Debt and Mental Health in Scotland

Alan McIntosh considers the issues of debt and mental health in the context of the Scottish legal system.

Recent research carried out by the Scottish Association of Mental Health into the effects the credit crunch is having on people's mental wellbeing found that those affected were eight times more likely to have sought help for the first time than those that had not[i].

This problem is not particularly Scottish, but for advisers working in money advice, it is important to understand that the laws that deal with debt and mental health are.

This article examines the law in Scotland and the issues money advisers are required to consider. These ranges from advisers dealing with clients, who lack the capacity to act, give instructions and understand advice; to those who are able to manage their affairs, receive advice and enter agreements, but require alternative arrangements to access advice. It also examines the protections available that can mitigate and avoid any unduly harsh effects resulting from the legal enforcement of debt.

Capacity to act

In Scotland there is a common law presumption of capacity. This allows advisers working with clients to presume that they have full contractual capacity. Such presumptions can, however, be rebutted: the burden of proof resting on those who wish to rely on the rebuttal.

Box Begins

"There is no all-purpose test for incapacity. The test depends on the decision to be taken…or task to be done. The principle of least restrictive alternatives and maximising the person's capacity underline the importance of not making blanket assessments of incapacity and recognising any residual capacity an adult has"
Hilary Patrick, et al, Mental Health, Incapacity and the Law in Scotland, Tottel Publishing 2006

Box Ends

Whether someone lacks capacity is not usually an absolute and likely to be a matter of degree. The definition of incapacity in Scotland, in relation to when a person cannot make decisions on their own behalf is contained in the Adults with Incapacity (Scotland) Act 2000. It defines incapacity as when a person is incapable of

(a) acting; or
(b) making decisions; or
(c) communicating decisions; or
(d) understanding decisions; or
(e) retaining memory of decisions

by reason of mental disorder.

The Scottish Government has produced guidance for social work and health care staff and other professionals in how to assess capacity under the Act and enable decision making[ii]. It defines capacity as:

> **"…the ability to understand information relevant to a decision and to appreciate the reasonably foreseeable consequences of taking or not taking that action or decision"[iii].**

The guidance provides chapters on supporting decision making, assessing a client's capacity to deal with property and money matters and how to work with six major groups of people who may have impaired capacity and cannot make some or all decisions for themselves. Appendix 1 also provides sample questions that can be used to assess a client's capacity to deal with money and property matters.

Box begins

Six major groups who may have impaired capacity to act or make some or all decisions for themselves:

- **People with neurological conditions;**
- **People with dementia;**
- **People with leaning disability:**
- **People with a severe or chronic mental illness;**
- **People with alcohol related brain injury;**
- **People affected by a sever stroke**

Box Ends

Communication

In assessing capacity the first thing an adviser has to consider is whether it is possible to communicate with the client. The Act does state that no-one should be deemed to be incapacitated simply as they lack or have a deficiency in a faculty of communication, if that lack or deficiency can be made good by human or mechanical aid. Where the inability to communicate is chronic, however, this can be grounds for incapacity even if a client can make a decision, as they may not be able to communicate it.

The first step in assessing capacity, therefore, must be in assessing the client's ability to communicate and in exploring other possible methods of communication with the client. This may mean involving others such as family members or support workers who know the client and can possibly communicate with them or by using other means of communication, such as pictorial diagrams, sign language or writing.

There is an underlying principle in the Act that where possible all reasonable steps should be taken to maximize a client's capacity and assist them to act on their own behalf. Advisers should, therefore, try to support clients by enabling them to communicate, possibly through the use of advocacy services or family members or conducting interviews over several short sessions, with regular intervals in an

environment which makes the client more comfortable and avoids the use of technical and legal jargon.

Decision Making

It is not enough that clients should be able to communicate, it is also vital that they can understand the choices they are being presented with and make decisions. The guidance identifies two strands in a client's ability to understand: the first being the client's ability to understand the facts; the second being the ability to weigh up the options and foresee the different outcomes and possible consequences of one choice over another.

Understanding the facts in relation to money advice means a client understanding and having an awareness of their own personal and financial circumstances, such as what income and outgoings they have and what are their assets. The second strand, the ability to weigh up the options means being able to understand the advantages and disadvantages of the option and what risks are involved.

This does not mean clients may be deemed incapacitated simply because they make bad or unwise decisions. We will all have our own preferences and understandings of what constitutes acceptable risks. It could be such poor decisions may be remedied by clients better informing themselves or having more regard to the risks. It is necessary that the poor decisions stem from the client's mental illness and their inability to understand the facts of their circumstances or the consequences of their decisions, or both.

