DISABLED PERSONS UNDER THE DISABILITY DISCRIMINATION ACT 1995

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I. INTRODUCTION

English law provides protection from discrimination for disabled persons in the workplace in the Disability Discrimination Act 1995.[1] Disabled persons are given individual rights, enforceable in specialist tribunals. Access to those rights depends upon satisfying the DDA's own definition of disabled person. It will be seen that although the definition is flexible and case-sensitive, it is highly complex and lends itself to litigation. Thus it fails to achieve its aim to be readily comprehensible to employers and employees; this creates an obstacle to a better public understanding of disability and the rights of disabled persons.

This article sets out an overview of the machinery of the DDA before analyzing the definition of "disability" applied in the Act. The underlying model of disability adopted within the legislative framework and the way in which the Tribunal is tasked with making a finding as to whether an applicant is disabled or not will be analyzed with the following question in mind: Is the DDA protecting those whom it was designed to protect?

II. BACKGROUND

Until the DDA of 1995, the only legislation dealing with the question of disabled persons in employment was the Disabled Persons (Employment) Act 1944, most of which has now been repealed. The 1944 Act required employers with twenty or more employees to ensure that at least 3% of their workforce consisted of registered disabled persons. This quota-based approach to giving disabled

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1. Disability Discrimination Act, 1995, c. 50 (Eng.).

persons access to and fair treatment in employment has been abandoned in favor of a new, direct rights-based scheme of legislation. However, persons registered under the 1944 Act on January 12, 1995 and December 2, 1996 were deemed to be covered by the DDA for an initial period of three years, after which time they could cite past disability.

III. DISABILITY DISCRIMINATION ACT 1995: AN OVERVIEW

Before moving to consider the definition of disability for the purpose of the DDA, it is helpful to set the context by considering briefly the type of protection that the DDA provides. The Act gives rights to individuals that are enforceable by claims brought in the Employment Tribunals, the principal forum for disputes as to employment rights in the United Kingdom. The statutory model is based on equality of opportunity through non-discrimination, rather than requiring positive discrimination. The Act protects a disabled person from discrimination by their employer.[2] It is unlawful for the employer to discriminate:

(a) In the arrangements made for the purpose of determining to whom employment is offered;
(b) In the terms on which employment is offered;
(c) By refusing to offer or deliberately not offering employment;
(d) In the opportunities offered (e.g., promotion, transfer and training); and,
(e) By dismissal or subjecting the disabled person to any other detriment.

Until October 1, 2004, there have been two principal forms of unlawful discrimination: less favorable treatment and failure to fulfill a duty to make reasonable adjustments.

By section 5, it is unlawful for an employer, for a reason that relates to the disabled person's disability, to treat a disabled person less favorably than it treats or would treat others to whom the reason does not or would not apply, unless that treatment can be justified. By section 6, where the arrangements or physical features of premises made by and/or occupied by the employer place the disabled person at a substantial disadvantage in comparison with persons who are not disabled, the employer is under a duty to take such steps as are

2. It should be noted that the DDA also makes unlawful discrimination against disabled applicants for jobs by their prospective employers. In this article, the expression employer is used to refer to both employers and prospective employers, likewise the term employee.

reasonable in all the circumstances to take, in order to prevent the disadvantaging effect of the arrangements or premises. "Arrangements" relates to arrangements for determining to whom employment should be offered and any term, condition, or arrangements on which employment, promotion, transfer, or training or any other benefit is offered or given. A failure to comply with the duty is unlawful discrimination, unless the failure can be justified. Treatment is justified where the reason for it is both material to the circumstances of the particular case and substantial.

From October 1, 2004, two new categories of discrimination have been introduced. First, direct discrimination: a person directly discriminates against a disabled person if, on the ground of the disabled person, disability for treating the disabled person less favorably than he treats or would treat a person not having that disability, whose relevant circumstances, including his abilities are the same as, or not materially different from those of the disabled person.[3] Second, harassment of a person for a reason related to that person's disability is now expressly made unlawful.[4]

IV. THE DEFINITION OF DISABILITY

The DDA sets out its own definition of disability. Entitlement to the protection of the Act depends upon proving that the definition is satisfied.

