge or Master in Lunacy, not by judicial inquiry but by medical evidence of incompetency. Full provision was made by the Lunacy Act 1890 for administration, without inquisition, of the estates of persons under mental disability. Since that time, the judicial inquiry has been abolished altogether, and a more medically oriented and informal approach has been introduced.

Under the Lunacy Act 1890 the jurisdiction relating to the administration and management of patients' affairs was assigned to a Master and Assistant Master in Lunacy, who operated under different titles until 1947 when the term Court of Protection was established.

23.01.1 *The Percy Commission and the 1959 Act*

Part VIII of the Mental Health Act 1959 re-established the Court of Protection. Prior to 1959, patients who were compulsorily detained in hospital came within the jurisdiction of the Court by operation of law. They were presumed incompetent to manage their affairs without any further specific inquiry into their mental condition or capacity for specific rational understanding. However, voluntary patients and mentally disordered people not living in hospital or not under guardianship were presumed competent to handle their financial interests. This presumption could be rebutted and the patient's right to manage his affairs removed, only by a finding of the Judge or the Master in Lunacy of the Court of Protection.

The Royal Commission on the Law Relating to Mental Illness and Mental Deficiency observed that a person's legal status could not of itself indicate whether he was capable of handling his own affairs. Some types of mental disorders which would justify compulsory admission "would not necessarily affect a patients' powers of judgement in relation to financial affairs". The Royal Commission concluded that "it should not be assumed in law or in administrative practice that mentally disordered patients who are admitted to hospital under compulsory powers are necessarily incapable of managing their financial affairs". "The law and administrative arrangements dealing with patient's property should not be in any way dependent on whether the patient is in hospital or not or whether a hospital patient has been admitted with

[1] The Percy Commission, para. 255.

or without compulsion".[1] Each individual case should be decided on the basis of an objective test of mental capacity. These recommendations were incorporated into section 101 of the 1959 Act and are now to be found in section 94(2) of the 1983 Act. The result is that the jurisdiction of the Court can be invoked only when the Court is satisfied after considering medical evidence that the person is incapable, by reason of mental disorder, of managing and administering his property and affairs. (But see the Court's powers in cases of emergency at paragraph **23.07** below).

23.01.2 *Principles established under the European Convention on Human Rights*

Article 6(1) of the European Convention on Human Rights provides that "in the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . ." In *Winterwerp v. the Netherlands*[2] the European Court of Human Rights held that where mentally disordered people were divested of the capacity to administer their property there was a determination of civil rights within the meaning of Article 6(1). Thus, patients divested of the right to manage their affairs are entitled to a judicial procedure as laid down in Article 6(1).

The Court in *Winterwerp* did not have the need to specify the procedural elements of a hearing under Article 6(1) because the Dutch statute provided for an automatic determination of financial incapacity for patients who were compulsorily detained. But the Court did state that: "While . . . mental illness may render legitimate certain limitations upon the exercise of the 'right to a court', it cannot warrant the total absence of that right as embodied in Article 6(1)."

The 1983 Act does provide a means for determining the separate question of civil capacity and there is an opportunity for an oral hearing. In practice, however, the Court of Protection dispenses with such a hearing in the great majority of cases and makes its decision without taking oral evidence from the patient or a representative; the decision is usually made on the written evidence already filed. The European Commission has yet to be asked to determine whether these provisions and practices are in conformity with the Convention.

23.02 Exercise of Jurisdiction under Part VII

The functions conferred in Part VII of the 1983 Act are exercisable by the Lord Chancellor, by any nominated Judge, by the Master

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[1] The Percy Commission, paras. 849–850.

[2] Application No. 6301/73, Report of the European Commission, 15 Dec. 1977. Judgement of the European Court, 24 Oct. 1979.

of the Court or by any nominated officer (s. 94(1)). For convenience, and in practical usage, the Court of Protection is used to refer to the Judge or Master.[1]

23.02.1 *Nominated judges*

The Lord Chancellor must nominate one or more judges of the Supreme Court for the purposes of Part VII of the Act (s. 93(1)). The Lord Chancellor has nominated all the Judges for the time being of the Chancery Division of the High Court, except those who are nominated as Judges of the Patents Court to act for the purposes of Part VII of the Mental Health Act (Court of Protection matters). When sitting as a nominated Judge, a Judge of the Chancery Division may, where it is necessary in aid, exercise his Chancery jurisdiction.[2] A summons for hearing by the Judge must be heard in chambers unless the Judge otherwise directs. In general, it is considered desirable that summonses heard by the Judge should be in public and particularly the judgements given in public.[3] In practice, very little of the jurisdiction under Part VII is exercised by a Judge; most functions are exercised by non-judicial officers in the Court of Protection.

23.02.2 *Court of Protection*

By section 93(2) of the 1983 Act there continues to be established the Court of Protection which exists for the protection and management of the property and affairs of persons under disability. The "Court" is not a judicial body as the name suggests but is an office of the Supreme Court; it is not juridically part of the Supreme Court. The Court of Protection is situated at 25 Store Street, London, WC1E 7BP.

23.02.3 *The Master*

The Master of the Court of Protection is appointed by the Lord Chancellor under section 89 of the Supreme Court Act 1981 (s. 93(2)). The Master must take the oath of allegiance and judicial oath (s. 93(3)).

23.02.4 *Nominated officers*

The Lord Chancellor may nominate other officers of the Court of Protection to carry out the functions conferred in Part VII. These are known as Assistant Masters who, under the direction of the Master,

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[1] For a full account of the jurisdiction and functions of the Court of Protection see *Heywwod and Massey*; for a practical guide see N. Whitehorn (1983; 6th edn.) *Court of Protection Handbook*, Oyez Longman, London; for a critical analysis see L. Gostin (1983) *The Court of Protection*, MIND, London.

[2] See *Re Platt* (1887) 36 Ch. D. 410; *Re Barber* (1888) 39 Ch. D. 187.

[3] *Re W. (E.E.M.)* [1970] 3 W.L.R. 87 at 97–98, [1971] Ch. 123.

carry out most of the Court's work. The Master and nominated officers can perform the functions under Part VII subject to any express provisions to the contrary in Part VII or the Court of Protection Rules (s. 94(1)(*a*)). In the case of nominated officers this is only so far as may be provided by the instrument by which they are nominated (s. 94(1)(*b*)).

23.02.5 *The Public Trustee*

The Public Trustee and Administration of Funds Act 1986 provides for the Office of the Public Trustee to assume some of the functions under Part VII of the Mental Health Act 1983. As from 2 January 1987 (the date the 1986 Act came into force) the Public Trustee was able to be appointed receiver under the Mental Health Act. The Public Trustee is appointed in all cases in which the Principal of the Management Division of the Court of Protection would have been appointed. The Public Trustee has responsibility for all matters where it is receiver. However, in normal circumstances it will refer to the Court of Protection any applications made in connection with any of the following: (1) The execution of a will (s. 96(1)(*e*)), the conduct of legal proceedings in the name of the patient (s. 96(1)(*i*)), the exercise of any power (including the power to consent) vested in the patient (s. 96(1)(*k*)), the giving of substantial gifts of any property of the patient (s. 96(1)(*d*)); (2) applications for the exercise of emergency powers by the judge (s. 98), appointment of a receiver (s. 99), vesting stock in a curator appointed outside England and Wales (s. 100), and general powers of the judge (s. 104); (3) applications under the Enduring Powers of Attorney Act 1985 (see para. **23.27A** below).[1]

23.03 Invoking the Jurisdiction of the Court

The functions of the Court of Protection under Part VII are exercisable where, after considering medical evidence, it is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs.[2] A person who comes within the jurisdiction of the Court is referred to in Part VII as a patient (s. 94(2)). This test requires the presence of mental disorder **and** an inability to manage property and affairs; the existence of, and relationship between, the two must be established by some medical evidence. Invoking the jurisdiction of the Court is not dependent upon the legal status of the patient or whether the patient is in hospital. The Court can accept jurisdiction, for example, over informal patients, patients in the community or guardianship patients. Even if a mentally disordered

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[1] See Court of Protection Practice Direction (Mental Health: Public Trustee) [1987] 1 W.L.R. 63. The address of the Public Trustee is 24 Kingsway, London WC2B 6HD.

[2] But see s. 98 where the Court can take jurisdiction in an emergency pending the determination of his capacity to manage his affairs (see para. **23.07** below).

person is incapable of managing his affairs, he is not a patient within the meaning of Part VII (see s. 94(2)) until the Court is so satisfied.[1]

23.03.1 *Inability to manage property and affairs*

The person must be shown to be incapable of dealing with his financial affairs. Much will depend upon his social context such as whether he can receive help from his family; and the complexity of his financial affairs. There should be some evidence (*e.g.* recent past behaviour) to show that the person is unable to manage the money and property that he has.

