

“ADULT INCAPACITY LAW: VISIONS FOR THE FUTURE DRAWN FROM THE UNFINISHED STORY OF A NEW SUBJECT WITH A LONG HISTORY”

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ABSTRACT

In 1961 Adrian Ward was one of the first intake for the first full-time law degree in Scotland. He was enrolled as a solicitor in 1967 and practised for approximately 50 years. From 1976 he was gradually drawn into the subject of what is now known (in Scotland) as adult incapacity law, in which he became a national and then international expert. As his interest and involvement developed, so did the subject. However, although it is still a new subject, its history in law goes back to Roman law, and concepts from Roman law were central to leading cases in the development of the subject in which Adrian was involved. Attempts to protect the human rights of defined groups go back in Scotland to the 7th century, but there is fundamental conflict between the concept of universality of human rights, and according particular rights to defined groups. Violations of human rights often start with putting people into categories seen as “other”. A deliberately personalised lecture confronted the audience with personally witnessed human rights violations. Of the concepts defined in the UN Convention on the Rights of Persons with Disabilities, “reasonable accommodation”, though it attracts more attention, is always second-best to non-discriminatory solutions offered by “universal design”. Human rights must be translated into law, and law into practice. Existing law should be understood, used to maximum effect, and then if necessary improved. Measures for the exercise of legal capacity can be categorised as voluntary, involuntary, and third party, but need to recognise the reality that “capability” and “incapability” are the extreme ends of a wide spectrum. Such variations, and individual progressions through them, must be accommodated in general provision and in individual measures. Fundamental concepts of human rights and their progressive developments have driven progress to date, and enabled probable future trends to be identified.

Keywords: capacity; law reform; human rights; legal history.

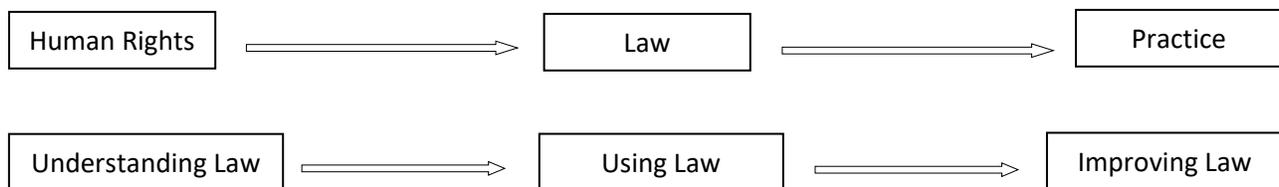
My subject today is “Adult incapacity law: visions for the future drawn from the unfinished story of a new subject with a long history”.

In over 43 years since I first lectured on this subject, this will be different. It will be personalised, and not sanitised. I shall try to encapsulate where we are, and where we are going, from the intersections of long perspectives over time, and broad perspectives geographically.

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It is a great honour that those intersections bring me right now to Edinburgh Napier University, at an event created and hosted by the Centre for Mental Health and Capacity Law. In my first significant conversation with Jill Stavert, I said that Scotland needed such a Centre, and Jill replied by telling me of her aim to establish one. I pay tribute to her huge achievement in creating and continuing to develop this Centre. And I thank her for providing the opportunity for this lecture.

I start with these two themes. First, the converging sequence of human rights translating into law, and law translating into practice, towards making theoretical rights real for individual people who need them most. Lauterpacht wrote that “the basic unit of all law is the individual human being”¹. Second, for us lawyers, is the sequence of understanding the law, using the law, and improving the law, towards that same objective.



Starting with fundamental human rights, a former synagogue in Prague has an exhibition of drawings made by children in Treblinka Concentration Camp, with personal details of each child artist, including their dates of death – mostly in October 1944, and some on the very day on which I was born. Those times produced the first formulations of fundamental human rights which continue to apply. Article 1 of the United Nations Universal Declaration of Human Rights of 1948 reads as follows:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and **SHOULD** act towards one another in a spirit of brotherhood.” (Emphasis added.)

That word “should” identifies a tension between what as a species we may do, and what “reason and conscience” tell us we should do. We are a contradictory species, capable both of great compassion, and of great cruelty. While we are comfortably together here, extreme violations of human rights are happening somewhere in the world, right now.

A psychiatrist, recently returned from counselling victims of such atrocities, had terrible stories to tell. He was asked: “What sort of people can behave like that?”. He told me: “The worst thing of all is that they are people just like you and me”.

Both the UN Declaration of 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms, drafted two years later, point to another long-standing theme, that of discrimination within anti-discrimination. The anti-discrimination Articles of

¹ “The individual human being”: Hersch Lauterpacht, “The Law of Nations, the Law of Nature, and the Rights of Man” (1943), in *Problems of Peace and War*, ed. British Institute of International and Comparative Law, Transactions of the Grotius Society 29 (Oceana Publications, 1962) 31.

both Conventions give a list of common grounds of discrimination, but neither mentions disability, in both cases relegated to the words “or other status” at the end². The same trend towards discrimination within non-discrimination can be seen in the UN Convention on the Rights of Persons with Disabilities. The key definition in Article 1 of that Convention reads as follows:

“Persons with disabilities **INCLUDE**³ those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” (Emphasis added.)

This strangely non-exclusive definition, and renderings of it limited to the description after the word “include”, has the effect of prioritising people who fit that part of the definition, and thus marginalising those who do not. People with short-term mental and intellectual impairments may well need the protections of the Convention. Also marginalised are people whose cognitive impairments are disabling even when all barriers are removed. They are the very people who most need the protections of the Convention. They should be at the centre of its requirements, not marginalised. Any interpretation of the Convention that has to squeeze them in as “hard cases” is flawed and unacceptable, supporting “discrimination within anti-discrimination”.

Scotland’s world-leading record in our subject includes recognition and protection of fundamental human rights going far further back than my lifetime. Over 14 centuries ago Adamnan’s “Law of the Innocents” protected children and others in time of war, with specified penalties and enforcement mechanism⁴. Sadly, breaches of that principle continue to this day, as do wider breaches of the fundamental rights of children, including in particular children with disabilities. As a boy in the 1950s, in the village where I still live, we were aware of the large house in the woods full of such children. It was several years later as a member of the Local Health Council that I first saw inside it. What I saw was shocking. When such establishments became subject to educational inspection for the first time, an experienced and hard-bitten Inspector of Schools told me how – after his first visit – he sat in his car, and wept.