For the purposes of the DDA a "disabled person" means a person who has a disability.[5] A disability is defined within the DDA as follows:

> a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities[6]

In addition to the section 1 definition, there are three other aids to definition:

- Schedule 1 to the DDA;
- Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of

3. Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI 2003/1673 (U.K.) regulation 4.

4. *Id.* regulation 4(2).

5. Disability Discrimination Act, 1995, c. 50 § 1(2) (Eng.).

6. *Id.* § 1(1).

Disability ("the Guidance") issued by the Secretary of State; and,

- The Disability Discrimination (Meaning of Disability) Regulations 1996.

Further, Tribunals can also draw on the ever-expanding caselaw that has dealt with a number of aspects of the definition. English law provides definitions of disability in other contexts (e.g., in certain social security and other welfare legislation); in certain instances, there are there are schemes of registration or certification.[7] However, the protection of the DDA is afforded only to those who meet the DDA's own definition. Protection therefore depends on assessment in each individual case of the several elements of definition.

It will be apparent that this creates potential difficulties. While this means that the definition is flexible, in that it is sensitive to individual circumstances, there is less certainty than in a certification/registration-based system. There is room for disagreement as to whether an individual is disabled or not. In cases of dispute it is for the Employment Tribunal to determine whether a person is disabled within the meaning of the DDA. Given that the definition is a complex one (as will be demonstrated below) there is considerable scope for argument, and that argument will invariably be expensive and will often require expert medical evidence. In practice, the question of whether an individual is disabled so as to be protected by the DDA has become a key battleground in litigation under the Act. Many applicants fail at this first hurdle.

The intention of the U.K. government when it introduced the Disability Discrimination Act in 1995 was to create a definition of disability that was both workable and comprehensible to employers. William Hague, M.P., then Minister for Social Security and Disabled People, said in recommending the Bill to Parliament that the definition of disability "is the right one because employers and service providers will understand it and it will therefore make the Act operable."[8]

This proposition is very much open to debate. In the years since the introduction of the DDA, questions of interpretation of the definition have been frequently litigated, and as matter of practice such cases often involve expert medical evidence. As Mummery L.J. put it in the first DDA case to reach the Court of Appeal, *Clark v.*

7. For example, local authorities register persons with certain types of disability in order to provide access to public services at concessionary rates.

8. Hansard, 24th January 1995, Vol. 253, No. 36, Column 148–49.

Novacold, the DDA is "An unusually complex piece of legislation which poses novel questions of interpretation."[9]

V. MEDICAL OR SOCIAL MODEL?

The model of disability underpinning the DDA is a medical model: it defines the disabled person in terms of his "impairment" as judged against a "normal" standard. The medical model has been chosen rather than a social model. The difference between the two models is deftly explained in *Challenging Disability Discrimination at Work* by Mary Stacey and Andrew Short:[10]

> A person with quadriplegia, who is able to use a wheelchair, may nonetheless be unable to enter a building accessible only by way of steps unsuitable for a wheelchair. The analysis of the medical model of disability is that he or she cannot enter the building because they cannot walk up the steps because of quadriplegia. In contrast, the social model analyses considers that the correct approach is to say that the person cannot enter the building because it is constructed in such a way as to deny access to wheelchair users.[11]

In 1983, Mike Oliver discussed a social model of disability that reflected a movement among the disabled for "nothing more fundamental than a switch away from focusing on the physical limitations of particular individuals to the way the physical and social environments impose limitations on certain groups or categories of people."[12]

The choice of the medical model that looks at functional impairment over the social model, which looks at the relationship between an individual and society, has a number of implications. First, emphasis is placed on the medical proof of impairment and the focus is on what is wrong with the individual. This has a potentially stigmatizing effect on the individual. One might say that the DDA draws a firm line between "normal" and "disabled," thereby emphasizing the differences between the two groups.