23.03.2 *Mental disorder*

Inability to manage a person's property and affairs must be by reason of mental disorder. Other disabilities such as blindness, deafness or other physical handicaps, or dependence on drugs or alcohol, may impede a person's social functioning, but cannot be a ground for taking him under the Court's jurisdiction. Note that the person must be suffering from mental disorder, and not necessarily from one of the four specific forms of mental disorder. (See further paras. **9.01–9.05** *ante*). For example, a mentally handicapped person who does not exhibit aggressive or seriously irresponsible behaviour (*i.e.* he is not mentally impaired) can be brought within the Court's jurisdiction.

23.03.3 *Medical evidence*

The Court must "consider medical evidence". There are no special requirements as to the kind of medical evidence required before the Court can accept jurisdiction. In particular the Court can act on the basis of one medical report; there is no requirement that the doctor should give oral evidence; and the doctor need not have any special knowledge in the diagnosis or treatment of mental disorder. Section 12 of the Act which sets out certain requirements for medical evidence given under Part II does not apply. Nevertheless the Court should in practice be prepared to take jurisdiction over a patient only after being entirely satisfied as to the quality and reliability of the medical evidence.

23.03.4 *Minors*

The Court's jurisdiction can extend to the estates of minors. However, it will not be exercised if the estate is already adequately protected by other means such as by the appointment of trustees. The Court usually accepts jurisdiction where the patient is nearing the age of majority and will become entitled to property. Where damages are recovered in the High Court on behalf of an informal patient, the Court

[1] *Re S. (F.G.)* [1973] 1 W.L.R. 178.

will usually accept jurisdiction to administer the damages if the minor is likely to survive until attaining his majority and is not likely to recover before then.

23.04 General Functions of the Court

The statutory functions of the Court are comprehensive. Section 95(1) provides that, with respect to the property and affairs of a patient, the Court may do or secure the doing of all such things as appear necessary or expedient: (*a*) for the maintenance or other benefit of the patient; (*b*) for the maintenance or other benefit of the patient's family;[1] (*c*) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered;[2] and (*d*) otherwise for administering the patient's affairs (s. 95(1)).

The primary concern of the court should be the benefit of the patient himself (s. 95(2)). Ungoed-Thomas, J. in *re W. (E.E.M.)*[3] held that the word "benefit" should be construed widely so as to include not merely what was financially or materially beneficial, but at least including the making of provision for obligations, beyond those legally enforceable, which the Court was satisfied that the patient would, if of sound mind, have fulfilled.

Section 95(1)(*c*) is the only paragraph upon which gifts to charity, legatees, or next of kin can be authorised. In applying s. 95(1)(*c*) the Court adopts a substitute judgement standard—*i.e.*, the court's view of what the actual patient "might be expected to provide" and not (if different) what some reasonable person in the patient's position would have done: "the court must seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight."[4]

In *Re C*,[5] Hoffman J enunciated a standard under section 95(1)(c) in a case where substitute judgement was not possible because the patient lacked competency since birth and there was no basis upon which to conclude what *this patient* would have done with her financial assets. Hoffman J said that in such cases the court must assume that the patient

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[1] "Family" connotes persons for whom the patient might *prima facie* be expected to make some provision; thus relatives such as nephews and nieces ordinarily are not included. *Re D.M.L.* [1965] Ch. 1133, at 1134.

[2] The Court should consider what the patient would have done if he had become of sound mind for sufficient time to review the situation, but knew after a brief interval he would relapse. *Re L. (W.J.G.)* [1966] Ch. 135, [1965] 3 All E.R. 865.

[3] [1971] Ch. 123 at 135–36.

[4] *Re D (J)* [1982] Ch 237, Sir Robert Megarry V-C; *Re C*, Chancery Division (Transcript) 24 April 1991, Hoffman J.

[5] [1991] 3 All E.R. 866; [1991] Fam. Law 521; [1992] 1 F.L.R. 51; (1991) 8 BMLR 1.

would have been a "normal decent person, acting in accordance with contemporary standards of morality."[1]

In the exercise of the general powers conferred by section 95(1), the Court must have regard primarily to all the **patient's** requirements: the Court must also have regard to the rules of law which restrict the rights of creditors. Secondarily, the Court must have regard to the interests of creditors and the desirability of making provision for obligations even if they are not enforceable in law (s. 95(2)). Thus, the Court should consider first the welfare of the patient and only then the just and proper claims of creditors.[2]

23.04.1 *Disclosure of information*

In *Re E. (Mental Health Patient)*[3] a patient successfully brought a claim for damages for negligence acting by the Official Solicitor, with damages administered by the Court of Protection. The parents later approached new solicitors with a view to appealing out of time. The Official Solicitor refused to release the relevant papers to the solicitors, but the Court of Protection ordered him to do so under section 95(1) on the ground that the papers were the plaintiff's property. The Court of Appeal said that, although the papers were the "property" of the patient, the parent had no absolute right to see them. The Court of Protection could order the disclosure of confidential documents if it was for the benefit of the patient. The Court should withhold a disclosure order only if such disclosure would cause the patient real harm.

23.05 Powers of the Court

The Court has the power to make any order, direction or authorisation it sees fit for the purposes of carrying out its general functions under section 95. This includes, but is not limited to: control and management of any of the patient's property;[4] sale, exchange or other disposition of property; the acquisition of property; settlement of any property[5] or the gift of any property for the purposes of the maintenance or benefit of the patient's family or for making provision for other persons or purposes for whom or which the patient might be expected

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[1] Compare with the standard in *Re J.B.* [1967] Ch. 247, at 253 (the court should do what it believes "a sane man properly advised and with a glimmer of decency" might be expected to do in the circumstances).

[2] *Re Seager Hunt* [1906] 2 Ch. 295.

[3] [1985] 1 W.L.R. 245 *reversing* [1984] 1 All E.R. 309.

[4] Persons acting as judges under Part VII are exempted from the requirement in the Financial Services Act 1986 to receive authorisation from the Securities and Investment Board before carrying on investment business. Financial Services Act (Miscellaneous Exemptions) Order 1989, S.I. 1989 No. 431.

[5] See *Re L. (W.J.G.)* [1966] Ch. 135.

to provide if he were not mentally disordered;[1] the execution for the patient of a will (see para. **23.05.1** below); the carrying on by a suitable person of any profession, trade or business of the patient; the dissolution of a partnership (see para. **23.29** below); carrying out of any contract entered into by the patient (see para. **23.26** below); the conduct of legal proceedings in the name of the patient or on his behalf (see paras. **24.24–24.29** *post*); the reimbursement of the patient's money to creditors or for the benefit of the patient or for his family which he might be expected to do if he were not mentally disordered (s. 96(1)).

The Court has special powers regarding the settlement of property or trust property under section 96(1) (s. 96(2)). Further, where a settlement has been made of any property of a patient and any material fact was not disclosed when the settlement was made, or where there has been a substantial change in circumstances since it was made, the Lord Chancellor or a nominated judge may by order vary the settlement in such manner as he thinks fit (s. 96(3)). But subsection (3) does not prevent trustees of a settlement from distributing the capital of a trust property during the patient's lifetime.[2]

23.05.1 *The execution of wills*

By section 96(1)(*e*) the Court has specific power to execute for the patient a will making provision which could be made by the patient if he were not mentally disordered.[3] (Under section 112, a "will" includes a codicil—*i.e.* an amendment to a will previously made). However, this power is not exercisable when the patient is a minor, and cannot be exercised unless the Court has reason to believe that the patient is incapable of making a valid will for himself (s. 96(4)).

In *Re D. (J.)*[4] Meggary V.C. said that, in exercising its discretion to order the execution of a patient's will, the Court had to seek to make such a will as the actual, and not hypothetical, patient, acting reasonably, would have been likely to make, with full mental capacity, memory and foresight. (For a case where the patient was never competent and there was no basis upon which to know what **she** would have done, see para. **23.04** above.)

Normally if a person was going to be adversely affected by the execution of the will the Court would be expected to give him notice of the proceedings. But where because of the patient's age and poor

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[1] See *Re C.M.G.* [1970] Ch. 574 (patient wishing to make a gift to mental hospital; the Court must consider whether patient would be expected to give gift if he were not mentally disordered and not under any influence).

[2] *Re C.W.H.T.* [1978] Ch. 67.

[3] See *Practice Direction* [1970] 1 All E.R. 15, [1970] 1 W.L.R. 228.

[4] [1982] 2 All E.R. 37. See also G. Sherrin (1983) Statutory Wills under the Mental Health Act 1959, *Fam. Law.*, vol. 13, p. 135.

health the matter was one of urgency, the Court can execute a will without giving notice to persons adversely affected.[1]

Where a will is executed under section 96(1) it is signed by the person authorised with the name of the patient and his own name, in the presence of two or more witnesses present at the same time (s. 97(1)). Section 97 sets out other supplementary provisions for the execution of wills under s. 96(1). If all the formalities set out in section 97 are complied with by the Court of Protection the will is valid as if executed by the patient himself (s. 97(3)), and the High Court has no jurisdiction to interefere with it.[2]

23.06 Receivership

The ordinary method by which the Court of Protection arranges for the management of a patient's affairs so that the patient's estate will be available for his benefit, is by the appointment of a receiver. Thus, the Court is empowered by section 99(1) to appoint a receiver to act on the patient's behalf.