We may have moved on, but efforts to place children more appropriately have led to other issues, such as children with disabilities placed far away from home areas and families, often cross-border. Such a case is currently before the Court of Session. In the case of young people aged over 16, this focuses a particular aspect of the more general scandal that Scotland was the first country in the world in which the Hague Convention 35 on the

² United Nations Universal Declaration of Human Rights 1948, Article 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ...”

³ My emphasis.

⁴ Cain Adamnan, 697 AD, a “perpetual law on behalf of clerics and women and children” protecting them in time of war, acceded to by over 50 “kings”, enforced through judges appointed specifically for the purpose. A heavy fine was imposed upon “whoever wounds or slays an innocent child under the ordinance of Adamnan’s law”, with the same fine “for him who commits the deed and for him who sees it and does not save to the best of his ability”; and “if there is negligence or ignorance, half the fine for it”.

International Protection of Adults was ratified, but it has still not been ratified in respect of England & Wales.

More serious breaches of the human rights of children persisted longer in other parts of our own continent. On my very first visit to the former Soviet Union following its breakup, I learned how in a low wage, high employment economy parents of children with disabilities were under huge pressure to surrender them into institutional care. The alternative, which some bravely adopted, was to conceal such children within their own homes. On that very first visit I stayed in such houses. I also met two young doctors whose dream was to create a school and day centre for such children, enabling them to continue to live with their own families. Cutting a long story short, we worked together, converting the dream to reality, a reality which became an example for the region, and which continues to thrive⁵.

But what of children already in institutional care? Eventually that project began to take them out, but in one of those early visits one of those doctors took me to such a place. The most disabled children were accommodated not on the ground floor, with easiest access to the grounds, but on the top floor, furthest from human view. They were held in cage-like cots. They were so starved of human contact that, if you went close, they hurled themselves at you – if they could. Some soft toys gifted from the west were pinned high on the wall as ornaments. At mealtimes they were lifted out of their cots and placed around a large bowl of food for which they sometimes fought. Annual mortality rate was 8%. My guide looked me straight in the eye and said: “the cause of death is usually certified as pneumonia”.

Of course, violations of the basic human rights of adults as well as children also continued long after the fundamental Conventions. One of those young doctors shuddered as we walked down the street. “Are you alright?” “It’s that building.” It was the former KGB headquarters. Her father was a quiet and decent man. I had been a guest in their house. She told me that he had been held here and continuously tortured for 18 months, before he and his parents were deported to Siberia. Similarly, with other hosts in another country, I was shown the yard behind a building where a lorry was parked with its engine running all night – to try to drown out the screams of people being tortured.

A first-hand example, one among many, was the “social institution” seen during one of my WHO visits, where the director entertained our team lavishly to lunch. When he escorted us around, I noticed female residents visibly shrinking from his presence. I also noticed that he steered us away from one particular building. We persisted in wanting to see inside. After a pantomime that no-one could find the key, we gained admission to what I can only call a hellhole, crammed with men with no activity or stimulation of any nature, dominated by the stink of the malfunctioning toilet.

I tell you these personalised examples to dispel any feeling that serious human rights violations can be depersonalised as distant in time or space. We slide towards them whenever people become defined by characteristics and put into categories. They become “other”,

⁵ Tartu Maarja Kool, Tartu, Estonia, see www.maarja.tartu.ee.

depersonalised, in perception if not in language “Untermenschen”, be they people defined by colour, gender, status as immigrants or refugees, or people with disabilities. They are placed outside the scope of normal human compassion.

Such depersonalisation is constantly to be found, in some degree or other; and generally in gradually increasing degrees when politics move further to the right or to the left or in both directions, as is happening in the United Kingdom currently. We have seen the consequences of such slides in other places and in other times. We enjoy no automatic immunity. The situations that keep our Equality and Human Rights Commission busy are worrying both in themselves and in their implications. To characterise as perpetrators hard-pressed front-line staff doing their best with hopelessly restricted resources is often unfair. We have to look to those who impose constraints and create cultures.

On 18th July 2019 the Supreme Court finally determined the case of *MM*⁶ about personal independence payments. For *MM*, the difference between requiring “prompting” or “social support” was the difference between qualifying for PIP and not. He was successful all the way from the Upper Tribunal through the Court of Session to the Supreme Court. The Secretary of State for Work and Pensions not only challenged his entitlement in successive appeals, but even although the case was said to be concerned with a general point of statutory interpretation, *MM* was deprived of the payments which he ought to have received for some four years from when he first applied for them. I would say quite firmly that no adequately civilised regime would have deprived a disabled person of such prospective entitlement while battling on a point of law, for that length of time. But we live in a society where – according to the press last week – a person who admits to having said of benefits claimants that “these people need putting down” is deemed to be a suitable parliamentary candidate for one of our major parties⁷.

However, attempts to respond to such categorisation and depersonalisation lead to a contradiction. The essence of human rights is universality: they apply to every human being on our planet by virtue of being a human being. They have been created to counteract risks of denial of those rights to people categorised as “other”. But if we try to define particular categories, giving them enhanced protection, do we not strengthen that concept of otherness? By putting definitional boundaries around those categories, do we exclude some people who need those protections? Do we risk treating included people as units within a special category, rather than as individuals in all their variety, risking discrimination within anti-discrimination?

Protection of special categories is as old as the concept of human rights, as my example of the law of Adamnan shows. But many key provisions of the Universal Declaration begin “Everyone ...” or “No-one ...”. Do we need more than emphasise that everyone means everyone and no-one means no-one? Do we need a Disability Convention or other special Conventions?

⁶ *Secretary of State for Work and Pensions v MM* [2019] UKSC 34. *MM* claimed PIP on 25th February 2015. The Supreme Court decision was issued on 18th July 2019.

⁷ The Times, November 5th 2019, page 8.

Accepting that we do have that Convention, that concern is exemplified by the definition of disability that I have already quoted. It also leads to a further contradiction, exemplified by the definition of discrimination on the basis of disability in Article 2 of the Disability Convention as:

“any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.”