Second, it is arguable that the fact that an individual seeking to bring a claim under the DDA may require extensive medical examination, evidence, and analysis of what he cannot do at a preliminary stage (with the attendant costs, in many cases, of

9. [1999] I.R.L.R. 318, 320 (C.A. 1999) (U.K.).

10. MARY STACEY & ANDREW SHORT, CHALLENGING DISABILITY DISCRIMINATION AT WORK 71 n.27 (2000).

11. Published by the Institute of Employment Rights, August 2000.

12. MIKE OLIVER, SOCIAL WORK WITH DISABLED PEOPLE 23 (1st ed. 1983).

instructing experts) serves as a deterrent. The potential trauma to a disabled applicant undergoing cross-examination on issues of great medical sensitivity should not be underestimated.

VI. IMPAIRMENT

In order to come within the definition, it is necessary to establish physical or mental impairment. The key concept "impairment" is not defined anywhere in the DDA or Guidance. The Guidance states in Part 1 that it is not necessary to consider how an impairment was caused, and some examples of physical and mental impairment are given (e.g., sensory impairments affecting sight or hearing), but there is no general definition. In *Rugamer v. Sony Music Entertainment UK Ltd.*,[13] the Employment Appeal Tribunal (EAT) held that it connoted some damage, defect, disorder, or disease compared with a person having a full set of physical and mental equipment in normal condition.

Further, it is clear that impairment does not itself equate to a medical condition or illness: in *College of Ripon & York v. Hobbs*,[14] the term "impairment" was held to relate to both cause and effect of illness as stated in the judgment of Lindsay J.:

> There is no statutory definition of 'impairment' and nothing in the Act or Guidance which requires that the task of ascertaining whether there is a physical impairment involves any rigid distinctions between an ongoing fault, shortcoming or defect of the body on the one hand, and evidence of the manifestation of the effects thereof on the other. The Act contemplates that an impairment can be something that results from illness as opposed to itself being an illness. It can thus be cause or effect.

Similarly in *McNicol v. Balfour Beatty Rail Maintenance Ltd.*,[15] per Mummery L.J., approving Lindsay J.'s approach in *Hobbs*:

> The approach of the tribunal should be that the term 'impairment' in this context bears its ordinary and natural meaning. It is clear from Schedule 1 to the 1995 Act that impairment may result from an illness or it may consist of an illness, provided that, in the case of mental impairment, it must be a 'clinically well-recognised illness'. Apart from this there is no statutory description or definition of physical or mental 'impairment'.

The definition therefore focuses on a comparison between the impaired applicant and a "normal" standard. A person is impaired if

13. [2001] I.R.L.R. 644, (E.A.T. 2001) (U.K.).
14. [2002] I.R.L.R. 185, 186, (E.A.T. 2002) (U.K.).
15. [2002] I.R.L.R. 711, 713, (C.A. 2002) (U.K.).

in some respect he falls below the normal standard. There is thus the potential for difficulty (particularly in cases of mental impairment) in drawing a line of demarcation between a person who is impaired, and a person who is simply at the less capable end of a spectrum of ability.

There are however, advantages to this approach. First, from a practical and medical point of view, it may be more straightforward in practice to identify the manifestations of an impairment than its cause, which in certain cases may be unknown to medical science, or at any rate difficult to prove.

Second, the elimination of the cause of an impairment from the definition removes an inappropriate layer of value judgment. At this stage of the enquiry, the issue is whether a person is disabled, questions of the lawfulness or otherwise of the treatment of a disabled person may involve difficult value and policy judgments, but at this stage, so far as possible, disability should be a question of fact, rather than of value judgment. The point can be illustrated by an obvious example: a man is rendered quadriplegic by an accident and is disabled, irrespective of whether he was an innocent victim or a reckless drunk driver.