Even where clients can be deemed to understand, it also worth remembering their mental illness can prevent them from acting on the information they are being given.

Authority for others to act

Where clients do lack capacity and this cannot be sufficiently maximised, it may be possible for them to be represented by others. In Scots law, people and organisations can have authority to act on behalf of incapacitated adults. The majority of these powers are contained within the Adults with Incapacity (Scotland) Act 2000. Some of these are consensual and can be provided by the incapacitated adult themselves, whilst others are non consensual and can be provided by the courts and Office of the Public Guardian.

As one of the principles of the Act are that any intrusion into the affairs of an adult should be the least restrictive possible, advisers should be aware that even when someone holds such powers, it is unlikely they will have carte blanche. Courts will usually only grant the minimum powers necessary to minimise any intrusion into the incapacitated adult's affairs. It is, important to not only see the documentation granting such powers, but to note the extent of those powers.

The provisions in the 2000 Act allowing others to act are:

Power of Attorney

There are two types of power of attorney provided for in the 2000 Act. The first of these is Continual Power of Attorney and the second is Welfare Power of Attorney. These are both consensual powers granted to a third party by the client themselves.
The first of the two, Continual Power of Attorney, grants the third party the power to deal with the financial affairs and property of the client and importantly enter legal contracts and raise or defend legal actions on behalf of the client[iv].
The second, the Welfare Power of Attorney, as the name suggests relates to welfare matters such as deciding on care arrangements and making lifestyle and medical decisions on behalf of the client[v].

Access to Funds Power

This power is not dependant on the consent of the client and can be granted by the Office of Public Guardian on receipt of an application by an individual or organisation[vi]. It allows the person or body which holds the power to deal with the clients accounts and pay bills.

Intervention Order

An Intervention Order is an order which is granted by the court, usually for a one off specific purpose, such as to allow someone else to sign a tenancy agreement[vii].

Guardianship Order

A Guardianship Order is made to allow an individual or organisation to act as the guardian for an incapacitated adult. The extent of any order is set by the court[viii].

Manager of Authorised Establishments

These orders are granted to the manager of an authorised establishment such as a care home, to manage the financial affairs of the client[ix].

Social Security and Tax Credit appointees can also deal with the financial affairs of a client in relation to benefits and tax credits. These powers are not contained in the Adults with Incapacity (Scotland) Act 2000.

Capacity to Contract

When a client is able to authorise an adviser to act or someone else has authority to do so, advisers still need to consider whether the client's mental illness raises issues affecting their liability for debts.

It has long been established in Scots Law that a person cannot enter into a contract, such as a consumer credit agreement, if their mental illness prevents them from understanding the nature of the obligation they have entered[x]. Whether a client is able to understand the nature of any financial agreement will depend on the nature of the

agreement and the extent which the client's mental illness diminishes their contractual capacity.

There is no one test of incapacity and much will depend on the decision at hand and the client's ability to understand not only the facts surrounding that decision, but the implications and consequences of any decision. The definition of incapacity contained in the Adults with Incapacity (Scotland) Act 2000 relates primarily to when a client can make a decision for themselves and will, therefore, be relevant when a court decides if a client had capacity to contract.

The MALG Debt and Mental Health Evidence Form[xi] is also a vital tool for money advisers in gathering evidence of a client's ability to manage their property and money matters, although it is primarily a debt management tool for debtors and creditors, rather than one intended to be used to dispute liability for debts.

If, however, information can be provided to show that the client did not understand the facts of their situation and the transactions they were involved in, then this can be vital in showing a lack of capacity to contract.

Equally important will be the dates when any impairment of the client's mental capacity occurred, if it is not continuing, to evidence that it existed at the relevant times when the transactions were entered. Such evidence will not in itself determine that a client lacked capacity, as ultimately contractual capacity is a question of law, than that of any medical professional. It will, however, be necessary for advisers to gather such evidence to support their negotiations with creditors and for clients to defend any legal action raised against them. Proving incapacity in a court, where a creditor disputes it, will require evidence, including medical evidence.

If sufficient evidence can be presented, however, and on the balance of probability show that the client lacked capacity then the effect is that the contract is void[xii]. This differs radically from the position in England and Wales. It is not necessary to show that the creditor should have known that the presumption of capacity was unsafe[xiii]. The logic behind this is, as the client lacked capacity to understand, there cannot have been any agreement and, therefore, any contract.