23.06.1 *Powers and duties of receiver*

The receiver can do all things in relation to the property and affairs of the patient as the Court orders or authorises him to do (s. 99(2)). The Court can only order or authorise the receiver to do what the Court could itself do under sections 95 and 96 (see discussion in paras. **23.04** and **23.05** above). While the authority of the receiver to manage the affairs of the patient is limited by the order, additional powers may be conferred upon him by subsequent orders, directions or authorisations.

The duties of the receiver include the management of the patient's estate in accordance with the powers expressly conferred on him. The receiver is the statutory agent of the patient,[3] and acts under the authority of the Court; the receiver must not improperly obtain financial gain by misusing his position of authority. The receiver is expected to take a personal interest in the patient and his affairs and should bring to the notice of the Court anything which he may from time to time consider to be for the benefit of the patient.

23.06.2 *Criteria for appointment of receiver*

There are no specific criteria laid down for the appointment of a receiver. However, in making a receivership order the Court will

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[1] *Re Davey* [1981] 1 W.L.R. 164 (Deputy master had not erred in failing to give husband or relatives notice of execution of will where patient was elderly and in poor health).

[2] *Ibid.*

[3] *Re E.G.* [1914] 1 Ch. 927.

most likely have regard to such factors as the age and mental and physical condition of the patient; the extent to which the patient can appreciate his finances and personal affairs; the size and complexity of his affairs; his prospect for recovery; existing arrangements and the needs of the patient's dependants. Specific directions are given in the order which are based upon these kinds of considerations.

23.06.3 *Who can be appointed as receiver?*

The Court usually appoints a named person to act as receiver, and this is most often a near relative of the patient; recently, however, greater use has been made of local solicitors as receivers. Sometimes the receiver is not a named person but the holder of a specific office (see s. 99(1)) such as the Director of Social Services. Such an order obviates the need for the appointment of a new receiver on the death or retirement of the officer concerned. (The expense of an officer of a social services authority who is appointed as receiver can be paid by virtue of section 49 of the National Assistance Act 1948, as amended by section 149 and Sch. 7 of the 1959 Act).

23.06.4 *Where there is difficulty in finding a receiver*

If there is difficulty in finding a receiver the Court used to appoint the Official Solicitor. However, as from January 1, 1983, the Receivership Division of the Official Solicitors Department was transferred to the Court of Protection. The Principal of the Management Division of the Court of Protection was then usually appointed receiver in those cases where previously the Official Solicitor would have been appointed—*e.g.* if no suitable receiver can be found or the Court feels that a patient is not being adequately represented by his receiver. As from January 2, 1987, the Public Trustee is appointed in all such cases. (See para. **23.02.5** above).

23.06.5 *Security and accounts*

Where an order is made appointing a person other than the Principal of the Court's Management Division as receiver, the person appointed must, unless the Court otherwise directs, give such security for the due performance of his duties as the Court may approve. The security must be given before the person acts as receiver unless the Court allows it to be given subsequently. The purpose of a security (which is usually by way of a guarantee bond) is to provide some financial undertaking that the receiver will perform his duties properly and ethically; if he does not the security can be claimed by the Court. (See s. 107(1) and rr. 55–65).[1]

[1] Rule numbers in paras. **23.06–23.12** are to the Court of Protection Rules. See para. **23.11** below.

Every receiver must render accounts annually or as otherwise directed by the Court (see s. 107(2) and r. 60(1)). The Court receives many receivership accounts certified by solicitors and if they are prepared by solictors they should be so certified. The certifcate may be given by a partner in the firm responsible for preparing the account, under his own signature, but that partner must not himself be the receiver. In a small number of cases, concerning large and complex estates, the Court requires receivership accounts to be audited rather than simply inspected.[1]

On the passing of the accounts the Court must make proper allowances out of the patient's estate, including an allowance in respect of the reasonable costs of the receiver of passing the accounts (r. 60(2)). If at the time his account is passed or at any other time a receiver has a balance of income over required expenditure he should apply to the Court for directions for it to be invested or otherwise dealt with. The money cannot be invested by the receiver except according to the directions of the Court (see r. 61).

23.06.6 *Discharge*

On the death of a patient, the jurisdiction of the Court comes to an end and the receiver is therefore automatically discharged. Upon the Court being satisfied that the patient has become capable, a receiver **must** be discharged. On the other hand, the receiver **may** be discharged if the Court considers it expedient[2] to do so. On application for discharge of a receiver the Court must comply with the rules of natural justice, but not the ordinary rules of evidence.[3] (As to final accounts upon discharge of a receiver, see r. 64).

23.07 Court's Powers in Cases of Emergency

The Court can exercise emergency powers under section 98 pending a final determination where the Court has **reason to believe** that a **person** (not yet a patient) **may be** incapable, by reason of mental disorder, of managing and administering his property and affairs. The Court must be of the opinion that it is necessary to make immediate provision for any of the matters referred to in section 96 (*e.g.* provision is needed for the maintenance or benefit of the patient or his family see para. **23.05** above). The Court may then, pending a final determination as to his competency, exercise jurisdiction under Part VII[4]. It is to be noted that section 98 does not require the Court to be satisfied "after considering medical evidence" in exercising its emergency juris-

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[1] *Court of Protection Practice Direction* [1984] 3 All E.R. 320.
[2] This means expedient for the patient. *Re N.* [1977] 1 W.L.R. 676.
[3] *Re W.L.W.* [1972] Ch. 456.
[4] However, where the Court is exercising its emergency jurisdiction under s. 98 it cannot exercise those powers specified in the third column of Sch. 3 (s. 113).

diction. In practice the Court will, however, expect such medical evidence as in procurable (even if inconclusive) to be filed.

23.07.1 *Receiver ad interim*

Under Rule 41 where the Court is of opinion that it is necessary to make immediate provision in relation to the property and affairs of a patient it may direct or authorise any person to do any act or carry out any transaction; or appoint a receiver *ad interim* for the patient. Usually the appointment of a receiver *ad interim* is made only if it becomes necessary to safeguard the patient's estate and interests—for example, to prevent his business or other affairs from being seriously impaired pending the appointment of a substantive receiver. (It may be possible to provide interim protection for a person's property by virtue of the duty of local authorities to take reasonable steps to prevent or mitigate loss or damage to movable property of patients admitted to hospital, etc.) (See para. **23.17** below).

23.08 Exercise of Jurisdiction without Appointing a Receiver ("Short Procedure")

The Court can exercise its jurisdiction without appointing a receiver. Rule 7 provides for a "short" or "simplified" procedure (*i*) where it appears to the Court that the patient's property does not exceed £5,000, or it is otherwise appropriate; and (*ii*) where the Court is of opinion that it is not necessary to appoint a receiver for a patient. An order under Rule 7 is an order directing an officer of the Court or some other suitable person to deal with the patient's property or affairs in any manner authorised by the Act and specified by the Court.

23.09 Vesting of Stock in a Foreign Curator

The Court is entitled to direct that any stock (or dividends from the stock) standing in the name of a person found under disability in a jurisdiction outside England and Wales should be transferred to the person appointed to manage his affairs (*i.e.* a curator). (As to the definition of "stock", see s. 100(2)). The Court must be satisfied that the mentally disordered person has been found to be incapable, by reason of mental disorder, of managing his affairs in a jurisdiction outside England or Wales; and that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient to exercise these powers (s. 100(1)). The purpose of section 100 is that the Court of Protection should be able to recognise the operation of foreign law where some form of curatorship has been constituted for a mentally disordered person, without the requirement of going into the question of mental capability itself.

23.10 Preservation of Interests in Property

It is a long established general principle that, so far as is possible, the disposal of the property of a person under disability should not alter the character of the property disposed of or interfere with the rights of succession.[1] Analogous provisions against disinheritance derive as far back as the *Statute de Prerogativa Regis* (see para. **23.01** above).

Section 101 of the Act provides that where any property of a patient has been disposed of and a person would have had an interest in the property (*i.e.* under a will or intestacy, a gift or nomination taking effect on the patient's death) but for the disposal: (*a*) he takes the same interest in any property belonging to the estate which represents the property disposed of; and (*b*) if the disposal was of real property any property representing it shall as long as it remains part of the estate be treated as if it were real property (s. 101(1)). (As to the meaning of "disposal of property", see s. 101(3)). The Court may give any directions necessary or expedient to facilitate the operation of section 101(1) (s. 101(4)).

Thus, if the property disposed of was real property (*e.g.* land, houses, buildings) any property representing it is automatically treated as if it were real property. However, to retain the character of personal property (movable property, goods and chattels) which would otherwise be converted into real property requires a direction of the Court (s. 101(2)).