The DDA does however import an element of value judgment by expressly deeming certain "anti-social" conditions not to amount to impairments: these include a tendency to physical or sexual abuse or to set fires; addiction to alcohol, nicotine, or any other substance; and voyeurism.[16]

However, these excluded conditions are limited to cases of "freestanding" conditions: where such condition results from an impairment that would otherwise be a disability, then the fact of the condition does not prevent that impairment being a disability. So, for example in *Power v. Panasonic*,[17] the applicant was an alcoholic and also suffered from clinical depression. The EAT held that the question was whether the clinical depression was a disability; it was irrelevant that the depression was caused by the alcoholism. Similarly, in *Murray v. Newham CAB Ltd.*,[18] the applicant had a tendency to physical abuse caused by paranoid schizophrenia. He was disabled: his schizophrenia was a disability, and his tendency to abuse was a manifestation of this. The exclusion would only apply to a "freestanding" tendency to violence, not one that resulted from a well-recognized mental impairment.

16. The Disability Discrimination (Meaning of Disability) Regulations 1996, (1996) SI 1455 (U.K.).

17. [2003] I.R.L.R. 151, (E.A.T. 2003) (U.K.).

18. [2003] I.R.L.R. 340, (E.A.T. 2003) (U.K.).

A. Physical or Mental Impairment

Schedule 1 to the DDA provides that a mental impairment includes an impairment resulting from or consisting of a mental illness only if the illness is a clinically well-recognized illness.[19] There is no counterpart in respect of physical impairments, but why there should not be such a provision is unclear. Certainly, one policy consideration that may have been in the minds of those drafting is that without some limitation the definition of disability would be too wide, in cases where the nature of the condition may be difficult to assess. What is clear is that the Government wished to avoid claims based on "obscure conditions unrecognised by reputable clinicians" and "moods and mild eccentricities."[20] However, as Barnes commented, "all physical conditions have psychological implications and . . . all intellectual impairments have physiological consequences . . . those labels are generally imposed rather than chosen and . . . they are politically and socially divisive."[21]

What is also evident from Schedule 1 is that a mental impairment flowing from a physical condition or illness is not expressly excluded[22] and nor, it seems, does it need to be a clinically well-recognized illness under the terms of the Schedule. It is also worth noting that a mental impairment other than a mental illness, such as a learning disability, does not need to be clinically well-recognized.

B. Mental Illness: Clinically Well-Recognized

Tribunals and higher courts have been reluctant to recognize that a mental illness is clinically well-recognized unless there is expert evidence. A clinically well-recognized mental illness is one that is recognized by a respected body of medical opinion (Guidance at Paragraph 14). It is highly likely that illness falling within ICD-10 (the World Health Organization's International Classification of Diseases) will meet the criterion. WHO defines impairment as any loss or abnormality of psychological, physiological, or anatomical structure or function.[23] In *Morgan v. Staffordshire University*, it was said that "the

19. A draft Disability Discrimination Bill (CM-6058-I) would remove this requirement. *See* section XII below.

20. Hansard, Rep SC E 7th February 1995 column 104.

21. C. Barnes, *Disability Studies: New or Not so New Directions*, 14 DISABILITY & SOC'Y 577 (1999).

22. A point taken by Lindsay J., in *Hobbs*, though he rightly stated that it would be invoked rarely.

23. Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definintion of Disablity, (1996) SI 1996/1996 (U.K.).

existence or not of a mental impairment is very much a matter for qualified and informed medical opinion."[24]

The very real difficulty that applicants claiming mental impairment disability may face is that their general practitioner's notes may only refer to "anxiety" or like descriptions in an effort to avoid stigmatizing the patient with mental illness. This may be especially true of younger patients, and the reluctance is not just confined to general practitioners.

VII. SUBSTANTIAL & ADVERSE LONG-TERM EFFECT ON THE ABILITY TO CARRY OUT NORMAL DAY-TO-DAY ACTIVITIES

A. Substantial Adverse Effect

The impairment must have a substantial and adverse long-term effect on the applicant's ability to carry out normal day-to-day activities. This is the medical model of disability, and the test is what the person can and cannot do.