This raises the question of whether a client who has been incapacitated can later ratify an agreement if they regain their senses and the ability to make decisions. An example may be the case of someone who has a credit card and continues spending once they become lucid again. If the agreement had been entered into when the client was not incapacitated, then it is clear the agreement is not made void by the supervening incapacity, but does not mean any transactions occurring after the incapacity cannot be challenged. Where the client lacked capacity at the time they entered the agreement, then the agreement is void and the effect is there is no agreement to ratify. Courts may, however, take the view the debtor adopted the transactions with their subsequent conduct. As this issue has never been decided, it may be that to be safe debtors should always renounce transactions once they regain their senses and make no further transactions.

Even where an agreement is void, however, a client can still be held liable for the price of such goods, where those goods are necessaries, such as food or clothing.[xiv]

Intoxication

A client's mental capacity to enter transactions can also be lost by intoxication, whether such intoxication is the result of alcohol or drugs. The level of intoxication, however, has to be substantial and must deprive the client from the exercise of reason[xv]. They must not be able to understand what they are doing. Intoxication may be relevant for mental health clients where the intoxication arises from prescribed medication or substance abuse and the accumulated effects of the reduced capacity, which results from their mental illness and intoxication, means they are not able to exercise reason.

In the case of intoxication, contracts are not automatically void, but can be annulled by the court providing once they regain their senses, the client takes steps to avoid what they have done and notify the creditor.[xvi] It is not necessary for the creditor to have been aware of the client's intoxication.

Facility and Circumvention

Another possible defence that may be available to a debtor suffering mental illness is facility and circumvention, although it may be harder to prove this than arguing the debtor lacked mental capacity.

Facility and circumvention is a defence that may be available to someone who suffers a degree of diminished capacity, but not to the extent that they are incapacitated. They, therefore, may understand the agreement they have entered.

It will, however, be necessary to demonstrate the client suffered a weakness of mind at the point they entered the transaction. Such a weakness can arise from mental illness, old age and bodily infirmity. Such weaknesses can also be temporary and arise from some trauma or distressing event such as bereavement.

It may be that where the client is intoxicated, but not to the extent they lack reason, they could still be considered to have a mental weakness[xvii]. It is also necessary to show the other party to the agreement took dishonest advantage of this weakness, to obtain the client's agreement, and that the client suffered some loss or harm as a result of the circumvention.

An example of this may be bank staff persuading a client to pay off a deceased partner's loan as it's what they would have wanted.

Where the weakness of mind is great, the amount of evidence required to prove the client's will was circumvented will not be as great as would otherwise be required and vice versa.

Such contracts are not automatically void, but can be annulled by the court.

Whether it would be advisable to use such a defence now is debatable and a debtor may be better advised to consider requesting an order under S140B (unfair relationship test) of the Consumer Credit Act 1974. This would allow the court to

look, not only at the circumstances, in which the agreement was made, but also the events afterwards and how the creditors enforced the agreement. The court would also have more flexibility in what remedy they could provide, even if they felt the circumstances did not merit the agreement being annulled.

Disputing liability

Once it is clear there are issues relating to a debtor's liability for their debts, advisers will have to consider how best to dispute such liability. Much will depend on the client's view and preferences and also the conduct of the creditors. Clearly, negotiation and requesting a write off will be less stressful than taking legal action, but another option may be the creditor's own complaint procedure and the Financial Ombudsman Service.

Where creditors raise court action, clients may be forced to defend the case, although if the issue of capacity is disputed the onus will be on the debtor to demonstrate they lacked the capacity and the issue may become a matter for proof. A cautious approach to legal action should be taken, considering there could be cost implications and such action may have a detrimental effect on the client's wellbeing. Specialised legal advice should be sought.

Enforcement of Debts

Not all clients who suffer mental illness will lack capacity or even have a diminished capacity to enter transactions on their own behalf. This does not mean, however, their mental health will not legally be relevant in relation to their debts.

The unfair relationship provisions contained in the Consumer Credit Act 1974 allow the court to have regard to all matters relating to the debtor that it considers relevant, including the debtor's mental health. It can have regard to such matters when considering how creditors exercise their rights and enforce any agreement and can also consider not only actions by the creditors, but omissions and any failure to act.

Scots law, however, also provides a number of other protections in relation to the enforcement of debt, where evidence of the debtor's mental health may be relevant.

Unduly Harsh

It is often commented in Scots Law that diligence, or legal enforcement action, is coercive and, therefore, unavoidably harsh. This does not mean, however, that diligence should be 'unduly harsh'.