To apply a “reasonable accommodation” to some people with some disabilities in some circumstances, albeit with the best of intentions, is discriminatory. I much prefer the concept of “universal design”, which is inclusive. Its use in the law and legal processes is seriously under-developed. To take simple examples, if some witnesses are permitted to sit while giving evidence while others stand, the feeling of differentiation can cause them to be less confident, and for that to be communicated as less certainty about what they are saying. Why doesn’t everyone sit down, including those questioning them? Even at the beginning of their evidence, does the formulation “raise your right hand and repeat after me” add veracity to the following evidence, and accordingly do people who cannot raise their right hand, or do not have one, automatically contribute less veracity?

Just a week ago the press reported a relaxation in the Court of Session, allowing judges and counsel to appear without the customary court dress – but only in hearings not involving giving evidence⁸. One would prefer to have seen evidence-based assessment of the advantages and disadvantages of wearing, or not wearing, court dress when litigants and witnesses are present, including persons with disabilities or other vulnerabilities.

More generally, as demonstrated in the paper “Access to justice for people with disabilities”⁹ by Dr Polona Curk, a psychologist with Essex Autonomy Project, and me of August 2018, the Equal Treatment Bench Books both sides of the border are valuable resources, but essentially contradict their titles. Rather than promote equal treatment of people with disabilities, they attempt to mitigate unequal treatment.

Of course, discrimination in the administration of justice takes more serious forms. A major culprit is Scottish Legal Aid Board, refusing to sanction minimum necessary periods of time for solicitors to take instructions and advise when dealing with people with mental health and other issues. To refuse to sanction Legal Aid for clients whose ability to instruct cannot be confirmed on the basis of a maximum of ten minutes on the telephone, even for those with severe difficulties in communicating at all by telephone, is a clearly discriminatory violation of the right to legal advice and representation. I have heard it suggested that this particular practice has stopped, but I am reliably informed by practising solicitors that it has not.

⁸ See Court of Session Practice Note (No. 1 of 2019) “Court dress in Outer House”, dated 31st October 2019, taking effect on 1st December 2019.

⁹ <http://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2018/08/Article-132-paper-.pdf>

Let us move from rights to law and practice, and some long-term trends identifiable from the development of Scots law.

Nowadays we talk about voluntary measures where formerly we called them anticipatory measures; involuntary measures where formerly we called them responsive measures; and third party measures. Let us run through the history of principal measures in the involuntary and voluntary categories taking us to where we now are.

In relation to involuntary measures, please look at Diagram A¹⁰. One theme is shifting terminology, to which I shall return. Another more seriously problematical one is the importation of child law to be applied to adults with disabilities. This takes us to a long-running and fundamental tension between doing what is "easy and certain" and what is "more difficult and less certain".

What is easy and certain? It is easy and certain to divide adult humanity into people deemed to be fully capable and responsible, and those deemed to be completely incapable and incapacitated. All juridical acts by the former are valid and binding. All juridical acts by the latter are void. Once this simple categorisation has been established, it is easy and certain to put people into the incapable category upon medical diagnosis of a defined relevant disability, without further enquiry into the effects of that disability. And once that category has been created, the easy option is to apply to people within that category the existing ready-made and well understood law applicable to young children.

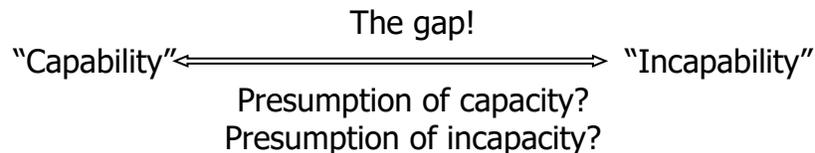
Thus, as we can see from Diagram A, a statute of 1585 imported the Roman law of children and applied it to adults with cognitive impairments. In 1913 the existing law of children was used to create a form of statutory guardianship for adults.

What is wrong with the easy and certain option? It is fundamentally discriminatory to place any adults, however disabled or frail and elderly, into a category of quasi-children and to deprive them of some of the basic rights held by all other adults¹¹. That violates the primary concept that human rights attach to every human being on our planet. Adults, however disabled or elderly, are not "big children". It is inappropriate to apply to any adults traditional concepts of child law, such as "best interests" tests and plenary, incapacitating guardianship. Relevant disabilities do not eliminate the rights of every adult to exercise autonomy and self-determination. Indeed, if capabilities are limited, the exercise of autonomy and self-determination as far as possible, if necessary with appropriate support, becomes even more important.

¹⁰ Appended to this paper.

¹¹ Scottish Law Commission Report No 151 on Incapable Adults, September 1995, Paragraph 2.50: "*Our general principles do not rely on the concept of best interests of the incapable adult ... 'best interests' does not give due weight to the views of the adult, particularly to wishes and feelings which he or she had expressed while capable of doing so. The concept of best interests was developed in the context of child law ... We think it is wrong to equate such adults with children, and for that reason would avoid extending child law concepts to them. ...*"

This leads to an even more basic objection to the “easy and certain” option. It has never coincided with reality. Concepts of total capability and total incapability are the extremes, probably fictional extremes, bracketing a huge range of variable capabilities in between. At one extreme, it is doubtful whether anyone is so robust that they could never need any form of support or protection. At the other extreme, complete incapability, and with it the connotation of lack of any individuality as a person, is most certainly a fiction. I call the space between those extremes “the gap”. Where in theory “the gap” should be filled by a presumption of capacity, in practice it is often filled by a presumption of incapacity.



Let us now follow the history of voluntary measures, leading us to confront that same gap. Nowadays the most common voluntary measure is the power of attorney, but until 1990 it was believed in many quarters that the authority of the attorney automatically ceased if the granter lost relevant capacity. My clients complained “you give us an umbrella, then take it away when it starts to rain”. In 1990 we went by statute to the opposite extreme¹². All powers of attorney were assumed to continue in force following impairment of relevant capacity, unless the document explicitly stated otherwise: with no controls or safeguards either at time of granting or during operation. Hence the elderly gentleman who was admitted to hospital and in quick succession granted three powers of attorney in favour of three different relatives. Since 2nd April 2001 we have had the safeguards at time of granting, and during operation, contained in the Adults with Incapacity (Scotland) Act 2000¹³. However, at first sight the language of that Act inhabits the binary world of capability or incapability, ignoring the gap between. Thus, both sections 15 and 16 refer to “the event of the granter’s becoming incapable in relation to decisions about the matter to which the power of attorney relates”, with a similar formulation in section 18. The same binary approach appears in the definition of a continuing power of attorney in Principle 2.1 of Council of Europe Recommendation (2009)¹¹ on principles concerning continuing powers of attorney and advance directives for incapacity, as:

“a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter’s incapacity.”

