

Middlesex University

School of Law

Defining Disability in the Workplace:
'A Critical Analysis of Section 6 Equality Act (2010)'

Ryan Harding

This Dissertation is Submitted in Part-Fulfillment of the Degree of
LL.M Employment Law

May 2014

Abstract

The first objective of this research proposal is to examine the current definition of ‘disability’ under Section 6 of the Equality Act (2010), hereafter referred to as ‘EqA,’ for employees in the workplace. The second objective is to critically analyse the definition and its interpretation and application in cases brought by employees under disability discrimination claims. The third objective is to evaluate whether or not the legislature have got such definition right, i.e. ‘have they drafted a definition which promotes enough equality and provides protection to all of those that need it?’

The main findings of this research proposal are that, on the whole, the current definition of disability as per Section 6 of the EqA appears to provide a fair level of protection to employees from disability discrimination. The legislature’s definition is complemented by numerous encouraging landmark decisions from the courts, which have helped in shaping a progressive definition of disability. However, there are several significant problems with the definition that are either restricting the level of protection, or not providing any protection at all. Accordingly, numerous opportunities to increase equality for employees have been identified, which can be remedied by suggested reformations of the law. Such suggestions will involve both short-term and long-term solutions.

This research proposal makes two key recommendations. The first is to enact a Bill before Parliament as a short-term and immediate measure in rectifying the most important problems facing equality, caused by a somewhat troublesome Section 6. The second recommendation is to introduce long-term reform for disability discrimination law. This will be achieved by moving from a medical model definition of disability, which the current legislation is based on, towards a social model definition of disability.

Dedicated to the loving memory of my mum, Sharon Louise Harding.

Born 9th January 1963 to 18th April 2007 - Aged 44

'Ad Astra Per Aspera'

Acknowledgements

I would like to extend both my thanks and gratitude to the following people:

Firstly, my dissertation supervisor, Professor Malcolm Sargeant, for encouraging me to take this research proposal as an opportunity to enjoy legal research, and for his continued support, critique and feedback from start to finish.

Secondly, my father, Russell, for not only his everlasting support, but for actually facilitating my LL.M and making this research experience possible.

Lastly, my best friend and brother, Scott. For 25 years of continued support, guidance, love and care. Such a demanding degree and dissertation have both been made easier for me due to the amazing friendship and laughter that we share each and every day. I am also thankful for the constant reminders to always try and focus on the brighter side of life, which I sometimes struggle to find.

Table of Contents

Introduction	1
Literature Review	3
Theory and Methodology	7
Theory.	7
Methodology.	7
Chapter One - An Introduction to the Issue of Disability	9
1.1 The Statistics.	10
1.2 What Do The Statistics Mean?	15
1.3 The Two Main Models of Disability-Related Discrimination.	16
1.4 The Medical Model of Disability.	17
1.5 The Social Model of Disability.	18
1.6 Other Models of Disability.	19
1.7 The Meaning of Discrimination.	20
1.8 The Aims of The Law.	20
Chapter Two - The Legislation Concerning Disability Discrimination	22
2.1 Sources of Equality Law.	23
2.2 European Union Law.	24
2.3 Equality as a Human Right.	25
2.4 Unlawful Discrimination Under The Equality Act (2010).	27
2.5 Direct Discrimination.	27
2.6 Indirect Discrimination.	30
2.7 Discrimination Arising From a Disability.	32
2.8 Remaining Forms of Discrimination.	33
2.9 S.6 Equality Act (2010).	33
Chapter Three - (1) There Must Be ‘A Physical or Mental Impairment’	37
3.1 The Court’s Approach.	38
3.2 The Meaning of Impairment.	39
3.3 Automatically Included Disabilities.	45
3.4 Past Disabilities.	46
3.5 Automatically Excluded Disabilities.	47
3.6 The Exclusion of Addiction.	47
3.7 Chapter Conclusion.	49
Chapter Four - (2) It Must Have ‘A Substantial Adverse Effect’	51
4.1 Meaning of Substantial Adverse Effect.	52
4.2 The Time and Way in Which an Activity is Carried Out.	53
4.3 Cumulative Effects of an Impairment.	54
4.4 Effects of Behaviour and Environment.	54
4.5 Effects of Medication or Other Treatment.	55
4.6 Progressive Conditions.	58
4.7 Severe Disfigurements.	59
4.8 Chapter Conclusion.	60

Chapter Five - (3) That it's Effect Must be 'Long-term'	62
5.1 The Effect Must be Long-Term.	63
5.2 Assessing Whether a Past Disability Was Long-Term.	65
5.3 The Meaning of Likely.	65
5.4 Recurring or Fluctuating Effects.	65
5.5 Predicting The Length of Mental Health Illnesses.	68
5.6 Chapter Conclusion.	69
Chapter Six - (4) 'Ability to Carry Out Normal Day-To-Day Activities'	70
6.1 The Meaning of Normal Day-to-Day Activities.	71
6.2 The Role of Medical Evidence.	75
6.3 The Effect of Time of Day.	76
6.4 Specialised Activities.	77
6.5 Adverse Effect.	78
6.6 Environmental Effects.	79
6.6 Chapter Conclusion.	80
Chapter Seven - Options for Reform and Remediying The Situation	82
7.1 Have The Legislature Got it Right?	83
7.2 Identified Problem Areas.	83
7.3 Is the Medical Model to Blame?	84
7.4 Action for Reform.	85
7.5 Long-Term Reform Solution.	85
7.5 Short-Term Reform Solution.	86
Chapter Eight - Final Conclusion	89
Recommendations	91
References and Bibliography	92
Journals and Reports	92
Text Books	95
Websites	96
Table of Cases	99
Table of Legislation	102

Introduction

Anti-discrimination legislation is essential to any modern civilisation that seeks to provide protection to its citizens that suffer from discrimination at any level. The rationale behind such legislation is to promote equality, whether in the workplace or in a wider societal setting. However, where disability-related discrimination is concerned, such legislation has attracted immense scrutiny from both academics and the courts, especially in relation to the legal definition of the word ‘disability.’