[1] See *Heywood and Massey*, pp. 122–125.

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23.11 Proceedings of the Court of Protection

The proceedings of the Court are conducted under the Court of Protection Rules 1984, S.I. 1984 No. 2035 (s. 106(1)). The Rules are promulgated by the Lord Chancellor (s. 108(1)). (As to the specific matters which can be provided for under the Rules see s. 106(2) and s. 108(2)).

23.11.1 *Exercise of jurisdiction*

Except where the Rules otherwise provide, the jurisdiction of the Court may be exercised (*i*) without fixing an appointment for a hearing; (*ii*) by the Court of its own motion or by application of any person interested; (*iii*) whether or not any proceedings have been commenced in the Court (r. 5). An application should be made on the appropriate form; but in an emergency the Court can dispense with the need for a written application (r. 6)[1]. The Court assists persons who would not normally be expected to consult a solicitor in preparing the necessary forms for making an application.

There is no provision in the Act or Rules regarding who should apply to the Court, but the nearest relative is normally considered to be the proper person. If the nearest relative is unable to apply, another relative or friend may do so, but the reason should be stated. Relatives of degree equal to or nearer than the applicant should be notified of the application and the Court should be informed that this has been done. Where no relative or friend is willing to apply, a trustee of a trust under which the patient has an interest, a partner in the firm of solicitors concerned with the patient's affairs, or even a creditor can make an application. Sometimes an officer of a local authority is authorised by his council to apply, but then it is usual for the authority to make the application either by its own solicitor or through the Court.

The application, accompanied by a medical certificate and other relevant facts and evidence, are filed with the Court.

23.11.2 *General powers of the Court with respect to proceedings*

The Court has the same powers as are vested in the High Court in respect of securing the attendance of witnesses and the production of documents (s. 104(1)). Under Rule 47 the Court can authorise or direct any party or the Official Solicitor to take out a summons requiring a named witness to attend before the Court and to give oral evidence or produce any document.

The Lord Chancellor or a nominated judge (but not the Master or a nominated officer) has the power to punish for contempt of Court in

[1] See *Practice Direction* [1985] 1 All E.R. 642 for the matters requiring formal application.

any manner in which the High Court could punish for contempt (s. 104(2)). The Master or nominated officer may certify an act or omission which would have been a contempt in the High Court to the Lord Chancellor or a nominated judge who will thereupon inquire into the alleged act or omission and take such action as if the proceedings had been before him (s. 104(3)).

Section 104(4) provides for the special procedure under section 36 of the Supreme Court Act 1981 for the issue of writs of *subpoena ad testificandum* (compels a witness to attend and give evidence) and *duces tecum* (compels a witness to attend and give evidence and also to bring certain documents in his possession specified in the subpoena) so as to be enforceable throughout the United Kingdom.

Note that by virtue of section 12(1)(*b*) of the Administration of Justice Act 1960, the publication of information relating to proceedings of the Court heard in private is a contempt of Court.[1]

23.11.2A *Nature of Proceedings*

In *re B (Court of Protection)*[2] Millett, J. held that in an ordinary case, and in the absence of emergency or need to act with speed, all persons who may be materially or adversely affected by proceedings of the Court of Protection should be notified of the application. This will normally include persons who have been named beneficiaries in a previous will or who are next of kin in the case of intestacy, and persons entitled to default of appointment (s. 96(1)(k)). In addition the Court should normally notify any person for whom the patient might be expected to make some substantial provision if of sound mind.

Millett, J. noted that the Court of Protection had power under the Court of Protection Rules 1984 (r. 37) to determine who is entitled to attend at any stage of the proceedings. However, that discretion must be exercised judicially, and it was an unjudicial exercise of discretion to exclude a person whose presence was relevant to an issue to be decided at hearing.

23.11.3 *Appeals*

Any person aggrieved by an order or decision of the Court may, within eight days of the entry of the order, appeal to a nominated judge (s. 105(1) and r. 53(1)). (As to an appeal from an order not made on an appointment for a hearing or an order appointing a receiver *ad interim*, see r. 54). On an appeal under section 105(1) the nominated

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[1] The boundaries of the protection of privacy relating to proceedings of a Mental Health Review Tribunal are discussed at length in *Pickering v. Liverpool Daily Post and Echo Newspapers* [1991] 2 AC 370, [1991] 1 All ER 622. See para. **18.23A** *ante*.

[2] [1987] 1 W.L.R. 552.

judge has a complete discretion to consider the matter and he is not fettered by any decision of the Master or nominated officer.[1] Appeal from a nominated judge lies to the Court of Appeal (s. 105(2)) without leave.[2] From the Court of Appeal an ultimate appeal lies to the House of Lords, though no such appeal has yet been made.

23.12 The Lord Chancellor's Visitors

Section 102(1) provides that there shall continue to be the following panels of Visitors: Medical Visitors, Legal Visitors and General Visitors. Each panel consists of persons appointed by the Lord Chancellor for a term and subject to conditions as he may determine (s. 102(2)). There are currently five substantive Medical Visitors (*i.e.* actually performing functions at the moment), five reserve Medical Visitors and one Legal Visitor. The Medical Visitors must be registered doctors with special knowledge and experience of people with mental disorder; a Legal Visitor must be a barrister or solicitor of not less than ten years standing (s. 102(2)). There is a team of General Visitors who are civil servants employed in the Lord Chancellor's Department; they are not required to possess either a medical or legal qualification (s. 102(1)(*c*)). Any Visitor can be paid such renumeration and allowances as the Lord Chancellor may, with the concurrence of the Treasury, determine (s. 102(4)).

23.12.1 *Functions of Visitors*

The Lord Chancellor's Visitors are not officers of the Court but visit patients in accordance with the directions of a standing nature given by the Master with the Lord Chancellor's concurrence (s. 103(1)). The purpose of visits is to investigate matters relating to the capacity of a person to manage and administer his property and affairs or other matters affecting the exercise of the Court's functions under the Act; where it appears to the Court that such a visit is necessary it may order the patient to be visited (s. 103(2)). (Note that the Master may also visit patients for the foregoing purposes and may interview the patient in private (s. 103(7)).

The most important part of the duties of Visitors is to advise the Court in determining the mental capacity of a person, whether in regard to an application for the appointment of a receiver or the discharge on recovery, but many other matters also arise which may require a visit—*e.g.* testimentary capacity, suitability of accommodation, care and attention and ascertaining the patient's views on any matter.

Every visit must be made by a General Visitor unless the Court

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[1] *Re D. (J.)* [1982] 2 All E.R. 37.

[2] *Re Cathcart* [1893] 1 Ch. 466; *Re Cathcart* [1902] W.N. 80. See *Moore v. Commissioner of Metropolitan Police and Others* [1968] 1 Q.B. 26.

considers it essential for the visit to be made by a person with medical or legal qualifications, and makes a direction accordingly (s. 103(3)).

The Visitors are required to report on the visit as the Court may direct (s. 103(4)). Such reports are confidential and may not be disclosed except on directions of the Court (s. 103(8)). The Master will normally authorise disclosure of reports concerned with the patient's capacity and then only on a signed undertaking by the solicitors not to disclose the contents except to the patient's legal and medical advisers. However, when a patient is applying for the discharge of his receiver the Court should, save in exceptional circumstances, exercise its discretion to allow disclosure of the Visitor's report, and where disclosure is ordered the patient should be able to test the report by putting questions to the Visitor.[1] It is an offence to disclose without authority any report or information contained therein (s. 103(9)).

A Visitor making a visit may interview the patient in private (s. 103(5)); and a Medical Visitor may carry out in private a medical examination and may require the production of and inspect any of the patient's medical records (s. 103(6)). The obstruction of a Visitor is an offence under section 139 (see para. **25.05** *post*). It is also a contempt of Court to interfere with the discharge of a Visitor's duties.[2]

23.13 Reciprocal Arrangements in relation to Scotland and Northern Ireland

A patient who has been brought within the jurisdiction of the Court of Protection (or has been so brought as an emergency case under section 98) can have his property[3] and affairs managed in Scotland or Northern Ireland, unless a curator bonis, tutor, judicial factor, committee or guardian has been appointed for him in Scotland or, as the case may be, Northern Ireland (s. 110(1)). Similarly, a mentally disordered person who has had his affairs managed under the law in force in Scotland or Northern Ireland can have them managed in England or Wales unless he is a patient under the jurisdiction of the Court of Protection or an emergency order has been made under section 98 (s. 110(2)). Nothing in section 110 should be construed to affect any power to execute a will under section 96(1)(*e*) or the effect of any will so executed (s. 110(3)).

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[1] *Re W.L.W.* [1972] Ch. 456.

[2] *Re Anon* (1881) 18 Ch. D. 26, at 27.

[3] References to "property" in s. 110 do not include references to land or interests in land but this does not prevent the receipt of rent or other income arising from land or interests in land (s. 110(4)).