We should note at this point the long-running commitment of Council of Europe to preferring voluntary measures over involuntary measures, and generally supporting the principles of autonomy and self-determination. Principle 7 of Recommendation (1999)⁴ on principles concerning the legal protection of incapable adults reads:

“Consideration should be given to the need to provide for, and regulate, legal arrangements which a person who is still capable can take to provide for any subsequent incapacity.”

¹² Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s71.

¹³ See Part 2 of the 2000 Act, which entered into force on 2nd April 2001.

Principle 1 of the 2009 Recommendation reads:

- “1. States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.
2. In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other methods of protection.”

Principle 14 of Recommendation 2014(2) on the promotion of human rights of older persons reads:

“Member States should provide for legislation which allows older persons to regulate their affairs in the event that they are unable to express their instructions at a later stage.”

Unlike the earlier Recommendations, Recommendation 2014(2) also introduces the right to support.

Principle 13 declares that:

“Older persons have the right to receive appropriate support in taking their decisions and exercising their legal capacity when they feel the need for it, including by appointing a trusted third party of their own choice to help with their decisions. This appointed party should support the older person on his or her request and in conformity with his or her will and preferences.”

Having approached the gap from various angles, let us rewind and follow another thread of my remit today, which is to trace briefly some aspects of my own experience, and the developments in which I have been involved, through to date, before concluding with my thoughts as to where all of these trends have taken us, and where I believe they will take us out into the future.

In 1961 I was part of the intake for Scotland’s first ever full-time law degrees, offered as first degrees. At that time no coherent subject of incapacity law, under any title, existed. That was still the case in 1976 when a friend who was an educational psychologist asked me to address a group of parents of children with learning disabilities who wanted to know about their children’s status in law then, and once they became adults. I said that I knew nothing about that subject. My friend said that they could not find any lawyer who did, so could I try to put together a talk for those parents. As a favour to a friend, I did so, thinking no more about it until a second group asked me to do the same. The vacuum quickly sucked me in. By 1984, Enable (then the Scottish Society for the Mentally Handicapped) asked me to write a book¹⁴ encapsulating the topic, so I did, thinking that they could sell the book and I could regain my evenings.

Demand doubled, particularly because at that time Scots law was in some respects beginning to progress beyond black and white concepts of total incapacity derived from a diagnosis. That had started with the abolition in the Education (Scotland) Acts 1980 and 1981 of the concept that some children were ineducable, replacing that with the concept of special

¹⁴ Ward “Scots Law and the Mentally Handicapped”, SSMH, 1984.

educational needs and the requirement for a record of needs setting out an individualised assessment and package of provision. Next, anticipating by several years the Disability Convention and published views of the UN Committee on the Rights of Persons with Disabilities, came the abolition of plenary disqualifying guardianship in personal welfare matters, which applied in all cases where any guardianship was required. Abolition came in the Mental Health (Scotland) (Amendment) Act of 1983, consolidated into the Mental Health (Scotland) Act 1984. The preceding regime, dating from 1913¹⁵, was linked to the process of institutionalisation under the Lunacy Acts, starting in 1857. It was directed at remedying the perceived “lasting injury to the community” resulting from the presence of people with learning disabilities “at large in the population”. It was a regime under which they should be “placed” in institutions or in guardianship.

The statutory guardianship introduced in 1984 conferred fixed and limited powers designed “as a means of ensuring that some mentally disordered people living in the community received the protection and support they require”. There were already trends internationally towards creating limited guardianship along the same lines as the reforms to our education law, assessing individual need and creating an individual package of provision. That was the context in which I also researched the history of the subject, encapsulated in the diagram that I have shown you, based on a diagram down to 1990 included in my book of that year “The Power to Act”¹⁶.

I was in the midst of these researches when along came the parents of Simon Morris¹⁷. Simon had recently attained majority. He still needed the support of his parents in many matters, including encouragement towards independence and making his own decisions. His parents were hampered by lack of recognition of their role, and also felt that they should not be playing such a role without some legal authority. They had studied my 1984 book, including the “comments and suggestions” in the last chapter. My researches told me that although procedure to appoint tutors-dative to adults had fallen into disuse, they had never been abolished, and indeed in 1923 there had been an isolated case of appointment with powers limited to personal welfare matters. So in 1986 we petitioned the Court of Session to revive the procedure, to do so in accordance with modern perceptions and principles, and to meet what was expressly observed as Simon’s needs for support with an appointment with powers limited to those shown by medical certificates to be necessary, and time-limited to ensure review. The petition was granted¹⁸. The concept was increasingly used, and increasingly refined and developed, throughout the period from then until Part 6 of the Incapacity Act came into force on 1st April 2002. Some appointments covered specific self-contained decision-making, for example in medical matters, foreshadowing intervention orders.

¹⁵ Mental Deficiency and Lunacy (Scotland) Act 1913.

¹⁶ Ward “The Power to Act”, SSMH, 1990.

¹⁷ Where I use real names in this paper, they are already in the public domain and/or I have permission to use them.

¹⁸ *Morris, Petitioner* (unreported) 1986 – see Ward, “Revival of Tutors-Dative”, 1987 SLT (News) 69: Revival of tutors-dative to adults.

However, tutors-dative were appointed only in personal welfare matters. Until 2002 we still had curators bonis acting in property and financial matters, again under a regime which completely disqualified the adult if such an appointment were made. The human rights violations (as we would now describe them) of that regime were multiple, and I sought to describe them in my 1990 book. Then along came Eileen Britton with her parents. As a youngster, Eileen had been brain-injured by a hit and run driver. Substantial damages had been awarded. By the time that I met the family, they were administered by a curator bonis. The family had been advised by a welfare rights officer to see a lawyer because the income allowed to Eileen by her curator was less than if she had never received the damages, and had been dependent upon state benefits. In the memorable words of her father: "Mr Ward, we are just ordinary working class people, but this does not seem right. Can you help us?" In my efforts to persuade the curator bonis to change his policies, I was a complete failure. When I went to see him, before my bottom even touched the chair, he had pronounced: "The family know that Eileen has money. They want to get their hands on it. It's as simple as that." To try to get the conversation going, I mentioned Eileen's desire to try typing. She might never be the world's best typist, but she wanted to try, and could easily afford a typewriter. Had she never said this to the curator? I then learned that he had never met her. He would neither budge nor resign.