As the statistics in Chapter One will demonstrate, a substantial proportion of the current population will be classed as being disabled at some point in their life. Due to advances in technology and improved medical expertise in relation to disabilities, the rate of survival for individuals has been improving¹ and is expected to rise year-on-year.² Accordingly, if anti-discrimination legislation does not evolve to suit the ever-changing needs of those with a disability, the more problems they will incur with regards to protection, thus resulting in a greater loss in overall quality to those who seek it.

The current definition of disability has been described as ‘extremely problematic both on a practical and theoretical basis.’³ As such, the purpose of this research project is to determine whether such condemnation is actually justified, by examining the current definition of disability under Section 6 of the EqA.

¹ Page 32 of Hepple, B (2011). *Equality: The New Legal Framework*. Hart Publishing Ltd.

² Page 41 of HMSO (2007). *Fairness and Freedom: The Final Report of the Equalities Review*. London: The Equalities Review.

³ Page 165 of Woodhams, C. and Corby, S. (2003). *Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act (1995)*. *Journal of Social Policy*. 1 (32).

Chapter One will present the facts and statistics of disability-related discrimination and demonstrate why it is so critical for those with a disability to be afforded the protection that they deserve, as well as examining the aims of such law. This will follow on to Chapter Two, which will outline the history of the current legislation, the sources of the current legislation, the types of discrimination that is outlawed, and finishing with a brief explanation of the current definition under Section 6.

Chapters Three, Four, Five and Six will focus on analysing each requirement of the definition in greater detail, whilst evaluating the effectiveness of such parts at the end of each chapter.

Chapter Seven will look at options for reform and remedying the situation. It will seek to answer whether the legislature have got the definition right, and propose reform in the areas in which it could be improved. This is followed by a final conclusion of the entire research project, followed lastly, by any key recommendations that the research project proposes as an attempt to remedy any lapses of equality that are triggered by the current definition.

Literature Review

This literature review examines the current existing literature relating to the questioned suitability of the current definition disability in the context of disability-related discrimination within the legal system of England and Wales.

Whilst the main source of the legislation that governs the definition of disability in regards to disability-related discrimination is certainly not undisputed, largely Section 6 of the EqA, the question of whether the definition achieves sufficient equality for those who rely upon it certainly is. Considering the vast litigation occurring in both courts and employment tribunals over the definition, despite the Government releasing detailed guidance on interpreting and applying the definition,⁴ a research investigation as to the suitability of the definition is thus rightfully warranted.

It is fair to submit that the majority of research investigations into the definition have resulted in negative criticism of the definition's suitability. This is evident from the work of legal academics over the last two decades such as Burgdorf (1997), Kaplan (1999), Hull (1998), James (2002), Woodhams and Corby (2003). Fredman (2005), Leonard (2006), and Flacks (2012) to name a small minority, with Woodhams and Corby deeming the term 'extremely problematic.'

These run parallel to criticisms from bodies such as The Equality and Human Rights Commission (2005), The House of Commons Work and Pensions Committee (2008), and The

⁴ Office for Disability Issues. (2011). *Guidance on Matters to be Taken Into Account In Determining Questions Relating to the Definition of Disability*. Available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf
Last Accessed 1st May 2014.

Ministry of Justice (2013). Despite the definition within the EqA only being drafted in relatively recent years, it is extraordinary to see little-to-no support from academics on the current definition, with a small minority only willing to show partial support, Chadwick (2004) and Butlin (2011).

However, despite dissatisfaction of the current definition, there is a distinct underlying theory of how improvements to the definition can be made. Generally, this is that the current definition is unsuitable because it is largely based on the medical model of disability. The proposed theory suggests that much of that which is unsuitable about the current definition may be remedied by legislating the definition on a social model of disability instead, Reeve (2004), McTigue (2007), Wilkinson (2009), Scullion, (2010) Smith and Baker (2010), Wallace (2010) and Stanley (2013).

Whilst Chadwick's (2004) paper entitled 'Defining Impairment and Disability' is relevant, in the sense that it touches on topics such as 'The Disability Discrimination Act (1995),' 'The Individual Definition of Disability,' and both the 'Medical and Social Model's of Disability,' it does lack critical analysis as to what the definition actually means. Despite this, it provides more of an evaluation of what the definition should actually be, and unsurprisingly, as most of the work already cited, Chadwick calls for the need to move the definition towards a social model. It is also acknowledged that although still relevant in some parts, this paper was submitted before the drafting and enforcement of Section 6 of the EqA.

Contrariwise, James' (2002) paper, 'The Meaning of Disability' is centred on providing a critical analysis of the definition of disability. However, there is little discussion of the

benefits and drawbacks of either the medical model of disability, or the social model of disability.