The term 'unduly harsh' made its first appearance in the Debtors (Scotland) Act 1987 in relation to the now abolished diligence of poindings and warrant sales and was a ground on which a debtor could apply to have goods released from attachment. Since then similar provisions now exist in relation to the diligences of attachment[xviii] and exceptional attachment[xix], money arrestment[xx] and actions of arrestment and furthcoming[xxi].

There is no statutory definition of what constitutes 'unduly harsh' and it is a matter of fact to be dealt with by the sheriff. It is probably safe to state that where there are factors that make the execution of diligence harsher than normal, it may be considered unduly harsh. Clearly it is for the sheriff to decide, but where a client is suffering from mental health issues, the harsh effect of diligence could be exacerbated as a result. Evidence that the client is suffering from mental illness, therefore, or that there are members of the client's family suffering such illness is relevant, particularly where the client's family will be affected by the diligence.

The successful use of such arguments in any application may result in the release of attached items or the release or restriction of any arrested funds.

Housing

In actions relating to the eviction of tenants for rent arrears, evidence of a client's mental illness can be considered by the courts. Section 16 of the Housing (Scotland) Act 2001, in relation to Scottish Secure Tenancies, requires the court only to make an order for recovery of possession if it believes it is reasonable. In determining whether any eviction is reasonable the court has wide discretion to consider a number of factors including the effect any eviction will have on the tenant and their family. In such cases, where it can be shown tenants are in a position to begin making payments towards arrears, evidence of mental illness in the home may be relevant information which prevents the court granting an order for eviction.

In relation to homeowners facing repossession it can be important to place evidence of mental illness before the court during an application to suspend an action for repossession under the Mortgage Rights (Scotland) Act 2001. When considering such an application courts should have regard to any circumstances which may have resulted in the debtor defaulting on their loan. A court, therefore, could consider the circumstances of mental illness where the debtor's inability to manage their affairs has arisen from such illness. The courts also have to consider the debtor and their family's ability to secure reasonable alternative accommodation. Where this will be a problem and the consequences of not being able to do so could further exacerbate any mental health problems, it should be brought to the courts attention.

Bankruptcy

In bankruptcy, the mental health of a debtor or any of their family members may be relevant where the court has to decide whether to grant an order allowing a trustee to sell a family home. Section 40(2) of the Bankruptcy (Scotland) Act 1985, requires the sheriff to consider all the circumstances of the case including the needs of the family members and the debtor. Where such an application is made the sheriff may refuse to grant the order or postpone it for as long as they consider reasonable, up to a maximum period of 12 months.

Conclusion

In conclusion, a client's mental health is an important factor advisers must consider at all stages of the advice process. To not do so could deny the client access to a service. Where there are communication problems adviser must support the client and help

them maximise their communication abilities where possible. They also need to ensure clients understand their own personal financial circumstances and can weigh up the advantages and disadvantages of the options that are being presented to them and assess the risks. Even where this is possible, advisers should be aware a client's mental illness may prevent them from acting. If others purport to act on behalf of a client, advisers have to ensure they have the necessary authority to do so. Even where no defence of incapacity is available, it may be that other possible grounds for disputing debts are. Mental illness, more often than not, will not raise issues of capacity, but evidence of it can still be hugely important in helping a debtor manage their debts and mitigate the harsher effects of any debt collection or enforcement.

Words 3,890

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[i] Crunch time for Scotland's mental health: a SAMH report
[ii] Communicating and Assessing Capacity: A guide for social work and health care staff http://www.scotland.gov.uk/Resource/Doc/210958/0055759.pdf
[iii] Chaper One, Para 3, Communicating and Assessing Capacity: A guide for social work and health care staff
[iv] S15 Adults With Incapacity (Scotland) Act 200
[v] S16 Ibid
[vi] S25 Ibid
[vii] S53 Ibid
[viii] S57 Ibid
[ix] S35 Ibid
[x] Stair, I, x, 3;
[xi] Can be obtained from http://www.moneyadvicetrust.org/section.asp?sid=12
[xii] Erskine, III, i, 16
[xiii] Loudon v Elder's Curator, 1923, SLT. 226
[xiv] S3 Sale of Goods Act 1979
[xv] Pollok v Burns (1875)2 R 497
[xvi] Pollok v Burns (1875)2 R 497
[xvii] Jackson v Pollok (1900) 8 SLT 267
[xviii] S22, S35, Debt Arrangement and Attachment (Scotland) Act 2002
[xix] S55 Debt Arrangement and Attachment (Scotland) Act 2002
[xx] S185 Bankruptcy and Diligence Etc (Scotland) Act 2007
[xxi] S73Q Debtor (Scotland) Act 1987