However, curator bonis procedure was not devised by the legislature. It was invented by the courts, and thereafter regulated, initially by an Act of Sederunt of 1730¹⁹. Curators bonis had in practice replaced appointment of tutors-at-law, because that procedure came to be regarded as "very absurd, very cumbrous, and very expensive". Such words would never apply to any modern procedure, would they? Curators bonis were originally introduced as a temporary measure pending service of a tutor-at-law. Tutors-at-law trumped curators bonis. Back we went to the Court of Session. The curator bonis opposed. The family won²⁰. Eileen's father became her tutor-at-law. He always felt that it was unfair that this ancient procedure did not recognise the role of Eileen's mother. After he had become a guardian under the transitional provisions of the Incapacity Act, she was appointed as additional joint guardian. They applied their role inventively. Eileen deserved greater independence, but still required support. The family lived in the ground floor of a four-in-a-block building. The house above theirs became vacant. Through her guardians, Eileen bought it. It was marvelous for me to experience the pride with which she admitted me after I had rung the bell, invited me in, and showed me round. Unfortunately, her life was bracketed at both ends with tragedy. She succumbed to breast cancer at a very young age. Sitting quietly at the back of the church at her funeral, I reflected on how the true heroes of the development of our law were these and many other families, motivated by a basic sense of injustice and challenging our profession to deliver justice.

That case, unlike *Morris*, is in the law reports. It was decided in 1992. Back in 1986 I had proposed to Scottish Law Commission a coordinated review and reform of both mental health and incapacity law. Their response was that such a task would be too large, but they could

¹⁹ Act of Sederunt 1730, see also Judicial Factors Acts 1849, 1880 and 1889.

²⁰ *Britton v Britton's Curator Bonis*, 1992 SCLR 947.

take on incapacity law. I was recruited on a temporary, part-time basis to the Commission as an external expert. What is now essentially our Incapacity Act appeared as a draft Bill annexed to the Commission's 1995 Report on Incapable Adults. That same collective sense of injustice carried through to the campaign for enactment. I had the great honour to be recruited as principal spokesperson for the campaign. In the run-up to the first elections for the Scottish Parliament, I went to all the party conferences and secured the commitment of every party to support the legislation. I then had the unique experience for any lawyer of accompanying the first major legislation through a brand-new Parliament.

The Incapacity Act completed the shift from what I term old law to new law. Old law was characterised by fixed provision, often complete incapacitation, based on diagnosis. New law sought to provide an individualised package of provision based on assessment. I prepared Diagram B²¹ twenty years ago to encapsulate the basic structure of the Act. It speaks for itself.

Before that, other things had happened. As to service provision, various involvements included the founder chairmanship in 1978 of Renfrew District Association for Mental Health, subsequently renamed RAMH – "Recovery Across Mental Health". From 1992 to 1997 I chaired successive NHS Trusts with an expanding remit covering learning disability, mental health and community services, and services for the elderly, in what was then the central region of Scotland. That included responsibility for the Royal Scottish National Hospital, which only shortly beforehand had been severely criticised by the Mental Welfare Commission for overcrowding to the extent that some residents could only reach their own beds by climbing over others, personal clothing got mixed up and redistributed in the laundry, and there was a lack of general stimulation and appropriate activity. The population was reducing as, in the language of the time, residents were "repatriated" to areas all over Scotland and the north of England. But those considered most difficult were left behind. So, as I can now admit, we broke the rules. We did what an NHS body should not do. We started buying ordinary houses in surrounding communities, registering them voluntarily with the local authority to ensure independent supervision and monitoring of standards, and started moving our residents out into them. I learned much else, beyond the scope of this talk, in those years.

Another development began in an improbable way in 1991. The former Soviet Union had broken up. Many of the constituent nations wanted to enhance their human rights standards with a view to joining the Council of Europe, in many cases as a stepping-stone to membership of the European Union. In their search for accessible material, they had somehow come across my 1984 and 1990 books, written in straightforward language for non-lawyers. My involvement in that whole region thus began, with echoes of the development of my involvement in Scotland. Yet again, I was asked to write a book, this time "A New View", published in 1993 and rapidly translated into five other languages²². That was

²¹ Appended to this paper.

²² Ward "A New View", International League of Societies for the Mentally Handicapped (subsequently "Inclusion International"), 1993 (English-language edition); also published in Czech (1994), Estonian (1995), Russian (1995), Polish (1996) and Lithuanian (1999).

a year after Gordon Ashton and I jointly produced "Mental Handicap and the Law"²³, which we were told was the first textbook to cover the law on a topic for both Scotland and England & Wales. That is certainly what Lord Mackay of Clashfern thought, and he kindly wrote a most generous Foreword.

Across Europe and the former Soviet Union, my travels were generated partly by individual countries, partly by projects funded by the European Union, and also in the mental health sphere by World Health Organisation. Yet again, I myself was on a huge learning curve. Scotland was seen as a world leader in the subject, and also as helpfully straddling both common law and civil law jurisdictions. Later involvements included joint authorship of "The International Protection of Adults"²⁴, contributions to various English and other textbooks, and a particular line of work in relation to voluntary measures – a series of seminars here in Scotland in the 1990s, advising the Nordic nations on the introduction of powers of attorney in 2007, joining the working party to draft Recommendation (2009)11, then more recently reviewing implementation of that Recommendation throughout Europe for Council of Europe.

Let me now pick up some more themes from all of that. Terminology continues to shift, and also to trip us up as soon as we cross borders. Back in 1980, World Health Organisation introduced the International Classification of Impairments, Disabilities and Handicaps²⁵, but we now use "impairment" where that document used "disabilities", and we use "disabilities" in place of "handicaps" to mean the disadvantages encountered in society, including physical structures and the ways in which society is organised.