One of the very few papers that fuses both of these topics, is Basi's (2012) paper entitled 'To Critically Examine Whether The Definition of 'Disability' as Found Within The Equality Act (2010) Is Satisfactory, in an Employment Law Context.' This paper addresses a mixture of 'Historical Analysis,' 'The Definition of Disability,' 'The Models of Disability,' and 'Options for Reform.' However, whilst 'The Definition of Disability' is explored - it certainly isn't critically analysed. It lacks both depth regarding the impact of statutory law, and the effect of subsequent common law decisions.

Whilst there certainly is sufficient material on the discussions of the various models of disability, there appears to be a lack of papers with a critical analysis of Section 6 in particular. Despite the cited body of legal research on the definition, it is acknowledged that the vast majority of it was written before both the EqA was drafted, and its 'Guide to Interpretation'⁵ was distributed. However, it too is recognised that the heart of the current definition was adopted from as far back as the Disability Discrimination Act (1995), hereafter referred to as 'DDA,' some 20 years ago. This has resulted in the bulk of such research studies being only somewhat part relevant, compared to the present time of the post-enacted EqA.

⁵ Office for Disability Issues. (2011). *Guidance on Matters to be Taken Into Account In Determining Questions Relating to the Definition of Disability*. Available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf Last Accessed 1st May 2014.

Therefore, this research proposal submits that a paper that thoroughly examines the definition within Section 6, and the changes – if any, that it has brought is both warranted and required. As such, this research proposal can expect to make a large contribution to the present material available. It will be able to provide an overview of the history of the relevant legislation, statistical data demonstrating why disability-related discrimination is a problem, a critical analysis of Section 6, and any recommendations for future reform.

Theory and Methodology

Theory.

The underlying theory of this research proposal is that:

‘Whilst the definition of disability within Section 6 provides a fair level of equality for those who suffer from disability-related discrimination, so long as the definition remains based on the medical model of disability, it will always have restricted limitations.’

Such theory is based on the current views of numerous academics in the legal journals and papers cited in the literature review. Although there were other competing theories outlined in the literature review, they were often held by an academic minority that offered criticism of the definition, but provided no real attempt as to how to substantially remedy the inequality that it caused.

Methodology.

Since this research proposal will focus heavily on utilising previously published secondary research materials such as statutory legislation, common law cases, legal commentary, and the re-examination of statistical data, there will be no implementation of primary research methods. The research proposal will not include any quantitative research analysis, but will instead focus on the use of qualitative research analysis of the law, which will help to explain why and how the law operates as it does.

These particular methods have been chosen above others because they will replicate the methods used in the relevant texts cited in the literature review, which have all proven to be successful in establishing themselves as quality research papers. The only foreseen restriction

of such choices is that there will be no opportunity to carry out primary research relating to the research.

Chapter One - An Introduction to the Issue of Disability

Chapter One - An Introduction to the Issue of Disability	10
1.1 The Statistics.	10
1.2 What Do The Statistics Mean?	15
1.3 The Two Main Models of Disability-Related Discrimination.	16
1.4 The Medical Model of Disability.	17
1.5 The Social Model of Disability.	18
1.6 Other Models of Disability.	19
1.7 The Meaning of Discrimination.	20
1.8 The Aims of The Law.	20

Chapter One - An Introduction to the Issue of Disability

1.1 The Statistics.

The Office For Disability Issues states that over 11.2 million people in Great Britain are classed as having a disability, of whom 5.2 million are adults of working age,⁶ 5.2 million are over state pension age⁷ and 0.8 million are children.⁸ This estimate covers the number of people with a longstanding illness, disability or infirmity, and who have a significant difficulty with day-to-day activities.⁹ This constitutes to approximately 19% of the current working population, of which, only 50% of those with a disability that are of working age are currently engaged in employment. This compares to approximately 80% of those without a disability who are of working age and engaged in employment. Unsurprisingly, the prevalence of disability rises with age. This is demonstrated by approximately 5% of children diagnosed with having a disability, compared to 14% of adults and almost 50% of pensioners.¹⁰ From these statistics it is quite clear to say that it was fair for Barnes¹¹ to argue that ‘disable people are disproportionately disadvantaged in the current labour market.’¹²

⁶ Working Age is defined as: men aged 16-64 and women aged 16-59.

⁷ State Pension Age is defined as: men aged 65 and over and women aged 60 and over. (State Pension age changed from 2010/11 and so the definition of State Pension age and Working Age is not consistent over time. The State Pension age for men is 65 for men born before 6th April 1959. For women born on or before 6th April 1950, the State Pension age is 60. From 6th April 2010, State Pension age for women born on or before 6th April 1950 started to increase gradually between April 2010 and November 2018. For the purpose of this date, women are defined to be of State Pension age based on their date of birth and the date of interview).

⁸ Children are defined as: both boys and girls under the age of 16.

⁹ Department for Work and Pensions. (2012). *Disability Prevalence Estimates 2011/12*. Available: <http://odi.dwp.gov.uk/docs/res/factsheets/disability-prevalence.pdf>. Last Accessed 1st May 2014.

¹⁰ DLF. (2010). *Key Facts*. Available: <http://www.dlf.org.uk/content/key-facts>. Last Accessed 1st May 2014.