B. ALTERNATIVE METHODS OF MANAGING A PATIENT'S PROPERTY AND AFFAIRS

23.14 Introduction

An application to the Court of Protection is unnecessary if there are other methods of managing the person's affairs. Some possible alternatives are briefly described below. It should also be noted that, since the passage of the Enduring Powers of Attorney Act 1985, it is possible for a power of attorney to continue in effect when the principal becomes mentally disordered; it can therefore be a viable alternative to the Court of Protection in some cases. (See further paras. **23.27–23.27A** below.)

23.15 Appointeeship

The Department of Social Services has power to appoint an appointee to receive and administer income support or social security benefits payable to someone who is "unable to act", and, therefore, cannot manage his own affairs.[1] An appointee is not designated where the beneficiary is already subject to the Court of Protection.

A near relative of a mentally disordered person living in the community is often the appointee; for patients in hospital an officer of the hospital is often the appointee. (As to social security benefits for hospital patients, see paras. **23.18–23.20** below).

23.16 Pay, Pensions etc. of Mentally Disordered Persons

A periodic payment of salary, pension or other similar payment payable by Parliament or administered by or under the control or supervision of a government department may be paid directly to the institution or person caring for the patient to be applied for his benefit. The government department or other authority must first be satisfied, after considering medical evidence, that the person in question is incapable by reason of mental disorder of managing and administering his property and affairs (s. 142(1)). The government department or other authority may pay only part of the sum to the patient and may pay the remainder as they think fit: (*i*) to or for the benefit of the patient's family or to other persons for whom the patient might be expected to provide if he were not mentally disordered; or (*ii*) to reimburse people who have paid his debts (whether enforceable or not) or helped to maintain him or his family.

23.17 Protection of Movable Property

The local social services authority's duty to protect "any movable property" of a patient is established under section 48 of the National Assistance Act 1948. The duty arises where a person is admitted to any

[1] Social Security (Claims and Payments) Regulations 1987, S.I. No. 1968, reg. 33.

hospital or accommodation provided under Part III of the 1948 Act (see paras. **4.05–4.06** *ante*) or is removed to any place under a removal order (removal by order of a Court of Summary Jurisdiction of persons in need of care and attention). It must appear to the authority that there is danger of loss of, or damage to, any of the patient's movable property by reason of his temporary or permanent inability to protect or deal with the property, and that no other suitable arrangements have been made for the purpose. The local authority's duty is to take reasonable steps to prevent or mitigate the loss or damage. For this purpose it has the power at all reasonable times to enter any premises which immediately before the person's admission or removal were his usual place of residence and to deal with any of his movable property, and it may recover from the patient or from any person liable to maintain him any reasonable expenses incurred.

C. MONEY FOR HOSPITAL PATIENTS

23.18 Introduction

Money is often held by hospitals for patients. The funds held in patient's accounts can include money obtained through state benefits and the patient's personal resources. The hospital can be designated as an "appointee" for the receipt of benefits (see para. **23.15** above) or they can be a mere agent for the patient. The majority of long-stay patients in mental illness and mental handicap hospitals are dependent upon state benefits. There is concern that many of those eligible for social security benefits, particularly mobility allowance, do not apply for them, and that an inordinate amount of the total monies held by hospitals for patients accumulates in their bank accounts without ever being spent.[1]

The putting of money aside deliberately for future purposes or for use following discharge into the community is an entirely legitimate, indeed wise, use of patients' funds. However, it is the unplanned, unimaginative accumulation of money which has resulted in a great deal of criticism. Some hospitals appear much more enterprising than others in helping patients to claim and spend their money. DHSS guidance is out of date and a revision of HM(71)90 (a review of how hospital payments should operate) is long overdue. Government proposals arising from a Rayner Review of benefits for hospital patients are also expected soon. It is not intended here to discuss the various means by which a patient can obtain his income including employment and the various forms of state benefit. What will be reviewed are the special provisions affecting rates of payments of benefit to hospital in-patients, especially those in hospital for longer periods of time.

[1] See, *Patients' Money: Accumulation of Balances in Long-Stay Hospitals*, DHSS, 1981. The amount of money belonging to patients but held by hospitals is increasing and has risen from £9.7 million as of March 31, 1975 to £37.5 million as of March 1982. Written Answer, *Hansard*, 28 Oct. 1982.

23.19 Reduction in State Benefits

If a person who is receiving social security benefit is admitted to an NHS hospital for free in-patient treatment for any length of time, his rate of benefit may be reduced. In some cases the benefit stops altogether. The reduction in benefit does not apply if the patient is paying the whole cost of his maintenance in the hospital. The detailed provisions as to which benefits are reduced when and by how much is to be found in the Social Security (Hospital In-Patients) Regulations 1975, S.I. 1975 No. 555.[1] Generally speaking the reductions are mainly in respect of "personal" benefits, *i.e.* sums that a person receives on his own account, although certain dependency benefits are also included in the regulations. If the patient is receiving two or more benefits they will generally be aggregated before any reduction is made.

White v. Chief Adjudication Officer and Another[2] was a test case for claims to income support on behalf of a number of elderly and mentally infirm patients were discharged from hospital to a nursing home. The Court of Appeal held that the nursing home was considered a "hospital" since it provided appropriate nursing and because of the patients' mental illness.[3] The Secretary of State had discharged his obligations to make provisions to meet all reasonable requirements for hospital accommodation. Since the patients were being maintained free of charge while undergoing medical or other treatment as an inpatient in a hospital, they were not entitled to income support.

23.20 Personal Allowance

Patients in hospital for more than one year will have their benefits reduced to a set personal allowance which was £7.15 as of November 1984. The benefits affected are supplementary allowance and supplementary pension, invalidity benefit and severe disablement allowance (see para. **23.21** below), widows' benefit, retirement pension and non-contributory retirement pension for people over 80, industrial widows' and widowers' benefit. However, the following are not affected: war pensions, which are not reduced at all from their normal rate; and war widows' pensions, which are paid in full for the first 52 weeks of a hospital stay and are then reduced but not to the level of the standard allowance. A hospital patient can also continue to receive mobility allowance in full so long as he continues to have a need of it.

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[1] These regulations have been amended by S.I. 1987, No. 31 to secure that men and women are treated equally. See also J. Matthewman & N. Lambert (1983) *Tolley's Social Security and State Benefits 1982*, paras. 8.96–8.97 with Table; DHSS Leaflet NI 9: "*Going into Hospital?*"

[2] Court of Appeal Civil Division, 17 B.M.L.R. 68, 21 July 1993.

[3] Social Security (Hospital In-Patients) Regulations 1975, reg. 2(2).

23.21 Pocket Money

The Secretary of State for Social Services may under section 122 of the 1983 Act pay to persons who are receiving in-patient treatment (whether or not they are detained) in a mental illness or mental handicap hospital such amounts as he thinks fit for their occasional personal expenses. "Pocket money"[1] is paid only where the patient would be without resources to meet his occasional personal expenses (s. 122(1)). The making of these payments is part of the hospital services provided under the National Health Service Act 1977 (s. 122(2)) and they are paid out of District Health Authority funds. In practice the maximum amount of "pocket money" paid is equivalent to the standard personal allowance.

The payment of "pocket money" was virtually supplanted by the introduction of non-contributory invalidity pension (NCIP) which was payable to men under 65 and women under 60 who entered hospital after November 17, 1975, and who were unable to work for 28 consecutive weeks but did not qualify for contributory benefits. NCIP has now been replaced by Severe Disablement Allowance which was introduced by the Health and Social Security Act 1984[2]. The Severe Disablement Allowance is the only non-means tested income maintenance benefit for people who are incapable of work but don't have the right amount of national insurance contributions to qualify for Sickness and Invalidity Benefit. However Severe Disablement Allowance, unlike NCIP, has an extra test, going beyond the straight-forward proof of "incapacity for work". This is the test of 80% disablement. It is likely that a person will meet this test if his mental illness or mental handicap is such that he must live as a long term patient in hospital. However, exactly how mentally ill or mentally handicapped people will fare under the 80% test is far from certain.

23.22 Further Reduction Below the Standard Personal Allowance

Where personal allowance or pocket money is payable there are provisions whereby it can be reduced below the standard weekly payment. Under regulation 16 of the Social Security (Hospital In-Patients) Regulations 1975, the amount a patient can be given can be reduced to no sum at all or a specified weekly sum below the standard rate. This will happen where (1) the patient is incapable of acting for himself and his benefit is being paid to the hospital authorities on his behalf and (2) where the medical officer who is treating an in-patient who has received continuous treatment for 52 weeks or longer issues a written certificate to the Secretary of State for Social Services. A cer-

[1] "Pocket money" is an unfortunate term which is still used in the Mental Health Act but not usually by mental health professionals.

[2] See also the Social Security (Severe Disablement Allowance) Regulations, 1984, S.I. 1984 No. 1303.

tificate should be furnished only if the doctor considers that, because of the patient's medical condition, the full standard weekly allowance cannot be used by or on behalf of the patient for his "personal comfort or enjoyment".