"Capacity" and "incapacity" have unfortunate dual meanings. In the Disability Convention and associated literature, "capacity" means the holding of rights and status, and exercising these is referred to as "the exercise of legal capacity". Our Incapacity Act defines incapability, meaning factual incapability, and provides that "incapacity shall be construed accordingly"²⁶.

²³ Ashton and Ward "Mental Handicap and the Law", Sweet & Maxwell, 1992.

²⁴ Frimston, Ruck Keene, van Overdijk and Ward "The International Protection of Adults", Oxford University Press, 2015.

²⁵ Geneva, 1980.

²⁶ Adults with Incapacity (Scotland) Act 2000, definition of capacity:

"1. – (6) For the purposes of this Act, and unless the context otherwise requires –
'adult' means a person who has attained the age of 16 years;

'incapable' means incapable of –

- a) acting; or
- b) making decisions; or
- c) communicating decisions; or
- d) understanding decisions; or

As a general piece of advice, where another jurisdiction uses what appears – often in translation – to be terminology with which we are familiar, to a greater or lesser extent it will mean something different.

Such caution may also be necessary in interpreting international instruments. I have three general comments on the interpretation of such instruments, sometimes relevant also to statutory interpretation. Firstly, often overlooked is the difference between principles, whether in human rights instruments or in our own Incapacity Act, and rules of law. Principles, in the famous words of Douglas Bader as once quoted to me by one of our most highly respected sheriffs, “are for the guidance of wise men and the obedience of fools”. Applying them blindly in isolation can produce daft results. If they conflict in particular circumstances, that is not a disaster – they have to be balanced to meet those particular circumstances. Secondly, documents such as the Disability Convention are not targeted exclusively at the laws, practices and experience of any one country. They are drawn from worldwide experience, and often the least satisfactory worldwide experience, of which I have given you a few snippets. Thirdly, documents such as the Disability Convention and comments on it tend to be weighted, even in the disability sphere, in favour of those able to articulate personal experience most loudly, creating hierarchies, so that particular care is needed in relation to the people with whom we as lawyers need to be most greatly concerned, namely those towards the bottom of such hierarchies.

The phrase “rights, will and preferences” features prominently in the Disability Convention and surrounding discussion²⁷. These elements are often at odds with each other. It is often people with relevant disabilities themselves who lead calls for careful balancing of these elements, with no one element automatically overriding the other two. Thus, a group of people with lived experience of compulsory psychiatric intervention agreed with the statement of one of them that “I am glad that when I was ill my right to life was considered more important than my right to autonomy”. A group of people with learning disabilities articulated the need, when will and preferences seemed to be at odds, for someone else to determine what was the overriding will; and even for predictable future will to override currently expressed will. Where there is some confusion between will and preferences, in a recently published article Dr Curk and I argued that there can only be one expression of will in a particular matter at any one time, derived from preferences, sometimes a bundle of preferences which may conflict with each other, and including preferences which reflect the in-built character and background of the individual. We quoted an analysis by Viscount Stair of the stages of will through to commitment, and equated this with the example of online

e) *retaining the memory of decisions,*

.....

'incapacity' shall be construed accordingly."

²⁷ Disability Convention Article 12.4: "*States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests."*

shopping: selecting an item, putting it in the basket, but only committing to purchase upon review of the basket and total cost, and perhaps rejecting some items at that stage²⁸.

A key element of the Scottish Law Commission's 1995 report²⁹, carried forward into the Incapacity Act, was the rejection of a best interests test, appropriate as I have already said to the law of children, and inappropriate for adults. I frankly disagree with precedents which suggest that our benefit principle is the primary principle³⁰. That seems to amount to adopting a best interests test. It is not supported either by our legislation or by the intentions behind it, which give no priority to any principle. If in the modern human rights era any principle should have priority, it is the requirement to take account of the present and past wishes and feelings of the adult³¹, including – in the language of the UN Committee – the best interpretation thereof where necessary³². Prior to the Convention, I had already suggested a methodology for achieving that in the last chapter of my 2003 book "Adult Incapacity", entitled "Constructing Decisions"³³.

It is not my intention to speak in detail about the Three Jurisdictions Report, published well over three years ago by Essex Autonomy Project³⁴. My very first meeting with Wayne Martin of Essex University echoed that first conversation with Jill. We quickly agreed that the Three Jurisdictions Report was needed. So we recruited a core research group, of which the Scottish half included Jill and Alison Hempsey – both here today – and pressed ahead. The main recommendations of our Report remain highly relevant at this point. The rights, will and preferences of the individual must lie at the heart of every regime. There should be attributable duties to ascertain the individual's will and preferences, which should only be overridden if stringent criteria are met. Independent advocacy services should be

²⁸ "Respecting 'will': Viscount Stair and Online Shopping", Ward and Curk (with contributions by People First (Scotland)), 2018 SLT News 123; also published in German translation in *Betreuungsrechtliche Praxis*, 2019 p54.

²⁹ Scottish Law Commission Report No 151 on "Incapable Adults", September 1995. See paragraph 2.50 quoted in footnote 12.

³⁰ Sheriff Principal Stephen on 26th August 2014 in Appeal by *BG in the Application by West Lothian Council*, noted at 2014 GWD 40-730: "This is indeed the core principle namely that it is the welfare of the adult and the benefit to the adult which is the overarching principle. ..."

³¹ Lady Hale in *Aintree University Hospital NHS Foundation Trust v James* ([2013] 3 WLR 1299, [2013] COPLR 492) (Supreme Court): "Insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being."

³² UN Committee on the Rights of Persons with Disabilities ("the UN Committee"), General Comment No 1 (2014) entitled "Article 12: Equal Recognition before the Law", paragraph 21: "Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the 'best interpretation of will and preferences' must replace the 'best interests' determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The 'best interests' principle is not a safeguard which complies with article 12 in relation to adults. The 'will and preferences' paradigm must replace the 'best interests' paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others."

³³ Ward "Adult Incapacity", W Green/Sweet & Maxwell, 2003, Chapter 15: "Constructing Decisions", pp331 *et seq.*

³⁴ "Three Jurisdictions Report: Towards Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation across the UK", Martin *et al*, 6th June 2016, at <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>.

strengthened and adequately funded, and should be focused on enabling people to overcome obstacles³⁵. Obligations to provide support should also be attributable and should encompass support for exercise of legal capacity, not simply for communication.