¹¹ Colin Barnes is a Professor of Disability Studies at the University of Leeds, England.

¹² Page 445 of C. Barnes, ‘A Working Social Model? Disability, Work and Disability Politics in the 21st C’ (2000), 20, Critical Social Policy 4.

Both Degener¹³ and Quinn¹⁴ have argued that historically, those with a disability are treated ‘not as subjects with legal rights, but as objects of welfare, health and charity programs.’¹⁵

Table 1.1 shows discrimination with the European Union.

Ground	Rare (%)	Widespread (%)	Don't Know (%)
Ethnic Origin	30	64	6
Disability	42	53	6
Sexual Orientation	41	50	9
Age	48	46	7
Religion or Beliefs	47	44	8
Gender	53	40	8

Table 1.1¹⁶

Table 1.1 shows that apart from ethnic origin, at 53%, disability discrimination is considered the most widespread form of any discrimination with the European Union, beating sexual orientation, age, religious beliefs and gender discrimination.

Table 1.2 shows whether belonging to one of these groups is an advantage, disadvantage or neither, in society at the current time.

Characteristic	Disadvantage	Neither	Advantage
Being Disabled	79	15	-
Being a Roma	77	15	-
Being Aged Over 50	69	24	-
Being of a Different Ethnic Origin	62	30	-
Being Homosexual	54	39	-
Being Part of a Different Religion	39	54	-
Being a Female	33	54	1
Being Aged Under 25	20	38	39

Table 1.2¹⁷

¹³ Theresia Degener is a Professor of Law and Disability Studies at the Protestant University of Applied Sciences in Bochum, Germany.

¹⁴ Gerard Quinn is a Professor of Law at NUI Galway, Ireland.

¹⁵ Paragraph 7 of Degener, T. and Quinn, G. (2000) ‘A Survey of International Comparative and Regional Disability Law Reform October’, Disability Rights Education and Defense Fund.

¹⁶ Statistics taken from European Commission (2010). *Discrimination in the EU*. Available: http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_fiche_be.pdf. Last Accessed 1st May 2014.

Table 1.2 shows that those who have a disability are considered to be at the most disadvantaged at a staggering 79% surveyed. This marginally beats being a Roma, and sits significantly higher than all other categories.

Table 1.3 shows the total number of disabled persons in Great Britain (figures are in millions)

	Adults of Working Age	Adults of State Pension Age	All Adults	All Children	All Ages
2002/03	5	4.7	9.7	0.7	10.4
2003/04	4.9	4.6	9.5	0.7	10.1
2004/05	4.8	4.6	9.5	0.7	10.1
2005/06	5.2	4.9	10.1	0.7	10.8
2006/07	4.9	4.9	9.8	0.7	10.4
2007/08	4.8	5	9.8	0.8	10.6
2008/09	5	5.1	10.1	0.7	10.9
2009/10	5.1	5.1	10.2	0.8	11
2010/11	5.2	5.2	10.4	0.8	11.2

Table 1.3¹⁸

Table 1.3 shows that the number of people with a disability has risen by 800,000 in just 8 years. This may be down to population growth, improved medical understanding and diagnosis, or a combination of the two.¹⁹

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Page 32 of Hepple, B (2011). *Equality: The New Legal Framework*. Hart Publishing Ltd.

Table 1.4 shows the response to the question of ‘Would you say that, with equivalent qualifications or diplomas, the following people would be ‘less likely,’ ‘as likely’ or ‘more likely’ than others to get a job, be accepted for training or be promoted?’

	Less Likely	As Likely	More Likely
A person Aged over 50 Compared With a Person Aged under 50	30	64	6
A Disabled Person Compared With an Able-Bodied Person	42	53	6
A Person Who is Not White Compared to a White Person	41	50	9
A Person of Different Ethnic Origin Than the Rest of the Population	48	46	7
A Foreigner Compared to a National	47	44	8
A Female Compared With a Male	53	40	8
A Homosexual Compared with a Heterosexual	33	40	1
A Person Who Practices a Different Religion	20	38	39
A Person Aged over 25 Compared With a Person Aged over 25	4	45	49

Table 1.4²⁰

Table 1.4 shows that with equivalent qualifications or diplomas, only 53% of the population believes that a disabled person is just as likely to get a job, training or promotion. This compares to 42% believing that they would be less likely to, and just 6% believing they stand more of a chance. This last figure may possibly be owed to the presence of positive discrimination, which is only permitted in cases of disability-discrimination.

²⁰ Statistics taken from European Commission (2010). *Discrimination in the EU*. Available: http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_fiche_be.pdf. Last Accessed 1st May 2014.