This test requires an examination of the individual employee's capabilities and should exclude general prejudicial assumptions about disabled people's abilities. By requiring consideration of the effects on the employee, the DDA does not, however, address the issue of discrimination on the basis of a false perception of disability.

The threshold for substantial adverse effect is put relatively low: "substantial" means more than trivial. It is not therefore necessary for a disabled person to be unable to carry out an activity at all: if a person can carry out an activity, but with difficulty, then there may still be a substantial adverse effect.[25]

It is relevant to take account of the extent to which medical advice, pain, or fatigue, for example, allow the activity to be carried out over a reasonable period of time. The fact that a person does not in fact carry out the activity in question is not determinative as it is recognized that many disabled people develop coping strategies to get on with their lives and this may involve avoiding certain activities. It is also relevant to consider the cumulative effect of multiple impairments and their interaction.

24. [2002] I.R.L.R. 190, 194–95, (E.A.T. 2001) (U.K.).
25. Goodwin v. Patent Office, [1999] I.R.L.R. 4, (E.A.T. 1998) (U.K.).

B. Normal Day-to-Day Activities

The DDA provides an exhaustive list of capacities at least one of which must be affected if an impairment is to be treated as having an adverse effect on the person's ability to carry out normal day-to-day activities. They are:

(a) mobility
(b) manual dexterity
(c) physical coordination
(d) continence
(e) ability to lift, carry, or otherwise move everyday objects
(f) speech, hearing, or eyesight
(g) memory or ability to concentrate, learn, or understand
(h) perception of the risk of physical danger.

Unless one of these activities is affected, the employee will not come within the definition of disability. In many instances a person with a disability will be impaired in a manner that affects the listed functions, but the fact that the list is prescriptive and exhaustive can result in hardship. The DDA does not always capture those that one might instinctively say ought to be protected. In *Gittins v. Oxford Radcliffe NHS Trust*,[26] the appellant suffered from bulimia nervosa. This was admitted to be a clinically well-recognized mental illness. In 1996, the appellant used kitchen cleaner to make herself vomit. In 1997, she cut herself with nursing scissors on more than one occasion. The appellant's case was that her eating disorder affected her ability to carry out normal day-to-day activities, affecting her ability to concentrate and her perception of risk of danger to a substantial degree in each instance. The Tribunal found on the facts that the impact of the mental impairment on the appellant's ability to concentrate was not substantial and that, although she had a tendency to self-harm, she was able to perceive the risks to herself. Therefore, she fell outside the list of activities, one or more of which must be substantially affected.

One category of cases where a relevant adverse effect does not have to be proved is that of severe disfigurement. Disfigurement would be highly unlikely to have an effect on one of the relevant capacities. Instead, they are treated as though they did have a substantial and adverse effect. This is a rare example of a definition

26. E.A.T./193/99, (Transcript) (U.K.).

of disability based on the social attitudes of society to the disabled person, rather than based on the capabilities of the individual.

The question of whether a disfigurement (which can include scars, limb disfiguration, or birthmarks, but not tattoos[27] and non-medical piercings) is severe is one of degree and depends on where it is situated on the body. A disfiguration that is more visible to others is likely to be considered to be more severe because the DDA acknowledges the perceptions of others in determining the issue.

The DDA does not define day-to-day activities considered to be normal. The Guidance provides that account should be taken of how far an activity is normal for most people and carried out by most people on a daily or frequent and fairly regular basis. The antithesis is between that which is normal and that which is abnormal or unusual as a normal activity, judged by an objective standard.[28]

Normal day-to-day activities do not include work of any particular form. It is incorrect to approach the question of disability by focusing on an employee's ability to perform work tasks, though it is of course the case that day-to-day activities that are considered to be normal may well form part of the working day. Accordingly, an impairment that has a serious impact on a person's ability to carry out a specialized job will not suffice where there is no adverse effect on normal day-to-day activities. One example of this might be color blindness for an airline pilot. In a more mundane setting, a person whose work involves heavy lifting, but who can no longer lift heavy objects will not be disabled if he or she has no problem lifting everyday objects.[29]