Let me now conclude by returning to that gap, and looking into the future.

Firstly, far too often the concept of tailored provision is abandoned in practice. If we look at powers of attorney documents or guardianship orders, it is easier to recognise the standard forms of particular firms, than to recognise the characteristics, circumstances and needs of the individual. I have picked up general international evidence of much greater use of fixed and plenary powers than intended in modern legislation. The reasons are to an extent understandable. Let's be sure that power of attorney documents cover every eventuality that may arise. Let's do the same with guardianship orders, to avoid having to go back to court for additional powers.

In the case of guardianship orders, I would suggest that this can best be remedied by a two-step procedure. Let the order include all the powers that might foreseeably be required, though still personalised to the particular person and circumstances. But at time of granting of the order, let the sheriff identify those immediately operable, with a simple procedure to bring other powers into operation when needed – perhaps a form of declaration by the guardian, lodged with the Public Guardian, explaining why a particular power needs to be brought into operation, that the guardian has used reasonable endeavours – specified – to support the adult in dealing with the matters without exercise of formal powers, and that the guardian has duly considered and applied the Act's principles in determining that the power should be exercised. Sheriffs can do this without waiting for amending legislation, using their broad discretionary powers under sections 3(1) and (2) of the 2000 Act. Perhaps in some cases the section 1 principles require them to do so.

In relation to powers of attorney, the gap is already being addressed. First of all, it is absolutely acceptable for powers of attorney to be granted with appropriate support, and the techniques such as using brief and simple language, and where appropriate large print, provided that the safeguards in Article 12.4 of the Disability Convention are applied. Such a style was proposed in my 2003 book³⁶. Adequate provision of legal services must certainly include offering this where appropriate, as a form of support for the exercise of legal capacity.

Addressing the gap in the period following granting involves including provisions for support and for co-decision-making in power of attorney documents.

³⁵ That is to say, obstacles to comprehension or communication, so as to enable exercise of capacity.

³⁶ Ward "Adult Incapacity", W Green/Sweet & Maxwell, 2003, pp 101-102.

Such documents typically contain further provisions. They place an obligation on the person who is supporter, co-decision-maker and attorney to provide the granter with all reasonable support in acting, deciding, formulating the granter's will and preferences, and communicating them⁴⁰. There will often be further express provisions that the overriding purpose of the document as a whole is to facilitate the exercise by the granter of the granter's legal capacity, as far as possible by the granter personally, if necessary with the attorney's support, and failing that – or in the event of doubt – using the co-decision-making arrangements; or, failing all of those alternatives, by the attorney playing the classic role under the 2009 definition of acting and deciding on the granter's behalf, but doing that on the basis of what the attorney reasonably believes the granter would do if capable, and in accordance with all other relevant human rights principles.

In the modern world, and in the context of modern human rights developments⁴¹, in my view it would be a failure to provide adequate legal services not to offer the possibility of including such provisions when advising and taking instructions on preparation of powers of attorney.

As with my previous suggestions, there is no reason why such provisions should not be included in guardianship orders, and they may be necessary to ensure full compliance with the section 1 principles. However, I must acknowledge the uncomfortable presence in the room of a massive mastodon still surviving from ancient times, in terms of development of human rights. That is the procedure for appointment of DWP appointees, conscientiously operated by many, but violating almost all relevant human rights requirements as to both appointment process and effective lack of accountability and supervision, giving rise to constant examples of misuse⁴². Among my failures is a complete failure over very many years to date to have these obvious deficiencies mitigated.

Four final thoughts are these.

Firstly, my work for Council of Europe identified that everywhere the concept of advance directives as a unilateral instrument complementary to powers of attorney, is undeveloped. Provision was included in the Draft Incapable Adults Bill of 1995, but disappeared from our Incapacity Act. It requires to be reinstated.

Secondly, twenty years after the Incapacity Act went through its parliamentary passage, we are in a process of comprehensive reform that is likely to take some time yet to result in updated law. Such updated law will require to be future-proofed. In my view it will require, for example, to take account of likely development of Fintech to enable creation of individual packages for financial management. If they become sufficiently sophisticated, with sufficient

⁴⁰ "The provisions of this paragraph are subject to the proviso that he/she shall have provided all reasonable support to me in acting, in deciding, and in formulating my will and preferences, and in communicating all of these."

⁴¹ Essex Autonomy Project – Three Jurisdictions Report (June 2016): Full potential as instruments of support and for exercise of legal agency of powers of attorney and advance directives should be recognised (Rec. 7).

⁴² Essex Autonomy Project – Three Jurisdictions Report (June 2016): "Legislation should ensure CRPD compliance for all measures relating to the exercise of legal capacity".

input as to a person's priorities, preferences, wishes and circumstances, is there any reason in principle why such a package should not have the same status as a continuing power of attorney? Could it be put in place upon granting of a guardianship order? If sufficiently sophisticated and accurately reflective of the individual, could it be a tool to guide the operation of welfare guardianship?

Thirdly, in my old overhead slides in the 1970s I pointed out that special provision equals discrimination, and protection equals disqualification⁴³. The dilemmas identified then still need much work in the era of the Disability Convention to achieve in practice maximum implementation of the prohibition in Article 5 against discrimination on the basis of disability and of the requirement of Article 12 for recognition of legal capacity in all matters on an equal basis with others, by finding least restrictive and disqualifying ways of providing the protection against exploitation and abuse required by Article 16.

Finally, I return to that contradictory creation of special categories. Currently, every month sees one or more consultations on proposals to address the needs of vulnerable clients or vulnerable consumers⁴⁴. There are as many definitions of vulnerability as there are consultations. All carry the risks that I have described of inappropriate inclusion or exclusion, and of categorisation. To a large extent, it would be better to develop techniques of universal design to ensure general inclusivity.