Table 1.5 shows disability prevalence disaggregated by impairment for Great Britain (millions)

Capacity Affected	2003/04	2004/05	2005/06	286.6	2007/08	2008/09	2009/10	2010/11
Mobility	6.2	6.0	6.2	6.2	6.3	6.4	6.3	6.4
Lifting or Carrying	5.9	6.0	6.1	6.0	6.0	6.1	6.0	6.1
Manual Dexterity	2.6	2.5	2.6	2.6	2.6	2.7	2.6	2.7
Continence	1.3	1.2	1.5	1.5	1.5	1.5	1.5	1.7
Communication	1.7	1.9	1.9	1.9	1.9	2.0	2.1	2.0
Memory/Concentration/Learning	2.0	2.0	1.9	1.9	1.9	2.2	2.2	2.3
Recognising When in Danger	0.6	0.6	0.6	0.7	0.7	0.7	0.7	0.8
Physical Co-ordination	N/A	2.2	2.2	2.4	2.4	2.4	2.4	2.6
Other	1.9	2.8	2.8	3.2	3.2	3.5	3.8	3.9
All With at Least One Impairment	10.0	10.1	10.1	10.4	10.4	10.9	11.0	11.1

Table 1.5²¹

Table 1.6 shows disability prevalence disaggregated by gender for Great Britain (millions)

Capacity Affected	2003/04	2004/05	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11
Male	4.9	4.8	4.9	4.9	5.0	5.1	5.1	5.3
Female	5.5	5.3	5.3	5.5	5.6	5.8	5.8	5.9
All	10.4	10.1	10.1	10.4	10.6	10.9	11.0	11.2

Table 1.7²²

²¹ *Ibid.*

²² *Ibid.*

1.2 What Do The Statistics Mean?

As per the statistics from the tables, it is clear that there is overwhelming evidence that those with a disability are facing discriminatory attitudes on a regular basis. A 2011 survey aimed at disabled people showed that: 19% stated they experienced disability-related discrimination everyday, 30% stated they experienced it every week, and 20% stated they experienced it every month.²³ Therefore, almost 50% of those surveyed stated that they experienced disability-related discrimination at least once per week, whilst over 66% experienced it at least once per month. However, perhaps more alarmingly, nearly 20% stated that they faced disability-related discrimination on a daily basis, whilst over 50% stated that they had experienced a ‘hostile, aggressive or violent’ attitude that they believe was solely related to the fact that they were disabled.²⁴

Considering that disability discrimination is viewed as the most widespread type of discrimination, those with a disability are tipped to be at the greatest disadvantage, with 42% of people believing that those with a disability are less likely to get a job, training or promotion. With the diagnosis of disabilities rising, there is a great concern that those with a disability are provided with sufficient protection from discrimination both as a person and as an employee.

²³ Survey on behalf of Scope carried out by COMRES. (2011). *Poll Digest - Social - Scope Discrimination Survey*. Available: <http://www.comres.co.uk/poll/8/scope-discrimination-survey-15-may-2011.htm>. Last accessed 1st May 2014.

²⁴ Scope (2012). *Latest Attitudes Survey*. Available: <http://www.scope.org.uk/news/latest-attitudes-survey>. Last accessed 1st May 2014.

1.3 The Two Main Models of Disability-Related Discrimination.

In England and Wales the two most common and fundamental models that depict disability discrimination are the ‘Medical Model of Disability’ and the ‘Social Model of Disability.’²⁵ Ultimately, the medical model focuses on the actual disability at hand and is only concerned with treating the disability. There is a notable focus towards the implementation of this model in the EqA, and preceding statutory instruments. However, one could argue that the requirement for employers and service providers to make ‘reasonable adjustments’ to their policies or practices, or physical aspects of their premises, follows the social model.²⁶

Contrariwise, the focus of the social model is on the wider society and dictates that the barriers to participating in society of those with a disability are society’s responsibility and as such, the disability of an individual should remain irrelevant.²⁷

Sargeant²⁸ gives a great example that shows the difference in philosophies between the two models: ‘The medical model is concerned with providing a wheelchair for a person with a disability that affects their mobility; [whereas] the social model would be more concerned about making access to transport and buildings as wide as possible. If a person in a wheelchair cannot access a building, it is society’s responsibility, not that of the disabled person.’²⁹

²⁵ Public and Commercial Services Union. (2012). *Disability Models and Attitudes*. Available: http://www.pcs.org.uk/en/equality/guidance-and-resources/disability_equality_toolkit/disability-models-and-attitudes.cfm. Last accessed 1st May 2014.

²⁶ Welsh Government. (2013). *Social Model of Disability*. Available: <http://wales.gov.uk/topics/equality/rightsequality/disability/socialmodel>. Last accessed 1st May 2014.

²⁷ Page 58 of Sargeant, M (2013). *Discrimination and the Law*. Oxon: Routledge.

²⁸ Malcolm Sargeant is a professor of Labour Law at Middlesex University, England.

²⁹ Page 58 of Sargeant, M (2013). *Discrimination and the Law*. Oxon: Routledge.

1.4 The Medical Model of Disability.

As aforementioned, the medical model sees the person imposed with a disability as the issue, those with the disability should, if possible, be adapted to fit into society as it stands. Rieser³⁰ argues that an obvious drawback to this model is that ‘if this is not possible, then we are shut away in some specialised institution or isolated at home, where only our most basic needs are met.’³¹ It is common for the impairment to be focused on, rather than that of the actual needs of the individual. In this sense, great reliance is placed upon the medical industry and other associated professions to provide help to a person by offering treatment or a cure to help eliminate disabilities.

The medical model would dictate that control is exercised over disabled people in respect of the built environment exhibiting physical difficulties and barriers. As such, this often makes it difficult or sometimes impossible for some people’s needs to be met in their day-to-day lives, whether at work, home, school, and leisure, entertainment and transport facilities. Rieser further argues that ‘medical model thinking about us, predominates in schools where special educational needs are thought of as resulting from the individual who is seen as different, faulty and needing to be assessed and made as normal as possible.’³² The social model has a clear shift in attitude; instead, looking at what is wrong with the school and focusing on the strengths of the child.