A less conventional approach to normal day-to-day activities was taken in *Cruickshank v. VAW Motorcast Limited*.[30] The applicant suffered from occupational asthma, exacerbated by fumes at work. Away from work, his condition improved. The approach of the EAT was that in a case where, as a result of a medical condition, the effects of an impairment on ability to carry out normal day-to-day activities fluctuate and may be exacerbated by environmental conditions at work, the tribunal should consider whether the impairment has a substantial and long-term adverse effect on the employee's ability to perform normal day-to-day activities both while actually at work and while not at work. "Normal day-to-day activities" are only a yardstick

27. The Disability Discrimination (Meaning of Disability) Regulations (1996) SI 1455 (U.K.).

28. Ekpe v. Comm'r of Police, [2001] I.R.L.R. 605, (E.A.T. 2001) (U.K.).

29. E.A.T./1386/97, (Transcript) (U.K.).

30. [2002] I.R.L.R. 24, (E.A.T. 2001) (U.K.).

for deciding whether an impairment is serious enough to qualify for protection under the Act. If, while at work, an applicant's symptoms are such as to have a significant and long-term effect on his ability to perform day-to-day tasks, such symptoms are not to be ignored simply because the work itself may be specialized and unusual, so long as the disability and its consequences can be measured in terms of the ability of an applicant to undertake day-to-day tasks. The DDA does not limit protection to those persons who have an incapacity of more or less constant effect in ordinary day-to-day circumstances.

This decision thus rejects the conventional wisdom that a person is not disabled if he or she can carry out day-to-day activities in all circumstances save the very special circumstances of his or her particular employment. There is some policy attraction to it, given that the purpose of the DDA is to protect employees from discrimination in the workplace, and it would seem appropriate to consider disability in light of what the employee can and cannot do at work. However, the decision permits the possibility that a person may be disabled for some jobs, but not for others—a result it is unlikely that Parliament intended.

C. Long-Term Effect

An adverse effect is long-term if it has lasted at least twelve months, is likely to last at least twelve months, or is likely to last for the rest of the person's life. The consideration of whether the adverse and substantial effect is long-term can easily become complicated in mental ill health cases where, by way of example, one manic episode in the case of bipolar affective disorder may increase the likelihood of a future episode significantly (but less than 50% in some cases). In these cases, medical evidence will be very important in order to assist the Tribunal's assessment.

VIII. RECURRING CONDITIONS

Persons with certain conditions (for example epilepsy, rheumatoid arthritis, or certain cancers) may experience periods of remission during which, because their health is good at that time, they would not satisfy the definition of disability. Special provision is made for those with recurring conditions. A person who has a recurring condition will be protected if the effect is likely to recur, and such effects are to be treated as long-term if they are likely to recur beyond twelve months after the first occurrence or where a recurrence happens within twelve months but continues for more than twelve

months after the first occurrence (Schedule 1 para 2(2)). The Guidance provides that an effect is likely to recur if it is more likely than not that it will—in other words a 51% probability requirement.

IX. PROGRESSIVE CONDITIONS

A person who has (or had in the past) a progressive condition, which affects his or her ability to carry out normal day-to-day activities, comes within the definition of disability, notwithstanding that the adverse effects are not substantial, but only if the condition is likely to result in an impairment giving rise to a substantial adverse effect. Non-exhaustive examples include cancer, multiple sclerosis, and HIV infection. As soon as someone with a progressive condition experiences symptoms that have an effect on his or her ability to carry out normal day-to-day activities, he or she will be deemed to have a disability. This remains the position even if the effects cease, for example during a period of remission. In other words, the initial effect is the trigger, but the disabled status is not forfeited upon any temporary recovery.

