



McGill Centre for Human
Rights and Legal Pluralism

Centre sur les droits de la personne
et le pluralisme juridique de McGill

SEMINAR SERIES

GLOBAL PERSPECTIVES ON DISABILITY, HUMAN RIGHTS AND ACCESSING JUSTICE 2013-14

Mental Health Disabilities & Access to Justice: Recognizing & Reinforcing Capacity

November 6, 2013

Moderator:

Derek Jones (CHRLP & Research Group on Health and Law)

Resource Persons:

Robert Dinerstein (Professor, American University Washington College of Law)

Emily Hazlett (Law Student Intern, Disability Rights International & BCL/LLB Student, McGill University, Faculty of Law)

Eliza Bateman (LLM Student, McGill University, Faculty of Law)

Organized by:

Centre for Human Rights and Legal Pluralism

McGill Human Rights Working Group – Disability and the Law Portfolio

Summary of Seminar

This seminar explored international perspectives on the intersection of disability, mental health, legal capacity and access to justice. Recent decades have witnessed an evolution in the understanding between life circumstances, mental health, human rights and involvement with the law. Yet people with mental illnesses face significant obstacles in protecting their basic civil rights. The UN Convention on the Rights of Persons with Disabilities (CRPD) has advanced debate, thought and policy on mental illness and legal capacity. Its articulation of the legal capacity of persons with disabilities “on an equal basis with others” has important implications for legal and non-legal issues at the nexus of mental disability, human rights and access to justice.

Moderator Derek Jones began the session with thoughts on historic revolutions or “paradigm shifts” in decision-making rights and duties on capacity in health and disability law: in medical treatment decisions, from a doctor-knows-best” to a patient-centered standard of informed consent; in mental health law, from presumptions of global incompetence to a legal presumption of decisional capacity of those with mental conditions; and now in disability law from traditional guardianship to supported decision-making. All three revolutions are incomplete and imperfect. All reject paternalism to embrace autonomy, respect for the person and shared decision-making powers. He noted that today’s speakers profile dimensions and experiences on legal capacity in three countries: the US, Guatemala and Australia.

American University Professor of Law Robert Dinerstein began by discussing the promise and challenges of Article 12 of the CRPD's "paradigm shift" from guardianship towards "supported decision-making" models of capacity. He compared supported decision-making with the "all-or-nothing" approaches that hold that if a person cannot make a decision in a specific aspect of his or her life, that person is thought incapable of making any decisions at all. He described such guardianship as akin to a "civil death", especially plenary guardianship approaches that strip individuals of central civic rights in areas like entering into contracts, getting married, voting, or making healthcare decisions. Even if the limits and dysfunctions of such models have been critiqued in the literature and rejected in the CRPD, the guardianship model remains prominent in US and international cases and in his legal clinic. He contrasted such guardianship with supported decision-making, which he described as "a series of relationships, practices, agreements of more or less formality, to assist a person to make decisions that are key to the person's life." Professor Dinerstein said that while supported decision-making has been little used in cases in the United States, he feels that the country is at a tipping point and the move to supported decision-making will likely become more pronounced.

Emily Hazlett discussed her human rights intern experience working for Disability Rights International (DRI), an organization that works with vulnerable, typically institutionalized people. She focused her comments on the effects of a loss of legal capacity. With the loss of legal capacity comes the loss of legal rights, most notably the loss of liberty. She spoke about this idea in relation to her experience with the Federico Mora psychiatric hospital in Guatemala City, Guatemala. As the only publically funded psychiatric hospital in Guatemala, the conditions at the hospital are dire. Ms. Hazlett critiqued that the requirement to exhaust domestic remedies prior to going the Inter-American Court of Human Rights, because it is hard to exhaust domestic remedies if an individual lacks legal standing in the first place due to presumed legal incapacity.

Eliza Bateman discussed ongoing trends and her insights from working for Victoria Legal Aid in Australia. In her legal practice, she represented individuals in guardianship cases and also did advocacy work for individuals with disabilities. She focused her discussion on a recent paper by the Victorian Office of the Public Advocate, which was a reading resource for the seminar. She discussed how the paper posited the supported decision-making model as the preferred paradigm, which was significant given that the paper was published by a government agency. However, Ms. Bateman noted that in Victoria the dominant model is still substituted decision-making, not supported decision-making. In contrast, she indicated that the Australian Government is in the process of rolling out a new disability law framework, which is intended to take a holistic supported decision-making rather than piecemeal approach to disability law issues.

When the floor opened for discussion, seminar participants raised diverse issues: the relation between incapacity in civil and criminal matters; ongoing developments in Quebec and historic reforms for supported decision-making in BC; the role of the CRPD in courts and whether its standards impose duties for systemic legal and non-legal reforms; training needs and models; supported autonomy, substitute judgment and best interest standards of decision-making; and the tension between affirming the autonomy of people with disabilities and making or supporting decisions that have the welfare of the person as the key focus. Professor Dinerstein concluded the session with a comment: that as we move away from a system that over-emphasizes paternalism, perhaps we will need to accept some of the risks inherent in freedom.