³⁰ Richard Rieser is the managing director of World of Inclusion Ltd and is an expert disabled international equality trainer, consultant and teacher.

³¹ Rieser, R. (2010). *Medical Model / Social Model*. Available: http://www.worldofinclusion.com/medical_social_model.htm. Last accessed 1st May 2014.

³² *Ibid.*

1.5 The Social Model of Disability.

On the other hand, the social model focuses on barriers established by society in terms of disabled people having access to facilities, goods and services, it attempts to break down these barriers that prevent disabled people from participating in society, employment and independent living.³³ The social model examines what can be done to eliminate barriers of inclusion and recognises that it is attitudes towards disabilities that often create such barriers and obliges people to be proactive in removing them.

Unlike the medical model, the social model often identifies problems faced by disabled people as a consequence of external factors, such as the way in which information is provided, e.g. only offering basic text instead of offering wider formats such as braille and larger text for the visually impaired. Another example is the way in which access is provided, only offering basic access instead of offering wider access such as wheelchair ramps, lifts and escalators for those that require them.

A key feature of the social model is the distinguishment between those with an impairment and those with a disability, this is not considered in the medical model.³⁴ An impairment is described as ‘a characteristic or long-term trait, which may or may not result from an injury or disease which may affect a person’s appearance or functioning of their mind or body. The characteristic may cause pain, fatigue, affect communication, or interfere with mental

³³ Public and Commercial Services Union. (2012). *Disability Models and Attitudes*. Available: http://www.pcs.org.uk/en/equality/guidance-and-resources/disability_equality_toolkit/disability-models-and-attitudes.cfm. Last accessed 1st May 2014.

³⁴ Dr. R. Laing. (2001). *The Development and Critique of the Social Model of Disability*. Available: http://www.ucl.ac.uk/lc-ccr/lccstaff/raymond-lang/development_and_critique_of_the_social_model_of_disability.pdf. Last accessed 1st May 2014.

capacity.’³⁵ The model recognises that disabled people are people with impairments who are disabled by their environment, not a medical condition. It is wrong to assume that an impairment causes a disability; it is the choices made by society that causes someone to be disabled.

“Example 1 - A wheelchair user wants to get on a bus. If it has room and access for wheelchairs, they are fine. If not, they are disabled.”

“Example 2 - A visually impaired person wanting to find out what the council is doing. If information is available in an audio format, they are fine. If not, they are disabled.”³⁶

1.6 Other Models of Disability.

Aside from the medical and social models, exist many others, such as the ‘Religious/Moral Model of Disability,’ which views disability as a ‘punishment inflicted upon an individual or family by an external force.’³⁷ Some argue that it is ‘an extreme model which can exist only in a society where deprivation is linked to ignorance, fear and prejudice’³⁸ and as such is ‘not fit for purpose’³⁹ and will not be discussed further.

³⁵ Public and Commercial Services Union. (2012). *Disability Models and Attitudes*. Available: http://www.pcs.org.uk/en/equality/guidance-and-resources/disability_equality_toolkit/disability-models-and-attitudes.cfm. Last accessed 1st May 2014.

³⁶ Examples provided by Welsh Government. (2013). *Social Model of Disability*. Available: <http://wales.gov.uk/topics/equality/rightequality/disability/socialmodel>. Last accessed 1st May 2014.

³⁷ Paragraph 1 of MDRC. (2007). *Religious/Moral Model of Disability*. Available: www.copower.org/models-of-disability/177-religiousmoral-model-of-disability.html Last accessed 1st May 2014.

³⁸ Paragraph 3 of MDRC. (2007). *Religious/Moral Model of Disability*. Available: www.copower.org/models-of-disability/177-religiousmoral-model-of-disability.html Last accessed 1st May 2014.

³⁹ Paragraph 6 of Kaplan, D. (2002). *The Definition of Disability*. Available: www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm. Last accessed 1st May 2014.

1.7 The Meaning of Discrimination.

In tackling disability discrimination, the first question to answer is ‘what is the definition of disability?’ Alexander⁴⁰ provides an easily understood legal definition of discrimination for the average layman as ‘different treatment motivated by prejudice or hostility.’⁴¹ Furthermore, he states that not all discrimination should be unlawful, even where it is immoral. Arguing, perhaps controversially, that for example, in choosing a spouse, a person that excludes a member of one particular race solely because of bias, may be acting within their moral rights, even if they are acting immorally. Rutherglen⁴² states that it is ‘crucial in a democracy... and necessary for the enactment and enforcement of civil rights law...’⁴³ for the public to understand the definition of disability. Furthermore, Gardner⁴⁴ states that ‘discrimination can also be characterised under principles of either harm or unfairness.’⁴⁵

1.8 The Aims of The Law.

Assuming that Gardner is right, the next question to ask is, ‘What is the aim when enforcing legal intervention?’ *Prima facie*, the obvious response would most probably be either ‘fairness or equality.’ Equality is not just confined to domestic statutes, but international legislation and Human Rights instruments throughout the entire world.⁴⁶ As Connolly states, ‘once it is given a firm meaning, it becomes clear that equality is not necessarily always a

⁴⁰ Lawrence Alexander is a Professor of Law at San Diego University, California, USA.

