Changes to Bereavement and Mental Health Law

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Editor

Bereavement Damages Increased

On 1 January 2008, statutory bereavement damages in England and Wales and Northern Ireland were increased from £10,000 to £11,800 for deaths occurring on or after this date. No doubt convincing statistical data could be produced to justify the increment of £1,800 at this point in time, but it remains a mean sum for a human life extinguished by negligence, gross or otherwise. The group of dependants who qualify for such an award has not been expanded.

Mental Capacity Act 2005 (MCA)

The MCA came into force on 1 October 2007. It replaces Part VII of the Mental Health Act 1983 and states at s 1(2) that a person must be assumed to have capacity unless it is established that he lacks capacity to make a particular decision. Accordingly, a person will not come within the jurisdiction of the new Court of Protection unless an application has been made on his behalf in respect of a specific matter.

The new MCA operates on the basis that the condition of a person who is mentally ill or incapable may be variable and that he/she may be capable of consenting to some transactions and decisions if not all. It requires a person’s capacity to be assessed on a decision and time-specific basis. By contrast, under the 1983 Act people diagnosed as mentally incapable who were patients of the Court of Protection remained under its jurisdiction in respect of all their property and affairs and it became routine practice for the civil court to informally ask for the Master of the Court of Protection’s approval when it was dealing with litigation that involved a patient or before the court approved a final settlement. This practice resulted from guidance given by the Court of Appeal in Re E (Mental Health Patient) [1985] 1 All ER 609 and will cease as agreed by the Civil Procedure Rules Committee.

However, and notwithstanding, Part 21 of the Civil Procedure Rules requires civil courts to approve settlements in civil litigation involving people who lack capacity in order to provide appropriate protection for them and a litigation friend has to be appointed to take charge of proceedings on behalf of any party who lacks capacity to conduct his/her own affairs. A new practice direction supplementing Part 21 has been drafted (see in particular paragraphs 5.6 and 6.5) and amendments made to the paragraphs containing provisions about the seeking of the court’s approval of settlements involving protected parties and investment of those funds (paragraphs 5, 6, 8, 10).

In this issue Dr Brendan Kelly considers the wretched lot of the mentally ill, incapable and destitute poor who lived in Ireland during the nineteenth century and how governments and the law of the day dealt with them. Why did their numbers apparently increase with dismaying and disproportionate rapidity when compared with statistics for England? From dying in the street “with their rights on” they soon over filled the public and private asylums built around the
country from which they were decanted to and from “houses of industry” (workhouses) and prisons and criminal asylums. Are there any lessons to be learned from this and the tensions between the law, administrators and doctors in charge?