Those with latent or asymptomatic conditions will not be covered under the terms of the DDA if they do not experience any symptoms. So, for example, a person diagnosed with HIV, early asymptomatic stages of cancer, or MS would not be protected by the DDA.[31]

In *Kirton v. Tetrosyl Ltd.*,[32] the applicant was left with some urinary incontinence following surgery for prostate cancer. His DDA claim failed because the progressive condition provisions were held not to apply. The EAT held that the incontinence did not result from the prostate cancer, but from the treatment for the cancer, and to fall within the definition, the effect on normal day-to-day activities must be as a direct result of the progressive condition such as cancer and not as a result of the surgery by which the cancer was treated. The Court of Appeal has now overruled this decision. It held that the impairment of urinary incontinence was a result of the cancer within the meaning of the statutory definition, albeit there was an intervening act of the surgical treatment of the cancer. According to Pill L.J. the words "as a result of that condition" should not be "so narrowly construed as to exclude an impairment which results from a standard and common form of operative procedure for the cancer." Scott Baker L.J. added that "impairment" in this context "also

31. A draft Disability Discrimination Bill would extend protection to such cases. *See* section XII below.

32. [2003] I.R.L.R. 353, (C.A. 2003) (U.K.).

includes the ordinary consequences of an operation to relieve the disease." This commonsense decision is to be welcomed.

X. DEDUCED EFFECT

The effect of medication and/or corrective measures is to be disregarded when deciding whether the impairment has a substantial adverse effect on normal day-to-day activities. If a person has an impairment that would be likely to have a substantial adverse effect on his or her ability to carry out normal day-to-day activities but for the corrective measures being taken, the impairment is still to be treated as disabling.

In the Court of Appeal decision in *Woodrup v. London Borough of Southwark*,[33] it was held that paragraph 6(1) of Schedule 1 provides that someone is to be treated as disabled even though they suffer no substantial adverse effect on their ability to carry out normal day-to-day activities if, without the medical treatment they receive, they would suffer the disability. The question to be asked is whether, if treatment were stopped at the relevant date, would the person then, notwithstanding such benefit as had been obtained from prior treatment, have an impairment that would have the relevant adverse effect?

Examples of corrective measures or treatment given in the legislation include medical treatment and the use of a prosthesis or aid. The provision will apply even where the measures result in the effects being brought completely under control or render them totally unapparent.

Medical treatment can include counseling (*Kapadia v. London Borough of Lambeth*[34]) and psychotherapy (*Abadeh v. British Telecommunications*[35]). In fact, medical treatment is not to be given an overly narrow construction.

One might well question why should a person whose impairment does not result in a substantial and adverse effect due to measures being taken be protected under the DDA, as this would not seem to accord with the medical model of disability, which looks at what a person can and cannot do. However, the measures taken may of themselves cause secondary effects or inconvenience to the person, for example a diabetes sufferer who has to inject insulin. Second, as

33. [2002] EWCA Civ. 1716, (Transcript: Smith Bernal) (U.K.).
34. [2000] I.R.L.R. 14, (E.A.T. 1999) (U.K.).
35. [2001] I.C.R. 156, (E.A.T. 2000) (U.K.).

Brian Doyle suggests,[36] such a person might experience continuing adverse treatment at the hands of others who might continue to regard that person as disabled.

However there is an exception in respect of spectacles and contact lenses. It is difficult to see a principled reason to distinguish these cases from those of other commonly available corrective aids. Perhaps the reason for the exception is that a significant number of people wear such visual aids and therefore there is little chance of any stigma being attached to it and consequently a lesser risk of discrimination. On the other hand, the concern may be that to bring within the scope of the DDA the whole class of spectacle or contact lens wearers would effectively make everyone disabled, thereby weakening the effectiveness of the Act in areas where its protection is more needed.

XI. PAST DISABILITIES

Section 2 of the DDA protects those who have had a disability in the past. This provision is of particular use where an employee's past sickness absence is held against him or her at a time when he or she has recovered. The section also operates to bring a person who has not had an impairment with an adverse and substantial effect on normal day-to-day activities for twelve months or more into the scope of the DDA if the adverse effects recur more than twelve months after the first instance.