23.23 Reward Payments

The expression "reward payments" is used to describe payments made by hospitals to patients undertaking work, other than on ordinary employment terms, as part of their rehabilitation. The amount paid is graduated so as to encourage participation in occupations of therapeutic value. The amount paid by the hospital is a matter to be decided locally, but account should be taken of both medical considerations and the economic value of the work performed. Any amount paid should be in addition to personal allowance. There is some legitimate concern that patients doing work of economic value to the hospital may not be paid fairly. There is often a general assumption that work is primarily of therapeutic value irrespective of the nature or purpose. Further, payment for work in hospital often is not related to clearly defined criteria and is sometimes confused with money used as a motivator in behaviour modification programmes (as to which see para. **20.08** *ante*).

23.24 Ability of Patients to Handle Cash

The patient should not have his personal allowance or reward payments reduced only because he is unable to handle cash. But hospital authorities can reduce the amount a patient receives in cash at any one time where: (*i*) the patient's mental or physical condition makes him unable to handle more than a limited amount of cash or any at all; or (*ii*) his doctor considers that it is necessary on therapeutic grounds to restrict the amount of cash which the patient should handle while in hospital. (See HM(71)90). The practical result is that many hospital authorities have a code of practice which sets daily and/or weekly cash withdrawal limits for patients.

23.25 Resettlement Benefit

A person who has been in hospital will begin to receive his benefit at the full rate again once he is discharged. (The necessary arrangements need to be made before he is discharged). If he has no dependant and has been in hospital for longer than 52 weeks he may, after he is discharged, be paid an additional amount of benefit on top of the full rate. This is a resettlement benefit which is intended to help the person settle back into life in the community. A person is entitled to resettlement benefit if after the first 52 weeks in hospital he is eligible for specified benefits (see 1975 Regs., 2nd Sch.). The person must show that his discharge from hospital was effected by, and with the approval of, a person having the power to discharge him. He must also show

that he is no longer receiving free in-patient treatment and is not going to live in accommodation provided by a local social services authority. The resettlement payment accrues during a person's second year in hospital. The benefit is not index linked and considering that the second year in hospital was, for many patients, a long time ago, the amount payable is clearly inadequate to meet a newly discharged person's needs in the community.

D. CONTRACTS, AGENCY, WILLS AND PARTNERSHIPS

23.26 Contract

23.26.1 *Liability*

In the case of contracts other than for necessaries (see para. **23.26.2** below), the general rule is that a mentally disordered person is bound by his contract unless he can show (*i*) because of his mental disability he did not understand what he was doing; **and** (*ii*) the other party to the contract was aware of his incapacity.[1] If these two criteria are met, the contract is voidable at the option of the mentally disordered person, and not void.[2] The burden is on the mentally disordered person to show that his disability prevented him from understanding the particular transaction, and that the other party knew this. If the mentally disordered person ratifies the contract after he has recovered or during a lucid interval he appears to be absolutely bound by the contract.[3]

The fairness of the contract may also be a relevant consideration. A New Zealand Court has suggested that where the contract is substantively unfair, the mentally disordered person can sue to have the contract declared void even if the other party was not aware of his mental incapacity.[4] It has also been suggested that the sane party can sue only if he did not know of the other party's disability and the contract was fair.[5]

The understanding and mental competence required to uphold the validity of the contract depends upon the nature of the transaction. There is no fixed standard of competency; for each transaction the party must have an understanding of the general nature of what he is doing.[6] Where the subject matter and value of the contract are trivial, the degree of understanding required may be low; and where the value to the person is great, the degree of understanding may be high.[7] The existence of mental disorder or a delusion in itself is insufficient to show mental incapacity.[8] If the party was sane when the contract was

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[1] *Imperial Loan Co. v. Stone* [1892] 1 Q.B. 599, 601, per Lord Esher, M.R., approved in *Hart v. O'Connor* [1985] A.C. 1000; *Brown v. Jodrell* [1827] M. & M. See also *Chitty on Contracts* (1989: 26th ed.), para. 617; and *Heywood and Massey*, pp. 223–230.

[2] *Manches v. Trimborn* (1946) 115 L.J.K.B. 305; *Gibbons v. Wright* (1954) 91 C.L.R. 423; *Molton v. Camroux* (1849) 4 Ex. 17.

[3] *Birkin v. Wing* (1890) 63 L.T. 80; *Matthews v. Baxter* (1873) L.R. 8 Ex. 132.

[4] *Archer v. Cutler* [1980] 1 N.Z.L.R. 386.

[5] *Molton v. Camroux* (1848) 2 Ex. 487, 503, aff. 4 Ex. 17. Cf. *Dane v. Kirkwall* (1838) 8 C. & P. 679.

[6] *Gibbons v. Wright* (1954) 91 C.L.R. 423.

[7] *In re Beanly* [1978] 1 W.L.R. 770 cited in Law Commission Consultation Paper No. 119, *Mentally Incapacitated Adults and Decision-Making: An Overview*, London, H.M.S.O. 1991, p. 25.

[8] *Jenkins v. Morris* (1880) 14 Ch. D. 674.

made, evidence of previous or subsequent incapacity is not material;[1] the incapacity must exist at the time the contract was entered into. And the fact that the person is well known in the community to be mentally disordered does not necessarily prove the other party knew of the mental incapacity.[2] It must be shown that the person himself did not know of the disability of the other party.

23.26.2 *Necessaries*

Section 3(2) of the Sale of Goods Act 1979 provides that "where necessaries are sold and delivered . . . to a person who by reason of mental incapacity . . . is incompetent to contract, he must pay a reasonable price for them". ("Necessaries" mean goods suitable to the condition of life of such person, and to his actual requirements at the time of sale and delivery). The necessaries must have been supplied with the intention of being paid for.

The importance of section 3(2) is only in cases where the contract could not be enforced. Thus if the supplier did not know the person was under a mental disability he could enforce the contract and receive the contract price. If the contract is unenforceable (*e.g.*, the supplier **knew** the person was under a mental incapacity) then he can only recover a reasonable price and not the contract price.

A person who lends money to a mentally disordered person knowing of his disability cannot enforce the contract, but can recover so much of the money as has actually been spent on necessaries.[3]

23.26.3 *Deeds*

The principles stated above regarding liability of mentally disordered people to contracts, generally also apply to deeds. Thus a deed executed by a mentally disordered person is valid if at the time of execution he is capable of understanding its effect.[4] Deeds executed during a lucid interval are valid.[5] However, like all contracts, they can be set aside on equitable grounds, such as if the sane person knowingly took advantage of his weakness in mind.[6] Certain documents can be declared void on the grounds of fraud, mistake or undue influence.[7]

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[1] *Hall v. Warren* (1804) 9 Ves. Jun. 605. *Cf. M'Adam v. Walker* (1813) 1 Dow 148, 177 (H.L.)
[2] *Greenslade v. Dare* (1855) 20 Beav. 284.
[3] *Re Beavan* [1912] 1 Ch. 196.
[4] *Elliot v. Ince* (1857) 7 De G.M. & G. 475.
[5] *Hall v. Warren* (1804) 9 Ves. 605.
[6] *Selby v. Jackson* (1844) 6 Beav. 192.
[7] See *e.g., Wright v. Proud* (1806) 13 Ves. 136 (a deed in favour of the keeper of a house where the patient was detained was voidable).

23.26.4 *Effect of being under the jurisdiction of the Court of Protection*

There is authority which pre-dates the Mental Health Act 1959 that once a patient is under the jurisdiction of the Court of Protection (see further paras. **23.01–23.13** above) any contract he makes does not bind the patient or his estate;[1] this is so even if he makes the transaction during a lucid period. However, it may bind the other party. The reason for this is that the patient should not be allowed to interfere with the Court's control over the property. It is unsettled whether a contract which did not involve the disposal of property would be voidable. Clearly, a contract can be entered into with the authority of the Court.

23.27 Agency and Power of Attorney

Agency is a relationship which arises when one person (called the principal) authorises another (called the agent) to act on his behalf, and the other agrees to do so. The agreement between principal and agent is often a contract, but need not be. A power of attorney is a specific type of agency. An instrument creating a power of attorney must be executed under seal by the principal (or donor). It is normally created by deed poll and the agent (or the attorney) produces it to third parties to show the extent of his authority to act for the principal. A power of attorney is a potentially effective way in which one person can voluntarily allow another person to manage his property and affairs on his behalf.