⁴¹ Page 201 of L. Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies* (1992), 141, Penns UL Rev 149.

⁴² George Rutherglen is a Professor of Law at the University of Virginia, USA.

⁴³ Pages 127-128 of G. Rutherglen, *Discrimination and its Discontents* (1995) 81 Virginia L Rev 11.

⁴⁴ John Gardner is a Professor of Jurisprudence at Oxford University, England.

⁴⁵ Pages 2-8 of J. Gardner, *Liberals and Unlawful Discrimination* (1998) 9 OJLS 1.

⁴⁶ Page 4 of Connolly, M (2011). *Discrimination Law*. 2nd ed. Sweet & Maxwell.

good thing.⁴⁷ Citing the treatment handed out in Hitler's concentration camps, Westen argues that equal treatment can sometimes amount to equally bad treatment.⁴⁸

The Formal Equality model of equal opportunity that Britain first adopted when introducing the Race Relations Act (1976) followed the same model that the United States adopted with the Civil Rights Act (1964). The Race Relations Act (1976) provided that direct discrimination was treating someone 'less favourably' on racial grounds, with the intention that people of different races should be treated equally. This Formal Equality model stated that people should be treated on a 'like for like basis.'⁴⁹ However, the notable exception from this model is disability discrimination law, which insists upon different treatment.⁵⁰ This exists as an exception because of the law that dictates how disability discrimination has been legislated and enforced, and will be examined in the next chapter.

⁴⁷ Page 4 of Connolly, M (2011). *Discrimination Law*. 2nd ed. Sweet & Maxwell.

⁴⁸ p.xvii of P. Westen, *Speaking of Equality*, (1990).

⁴⁹ This philosophy can be traced back to Aristotle's works in *Nicomachean Ethics V.III*.

⁵⁰ Pages 16-17 of H. Collins, *Discrimination, Equality and Social Inclusion* (2003) 66 M.L.R.

Chapter Two - The Legislation Concerning Disability Discrimination

Chapter Two - The Legislation Concerning Disability Discrimination	23
2.1 Sources of Equality Law.	23
2.2 European Union Law.	24
2.3 Equality as a Human Right.	25
2.4 Unlawful Discrimination Under The Equality Act (2010).	26
2.5 Direct Discrimination.	27
2.6 Indirect Discrimination.	30
2.7 Discrimination Arising From a Disability.	31
2.8 Remaining Forms of Discrimination.	32
2.9 S.6 Equality Act (2010).	33

Chapter Two - The Legislation Concerning Disability Discrimination

2.1 Sources of Equality Law.

In order to understand the definition of disability with regards to discrimination, it is first necessary to examine the law that governs discrimination as a whole. Domestically, the most prominent anti-discrimination measures is legislation within the EqA, which consolidated numerous statutes and regulations into a single Act of Parliament, ‘bringing together over 100 separate discrimination measures.’⁵¹

Before such consolidation was ordered to be legislated, the numerous Acts that existed in relation to discrimination were inclusive of: ‘the Equal Pay Act (1970), the Sex Discrimination Act (1975), the Race Relations Act (1976), the Disability Discrimination Act (1995), the Employment Equality (Religion and Belief) Regulations (2003), the Employment Equality (Sexual Orientation) Regulations (2003), and the Employment Equality (Age) Regulations (2006).’⁵²

Prior to the EqA, one of the first statutes to assist those with a disability was the Disabled Persons (Employment) Act (1945), which was enacted shortly after the Second World War. The rationale behind the legislation was to assist soldiers who were injured during the war by imposing a quota on the composition of the workforce at 3% that are disabled, if they had twenty or more employees.⁵³ Despite the good intentions, the Act was termed as ‘a genuine

⁵¹ Page 5 of S. Wallace. *The Sting in the Tail*, (2010) May Employment Law Journal 110

⁵² www.equalityhumanrights.com/advice-and-guidance/equal-rights-equal-respect/useful-information/understanding-equality

⁵³ Page 265 of Taylor, S. and Emir, A. *Employment Law - An Introduction*, 3rd Ed, (OUP).

affirmative action provision, but one that did not work.’⁵⁴ This was most probably because the Act required the fulfillment of quotas that were not always fully enforced by employers. The first real Act aimed solely aimed at tackling disability discrimination was the Disability Discrimination Act (1995) which was described in *Clarke v Novacold*⁵⁵ as a ‘revolutionary Act aimed at the integration of disabled people into society and into the country’s workforce.’⁵⁶ However, Lord Lester stated that the Act was ‘riddled with vague, slippery and elusive exceptions’ making it ‘so full of holes that it is more like a colander than a binding code.’⁵⁷

2.2 European Union Law.

The EU has legislated against discrimination on the grounds of disability under The Framework Directive on Equal Treatment in Employment and Occupation (Directive 2000/78/EC).⁵⁸ This Directive put a duty on Parliament to ‘take appropriate measures in line with the principles contained in [this directive], in order to eliminate disadvantages entailed by such provision.’⁵⁹ The Directive included proposals to combat discrimination on the grounds of disability ‘with a view to putting into effect in the Member States the principle of equal treatment.’⁶⁰ Although it is true that the EU directive has directly influenced anti-discrimination law domestically, EU anti-discrimination law was drafted under the influence of domestic legislation itself. For the purpose of Directive 2000/78, as per *Chacon Navas v Eurest Colectividades SA*,⁶¹ the concept of disability must be understood as referring to ‘a limitation, which results in particular from physical, mental or psychological impairments

⁵⁴ Page 289 of Alldrige, P. *Locating Disability Law*, (2006) 59 Current Legal Problems 1.