It would seem that someone who has suffered from a past disability and is completely cured is in a better position than a person with a latent asymptomatic condition. If the protection for those who have been disabled in the past is to eradicate prejudice based on erroneous assumptions, then it is hard to decipher why protection should not be extended to those who will suffer substantial and adverse effects in the future, but may well suffer from the erroneous assumptions of others in the present.

XII. IS THE DDA ACHIEVING ITS AIMS?

The use of medical evidence in establishing whether an individual is disabled or not has turned this type of discrimination case into a very different type of claim than sex and race discrimination. While, on the one hand, the definition contained in section 1 together with

36. BRIAN DOYLE, DISABILITY DISCRIMINATION LAW & PRACTICE (3d ed. 2000).

the Guidance, Code, and Schedule 1 can operate widely so as to bring those who would not ordinarily and/or stereotypically be considered to be disabled within the Act, it has also meant that entire groups such as those diagnosed with cancer who have not yet begun to suffer from mental or physical impairments remain outside its remit.

In many cases, neither employer nor employee can say with any great degree of confidence whether the employee is disabled within the meaning of the DDA or not, but employers are surely best advised to adopt a cautious approach in dealing with any such employees or job applicants. The inherent tension between the need to allow Tribunals sufficient flexibility to deal with wide-ranging conditions and the need to give employers and employees a degree of certainty so that they can make arrangements accordingly is difficult to resolve, but one suspects that while it is obvious in the application of the DDA provisions, it is not unique.

There is an inescapable tension caused by the operation of the DDA machinery whereby lay members (in terms of medical knowledge and qualification) are required to make findings of fact on questions that are heavily based upon sometimes complex medical data or analysis. Nowhere is this so apparent as in the sphere of mental health disability. A point amply illustrated by *Gittins*[37] is the difficulty in appealing a finding of fact by a Tribunal in circumstances in which a Tribunal with no medical expertise has to grapple with complex medical evidence in coming to its conclusion. The dangers of making a finding of fact in a vacuum are equaled by the dangers of delineating Tribunal responsibility to determine whether someone is disabled within the DDA to the medical experts. There is no easy solution to this dilemma while the DDA is constructed upon an orthodox medical model of disability.

In 2003, the Disability Rights Commission published its first legislative review of the DDA: "Disability Equality: Making it Happen." The DRC has recommended changes to the DDA that would meet a number of the points canvassed above:

- The list of normal day-to-day activities should be revised to include the ability to communicate with others and to ensure those with self-harming behavior are covered;
- Removal of the requirement for a mental illness to be "clinically well-recognised";
- Progressive conditions to be covered from the point of diagnosis;

37. *See supra* note 25.

- The twelve month requirement should be reduced for individuals with depression; and,
- Discrimination where a person is erroneously treated as disabled or discriminated against by reason of being associated with a disabled person should be covered.

The proposals of the DRC serve as a helpful guide as to where the current legislation fails to answer the needs of the disabled persons who ought properly to fall within the terms of the statutory protection. A draft Disability Bill published in December 2003 will bring more people diagnosed with the progressive conditions of HIV, MS, and cancer within the scope of the DDA. The Bill was considered by a Parliamentary Joint Committee in May 2004, but has not yet been put before Parliament.

The aim of the DDA was, among others, to eradicate prejudice against disabled persons in the workplace and to grant equal access to opportunities where it was reasonable to expect the employer to do so, but the Act does not entirely achieve that aim. Instead, one might say that persons who were not intended to be covered by the DDA are covered upon a technical and strict interpretation of section 1. For instance, those with relatively short-term injuries that cause an effect that is just over the threshold of being trivial or minor may find themselves to be "disabled" when employment disputes arise. Perhaps the one question underlying the numerous others posed in this article is what is the distinction between "normal" and "disabled" and how does one deal with the shades of gray?