23.27.1 *Mental capacity needed to create and sustain a power of attorney*

Capacity to create a power of attorney is determined by the rules governing contractual capacity generally. The general test of contractual capacity is that the person concerned was capable of understanding the nature and effect of the contract at the time he made it (see para. **23.26** above). The donor's loss of mental capacity subsequent to the making of a power generally has the effect of automatically revoking the power, so that the attorney no longer has actual authority. This follows from the basic proposition that an act done by a person's agent is to be treated as one done by the person himself, so that an agent does not have authority to do what the principal cannot do himself.[2] There are two modifications of this general principle: (*i*) an attorney who acts under a power that has been revoked without knowing of the revocation does not thereby incur liability to either the donor or anyone else;[3] (*ii*) where an attorney acts under a revoked power, anyone with whom he deals who is himself unaware of the

[1] *Re Walker* [1905] 1 Ch. 160; *Re Marshall* [1920] 1 Ch. 284.
[2] *Drew v. Nunn* (1878) 4 Q.B.D. 661.
[3] Powers of Attorney Act 1971, s. 5(1) (which has the effect, as far as powers of attorney are concerned, of reversing *Yonge v. Toynbee* [1910] 1 K.B. 215).

revocation may rely on the attorney's ostensible authority and the transaction will be binding on the donor.[1] It is as well for attorneys to bear in mind the general principle that mental incapacity of the principal invalidates the power. Once the attorney becomes aware of the incapacity he should no longer act on behalf of the donor; he could consider applying to the Court of Protection under Part VII of the Mental Health Act 1983 (see further paras. **23.01–23.13** above).

23.27A Enduring Power of Attorney

23.27A.1 *Background*

In summary, a power of attorney will be revoked by the donor's supervening incapacity. The protection afforded to an attorney or third party acting in pursuance of a revoked power is available only if the attorney or third party is unaware of the revocation. The attorney who continues to act despite being aware of the revocation may be liable to the donor or to a third party for any loss caused by his unauthorised actions; the third party who deals with the attorney after learning of the revocation may find that the transaction will not bind the donor and so may be set aside. Thus at a time when the donor has become mentally disordered and most in need of assistance in managing his affairs, the attorney has no authority to act. For example, an elderly person, feeling he is becoming increasingly unable to manage his affairs, may wish to create a power in a spouse or child or trusted solicitor in the expectation that, in consultation with him, the attorney will help him to run his affairs.

In 1983 the Law Commission[2] proposed that the law should be changed to permit the creation of a special type of power of attorney—the "enduring power of attorney" (EPA)—which could not be revoked by the incapacity of its donor. The benefits of EPA are that the delay and expense of an application to the Court of Protection can be avoided; there are less uncertainties as to when a donor has become incompetent; and it gives the donor some control, while competent, of who will exercise powers on his behalf. The Law Commission also saw the need for safeguards to protect the donor against abuse by the attorney.

The Enduring Powers of Attorney Act 1985[3] gives effect to the recommendations of the Law Commission; and the Court of Protection (Enduring Powers of Attorney) Rules 1986 (S.I. 1986 No. 127) provide for the procedures required for applications, hearings, reviews and

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[1] Powers of Attorney Act 1971, s. 5(2). This protection does not apply where a power never existed in the first place such as where the donor never had capacity to create the power.

[2] *The Incapacitated Principal*, Law Com. No. 122, Cmnd. 8977, HMSO, London. See Law Commission Working Paper No. 69.

[3] All references in paragraph **23.27A** are to the Enduring Powers of Attorney Act 1985 unless otherwise specified.

appeals, and cancellation of registration for enduring powers of attorney.

Enduring powers of attorney, in order to be valid, have to be in the form prescribed by the Enduring Powers of Attorney (Prescribed Form) Regulations 1987.[1] (See Appendix **B 159**)

23.27A.2 *Creation and Characteristics*

An enduring power of attorney (EPA) is not revoked by any subsequent mental incapacity (s. 2(1)). An EPA is created if it is executed by the donor and attorney in the form and manner prescribed in regulations (S.I. 1986 No. 127, S.I. 1987 No. 1612) promulgated by the Lord Chancellor (s. 2(1)). In particular, the document must explain the effect of creating or accepting an EPA; and include statements by the donor that he intends the power to continue in spite of supervening mental incapacity, and by the attorney that he understands the duty of registration imposed under the Act (s. 2(2)(b)). The EPA must be executed by the donor and the attorney, although not necessarily at the same time, in the presence of a witness.[2]

An enduring power of attorney executed pursuant to the 1985 Act is not rendered invalid by reason of the fact that at the time of execution of the power the donor was incapable by reason of mental disorder from managing his affairs. The test of validity of the power is whether at the time of execution the donor understood the nature and effect of the power and not whether the donor would have been able to perform all of the acts which the power authorised.[3] The matters which the donor should understand in order that he is deemed to have created a valid power are: that the attorney will be able to assume authority over the donor's affairs as provided in the terms of the power; that the attorney will be able to do anything with the donor's property, as provided in the terms of the power, which the donor could have done; that the authority will continue if the donor should become mentally incapable; that if he should become mentally incapable, the power will be irrevocable without confirmation by the court.

The interpretation by Hoffmann, J in *Re K, Re F* is consistent with the purpose of the 1985 Act to provide an inexpensive method by which a person could confer power to manage his affairs upon a person of his

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[1] S.I. 1987, No. 1612. Reg 2(6) provides that an instrument differing in immaterial respect in form or mode of expression from the prescribed form shall be treated as sufficient. See further Court of Protection Practice Direction [1989] 2 All E.R. 64. (Solicitors should include in the forms to be completed by their client all marginal notes unless they come within specified exceptions). The use of Shaw & Sons Stock Form **S2** or **S2A** is recommended.

[2] Enduring Powers of Attorney (Prescribed Form) Registration 1987 (S.I. 1987, No. 1612.)

[3] *Re K, Re F* [1988] 1 All E.R. 358, [1988] 2 W.L.R. 781, [1988] Fam. Law 203.

choice which would remain effective notwithstanding any change in his mental capacity.[1]

23.27A.3 *Scope of Authority*

An EPA may confer general authority to act on the donor's behalf in relation to all or part of his property and affairs; or it may only confer limited powers. Subject to the terms of the document, an attorney can benefit himself or others, provided the donor might be expected to provide for that person's needs (s. 3(4)). The assumption is that the donor is mentally competent to review the position with the benefit of advice (s. 13(2)).[2]

23.27A.4 *Registration Application: Action on Actual or Impending Incapacity of Donor*

If an attorney under an EPA has reason to believe that the donor is or is becoming mentally incapable he must, as soon as practicable, make an application to the Court of Protection for registration of the instrument creating the EPA (s. 4(1), (2)).[3]

Where the Court of Protection has reason to believe that the donor is, or may be becoming, mentally incompetent (whether or not an application for registration has been made), it can exercise powers with respect to the EPA it thinks necessary (s. 5).

Where an application for registration is duly made the Court of Protection must register the instrument unless (s. 6): (*i*) a receiver has already been appointed by the Court; (*ii*) there is a valid notice of objection; (*iii*) notice of the application has not been given under Schedule 1 (and no dispensation or exemption applies); or (*iv*) the Court has reason to believe one of the grounds of objection could be established.

The grounds of objection to an application for registration include that: there was no valid EPA; the application is premature because the donor is not becoming incompetent; the donor created the EPA under fraud or duress; the attorney is unsuitable. Hostility towards the attorney on the part of other interested parties does not necessarily render the attorney unsuitable. This would only arise where the hostility would impact adversely on the estate.[4]

If the Court is satisfied that one of the foregoing grounds for objection is met it will not register the EPA; and if the application is refused on the grounds of fraud, duress or unsuitability of the donor, the EPA is revoked.

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[1] [1988] 1 All ER at 363.

[2] See *Re L.* (W.J.G.) [1966] Ch. 135; *Re T.B.* [1967] Ch. 247.

[3] The attorney must give notice to the donor and his relatives pursuant to schedule 1 before making an application for registration (s. 4(3)).

[4] *Re W.* [2000] 1 All E.R. 175.

23.27A.5 *Legal Position After Registration*

The effect of the registration is that no revocation of the power by the donor or disclaimer by the attorney is valid unless confirmed by the Court of Protection (s. 7).

The Court of Protection has wide powers once the EPA is registered to: determine any question as to the meaning of the EPA, give directions with respect to the management of the donor's affairs; require the attorney to produce documentation (s. 8).

The powers of the Court of Protection under the 1985 Act, however, are primarily directed to the proper supervision of the attorney, and to giving consents and authorisations necessary to supplement the power (s. 8). While section 8 of the 1985 Act gives the Court of Protection jurisdiction to supervise the conduct of the attorney, it does not give the Court unrestricted power to direct the disposal of the donor's property. In *Re R (Enduring Power of Attorney)*[1] an elderly woman gave an enduring power of attorney to her nephew with a general authority to act on her behalf. The donor was then found incompetent to manage her affairs by a Visitor of the Court of Protection. The attorney then terminated the employment of the patient's companion and housekeeper. The housekeeper asked the Court of Protection to provide for her out of the patient's estate. The Court of Protection refused. Vinelott J held that the Court of Protection had no unrestricted power to direct disposal of the donor's property by way of gift or in recognition of a moral obligation unaccompanied by any legal obligation.