The same applies even more to legal systems. I have argued the point many times, ever since "A New View" in 1993. Put simply, the individual human being, characterised by Lauterpacht as the basic unit of all law, is depicted in law as the fully capable, fully able and well-resourced person – until recently male person. Laws seek to accommodate everyone else by special exceptions and special provisions. I have argued, and shall continue to argue, for what I now describe as the principle of reversed jurisprudence⁴⁵. All laws should be rigorously tested for maximum possible inclusivity. If some people do not need some of the resulting provisions and protections, that is not a problem. Failure to deliver true equality before the law, in all of our law, is a fundamental problem.

We can take particular pride in the recognition of Scotland's leading role in this subject by the award to us of the World Congress on Adult Capacity from 7th – 9th June 2022⁴⁶. We are by far the smallest country ever to host that event, and shall be only the second European

⁴³ From overhead slides in the 1970s:

- "minimum necessary special provision, accurately related to need"
- "no unnecessary imposition of special provision"
- "special provision = discrimination"
- "protection = disqualification"

⁴⁴ At time of writing, the Mental Health and Disability Committee of the Law Society of Scotland had received thirty such consultation documents since 1st January 2019.

⁴⁵ Lohnig *et al* "Kindesrecht und Elternkonflikt", Giesecking, 2013: see "Children's Rights and Parental Conflict in Great Britain", Ward, pp264-265; see also Ward "A New View", ILSMH, 1993 "Postscript: A Contradiction and a Vision", page 198.

⁴⁶ World Congress on Adult Capacity, WCAC 2022, Edinburgh International Conference Centre, 7th – 9th June 2022.

country to do so after – by then – it will have been held in every inhabited continent except Africa.

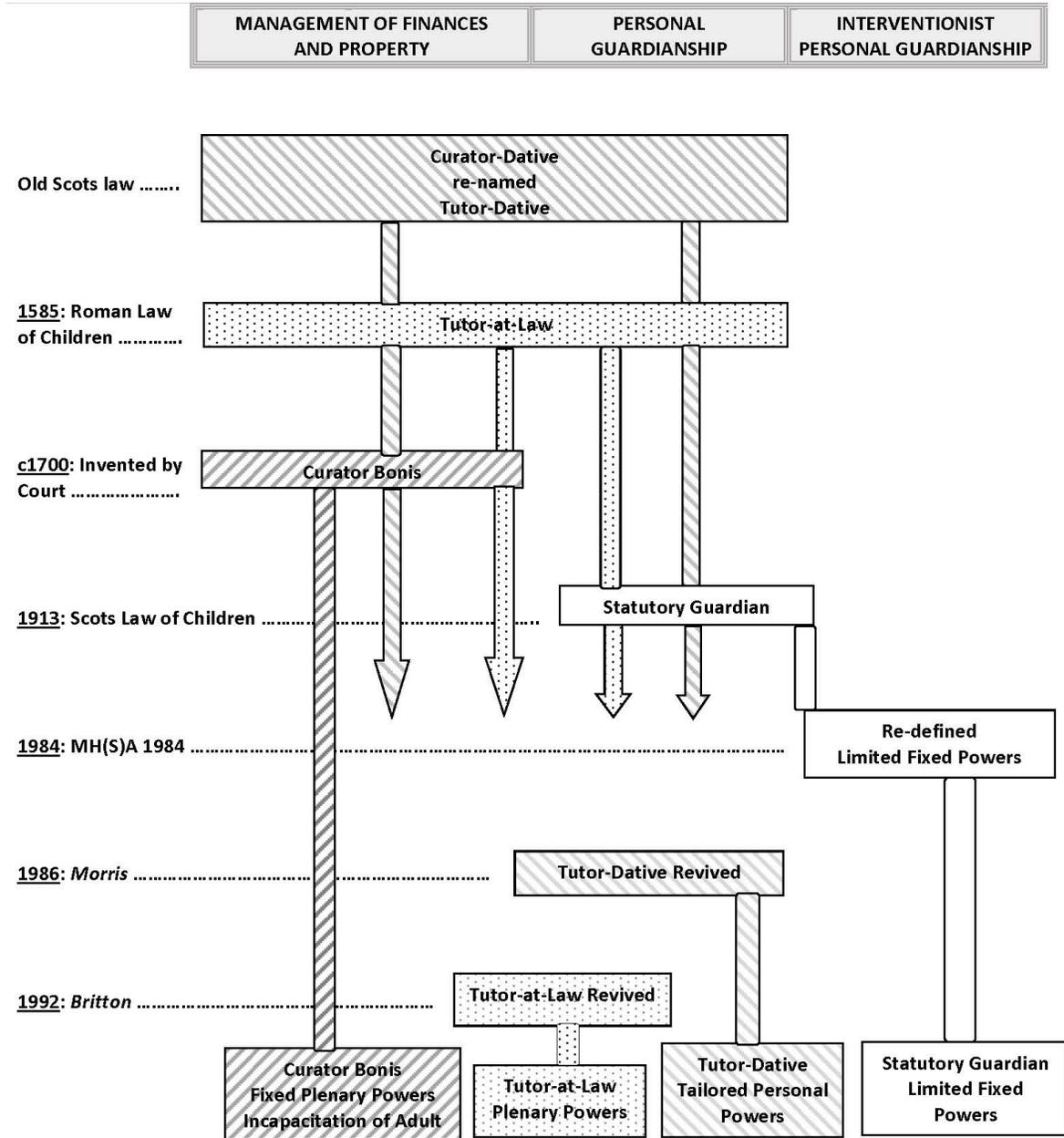
WCAG 2010	Japan
WCAG 2012	Australia
WCAG 2014	USA
WCAG 2016	Germany
WCAG 2018	South Korea
WCAG 2020	Argentina
WCAC 2022	Scotland

Those of you with sharp eyes, if they are still open, will note the shift from “WCAG” to “WCAC”. Hitherto, the title of these Congresses has been “World Congress on Adult Guardianship”. A subsidiary success for Scotland has been to obtain the necessary international board approval to change this, in 2022, to “World Congress on Adult Capacity”. For the people upon whom all such regimes should be centred, the implications have the potential for practical, not merely symbolic, refocusing.

In our whole subject we are in challenging times, with huge potential for better delivery in practice of basic human rights. Despite my rather long personal involvement, I have to say that in many ways we are only beginning.

DIAGRAM A

HISTORICAL SUMMARY – GUARDIANSHIP IN SCOTS LAW TO 2002



From "The Power to Act" (1990) adapted and extended

DIAGRAM B