The purpose and effect of the 1985 Act is to enable a person to give a power of attorney, which endures despite a supervening incapacity, to a person of his choice, and empowers the attorney to deal with his property in the way **the attorney** thinks fit, subject to any restrictions in the power of attorney.

23.27A.6 *Revocation or Disclaimer of an EPA*

The attorney cannot issue a disclaimer unless and until he gives notice to the donor or the Court of Protection (ss. 2(12), 4(6), 7(1)). This is intended to ensure that the donor can make other arrangements or his interests are otherwise protected.

An EPA is revoked on the exercise by the Court of Protection of any of its powers under Part VII of the Mental Health Act 1983 if the Court so directs (ss. 2(11), 6(2)). (As to the powers under Part VII of the 1983 Act, see paras. **23.01–23.13** above).

Once an EPA has been registered, it can be revoked by the donor

[1] [1991] Fam Law 94, [1991] 1 FLR 128.

if the Court finds, upon application, he was capable of doing so at the time (s. 8(3)).

The Court must cancel the registration, *inter alia*, if it is satisfied (s. 8(4)): the donor is likely to remain mentally capable; the donor is bankrupt or dead; there was no valid EPA; there was fraud or duress; the attorney is unsuitable.

23.27A.7 *Application of Mental Health Act Relating to Court of Protection*

The following provisions of Part VII of the Mental Health Act 1983 (relating to the Court of Protection) apply to persons within the Enduring Powers of Attorney Act 1985: s. 103 (functions of visitors—see para. **23.12** above); s. 104 (powers of judge—see para. **23.11.2** above); s. 105(1) (appeals to nominated judge—see para. **23.11.3** above); s. 106 (rules of procedure—see para. **23.11** above).

23.28 Wills

A will is not valid unless the testator is of sound mind, memory and understanding. Thus, the testator must be able to appreciate the nature of the act and its effect and understand the extent of the property he is disposing.[1] The Law Commission concluded that "a testator is not only required to pass the ordinary test of understanding the nature of his act and its broad effects, but must also pass a memory test of recalling the extent of his property and a further test of awareness of the moral obligations owed to relatives and others."[2] Even if a person is capable of entering into complex business transactions he may lack testamentary capacity if he is subject to delusions which relate to a close relative who would be a natural beneficiary.[3]

In *Nichols and Freeman v. Binns*,[4] a testator confined in a mental hospital had for many years been mentally disordered accompanied with lucid intermissions. The court held that the fact that the will was a rational one (making a natural and equitable distribution) of property, though not conclusive, is strong evidence of its having been made during a lucid interval. If a will contains irrational and unrealistic provisions together with reasonable ones it must be assumed that it was made during the incapacity of the testator.[5] However, irrational

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[1] *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549.

[2] Law Commission Consultation Paper No. 119, *Mentally Incapacitated Adults and Decision-Making: An Overview*, HMSO: London, 1991, pp. 26–27, citing *Boughton v. Knight* (1873) 3 P. & D. 64, 65; *Smith v. Tebbitt* (1867) 1 P. & D. 398; *Harwood v. Baker* (1840) 3 Moore P.C. 282.

[3] See *Smee v. Smee* (1879) 5 P.D. 84.

[4] (1858) 1 Sw. & Tr. 239.

[5] *Arberry v. Ashe* (1828) 1 Hag. E.C.C. 214.

dispositions are not necessarily evidence of lack of testamentary capacity[1] and a will may be held good if an irrational clause is deleted.[2]

The burden of establishing testamentary capacity is on the person propounding the will,[3] and the burden is even greater when the testator had been subject to delusions.[4] A will made by a person who has suffered from mental disorder must be shown to have been made during a lucid interval or after his recovery.

If at the time a patient makes a will he is subject to the jurisdiction of the Court of Protection that does not in itself invalidate the will.[5] But the Court of Protection can execute a will for a patient as if he were not mentally disordered (s. 91(1)(*e*)). (As to the power of the Court to make a will and the effect on a will of property disposed of, see paras. **23.05.1** and **23.10** above).

As a general rule a testator must have the same degree of understanding when revoking a will as when making it.[6] Revocation when the testator is of unsound mind will be ineffective.

23.28A Grants of Representation

The Non-Contentious Probate Rules 1987[7] cover the situation where a person entitled to a grant of probate or administration in pursuance of the Supreme Court Act 1981 is determined by the registrar to be incapable of managing his affairs by reason of mental incapacity. In such a case the following order of priority may be granted:

a person authorised by the Court of Protection;
a lawful attorney acting under a registered enduring power of attorney;
the person entitled to the residuary estate of the deceased.

Notice of an intended application under these Rules must be given to the Court of Protection.

23.29 Partnership

A partner's permanent mental incapacity is a ground upon which a partnership can be dissolved, although it does not of itself bring the partnership to an end.[8] Until dissolution, the power of the mentally

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[1] *Austen v. Graham* (1854) 8 Moo. P.C.C. 493.
[2] *In the estate of Bohrmann, Caesar and Watmough v. Bohrmann* [1938] 1 All E.R. 271.
[3] *Cleare v. Cleare* (1869) L.R. 1 P. & D. 655.
[4] *Smee v. Smee* (1879) 5 P.D. 84.
[5] *Re Walker* [1905] 1 Ch. 160.
[6] *Re Sabatini* (1969) 114 So. Jo. 35.
[7] S.I. 1987 No 2024.
[8] *Wrexham v. Huddleston* (1734) 1 Swan 514; *Waters v. Taylor* (1813) 2 Ves. & B. 299 at 303; *Anon* (1856) 2 K. & J. 441 at 447.

disordered person to bind his firm appears to continue, notwithstanding the rule that the insanity of the principal revokes the authority of an agent.[1] If, however, an action for dissolution is pending, the mentally disordered person may be restrained from interfering.[2]

The statutory jurisdiction to decree a dissolution of partnership whenever circumstances have arisen which, in the Court's opinion, render it just and equitable to do so[3] enables the Court to dissolve a partnership where a partner is suffering from such mental disorder as renders dissolution just.

By section 96(1)(*g*) the Court of Protection can dissolve a partnership of which a patient under the Court's jurisdiction is a member. This power will only be exercised where a receiver has been appointed and there are no disputes as to accounts or otherwise under the partnership deeds or articles; the reason is that the Court has no machinery to deal with such disputes.

23.30 Auctions

It is likely that the bids of mentally disordered persons who do not appreciate the transaction they are entering into at an auction are void and cannot be enforced against them.[4] The authorities are old and there are no modern decisions on the matter. However a sale by auction of a patient's property may be made by order of the Court of Protection.[5]

23.31 Tort

If a person is so mentally disordered that his act is involuntary and purely automatic, he has a valid defence to an action in tort, even if it is a tort of strict liability. Thus in *Morris v. Marsden*[6] Stable, J. said: "if a person in a condition of complete automatism inflicted grievous injury, that would not be actionable. In the same way, if a sleepwalker inadvertently, without intention or without carelessness, broke a valuable vase, that would not be actionable."

Where there is a voluntary act—*i.e.*, the mind prompts and directs the act—mental disorder itself does not provide a defence to an action in tort. The question must be put in each individual case—did the mentally disordered person have the requisite state of mind required

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[1] *Yonge v. Toynbee* [1910] 1 K.B. 215.
[2] *J. v. S.* [1894] 3 Ch. 72.
[3] Partnership Act 1890, s. 35(*f*).
[4] *Blackbeard v. Lindigren* (1786) 1 Cox Eg. Cas. 205; *Samuel v. Robinson* (1846) 7 L.T.O. 301, N.P.
[5] See *Heywood & Massey*, pp. 157–159.
[6] [1952] 1 All E.R. 925 at 927.

by the particular tort? If he had the state of mind required for liability than his mental disorder is no defence:

Malice or specific intent—where the tort requires improper purpose or malice (*e.g.*, malicious prosecution or deceit) if the mental disorder prevents him from forming the necessary intent, he will have a valid defence.

Trespass (intentional torts to persons or property; see para. **21.02** *ante*)—this tort requires only that the person intended to use force—*i.e.* "his mind directed the blows which he struck." The principle established in *Morris v. Marsden* is if a mentally disordered person knew the nature and quality of his act he is liable, even if he did not know he was doing wrong. A mentally disordered person who "converts any property under a delusion that he is entitled to it or that it was not property at all" has no defence.[1]

Strict liability—Mental disorder would not provide a defence unless it was so severe as to render the act in question involuntary.

Negligence—There is little judicial guidance concerning the liability of mentally disordered persons in negligence. Minors may not be negligent in situations where an adult would be. The test is what degree of care a minor of a particular age could be expected to take.[2] Clearly a mentally handicapped person or senile person with the same mental age as a child should be judged by the same standard. It is less clear what test would be applied in the case of a mentally ill person. It is suggested that the person would be judged by the degree of care a mentally ill person in his circumstances would be expected to take.

[1] [1952] 1 All E.R. at 927.
[2] *Yachuk v. Oliver Blais, Co. Ltd.* [1949] A.C. 386.

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