⁵⁵ *Clarke v Novacold* [1999] I.C.R. 951.

⁵⁶ Paragraph 54 of *Clarke v Novacold* [1999] I.C.R 951.

⁵⁷ HL Deb 22nd May 1995 Col 813.

⁵⁸ Directive 2000/78/EC is inclusive of religion or belief, age and sexual orientation, as well as disability.

⁵⁹ Article 2(b)(ii) of Directive 2000/78/EC.

⁶⁰ Article 1, Chapter 1 of Directive 2000/78/EC.

⁶¹ *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706 ECJ.

and which hinders the participation of the person concerned in professional life.’⁶² Furthermore, the ECJ held that an employee who has been dismissed solely on account of sickness is not protected by the prohibition against discrimination on grounds of disability in Framework 2000/78.

2.3 Equality as a Human Right.

The notion that equality is seen as a fundamental human right is reflected by the fact that all major international human rights instruments contain equality clauses to some degree. This is demonstrated by Article 1 of the United Nations’ Universal Declaration of Human Rights (1948),⁶³ which states that ‘All human beings are born free and equal in dignity and rights.’⁶⁴ Anti-discriminatory assertiveness is underlined in Article 2 which states that ‘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.’⁶⁵

Interestingly, the prohibition of discrimination appears to be an open-ended list, as is clear from the wording ‘such as’ and, ‘or other status’. Accordingly, other grounds of discrimination may also be covered such as sexual orientation, or more notably, disability discrimination.

Equality is further highlighted in Article 7 which states that ‘All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any

⁶² Paragraph 43 of *Chacon Navas v Eurest Colectividades SA* [2006] IRLR 706 ECJ.

⁶³ UDHR United Nations’ Universal Declaration on Human Rights.

⁶⁴ Article 1 of the United Nations Universal Declaration of Human Rights (1948).

⁶⁵ Article 2 of *Ibid.*

incitement to such discrimination.⁶⁶ From this, it is evident that both equality before the law and protection from discrimination should be incorporated in domestic legislation. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which was incorporated into British domestic law by the Human Rights Act (1998), contains a non-discrimination clause in Article 14 and an open-ended list of discrimination grounds:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁶⁷

Further protection provided by the EU can be found in the Charter of Fundamental Rights of the European Union (2000).

“Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”⁶⁸

Accordingly, since both the right of equality and the right not to be discriminated against are rooted in EU legislation there is a requirement for these principles and directives to be enshrined in domestic law.

⁶⁶ Article 7 of *Ibid.*

⁶⁷ Article 14 of the European Convention for the Protection of Human Rights (1950).

⁶⁸ Article 21(1) Charter of Fundamental Rights of the European Union (2000).

2.4 Unlawful Discrimination Under The Equality Act (2010).

The Equality Act (2010) is currently at the forefront of governing discrimination and protects nine characteristics of any particular person from discrimination within their duration of employment. These are: age,⁶⁹ disability,⁷⁰ gender reassignment,⁷¹ marriage and civil partnership,⁷² race,⁷³ religion or belief,⁷⁴ sex,⁷⁵ sexual orientation,⁷⁶ and pregnancy and maternity.⁷⁷

Furthermore, the Act has created numerous instances in which disability discrimination can arise during employment and thus be unlawful: direct discrimination,⁷⁸ indirect discrimination,⁷⁹ unfavourable treatment arising from a disability,⁸⁰ failure to make reasonable adjustments,⁸¹ and harassment related to a disability.⁸² Under Section 83(2)(a) of the EqA, employment is defined as ‘employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.’

2.5 Direct Discrimination.

S.13(1) EqA states that direct discrimination due to disability occurs when ‘a person (A) discriminates against another (B) if, because of a [disability], A treats B less favourably than A treats, or would treat, others.’ Legislation previous to the EqA, such as the DDA, had used

⁶⁹ Age is a protected characteristic under Section 5 of the Equality Act (2010).

⁷⁰ Disability is a protected characteristic under Section 6 of the Equality Act (2010).

⁷¹ Gender Reassignment is a protected characteristic under Section 7 of the Equality Act (2010).

⁷² Marriage and Civil Partnership is a protected characteristic under Section 8 of the Equality Act (2010).

⁷³ Race is a protected characteristic under Section 9 of the Equality Act (2010).

⁷⁴ Religion or Belief is a protected characteristic under Section 10 of the Equality Act (2010).

⁷⁵ Sex is a protected characteristic under Section 11 of the Equality Act (2010).

⁷⁶ Sexual Orientation is a protected characteristic under Section 12 of the Equality Act (2010).

⁷⁷ Pregnancy and Maternity is a protected characteristic under Section 18 of the Equality Act (2010).

⁷⁸ Direct Discrimination is a protected characteristic under Section 13 of the Equality Act (2010).

⁷⁹ Indirect Discrimination is a protected characteristic under Section 19 of the Equality Act (2010).

⁸⁰ Section 15 of the Equality Act (2010).

⁸¹ Section 21 of the Equality Act (2010).

⁸² Section 26 of the Equality Act (2010).

the term ‘on the ground of.’ Although this effectively means the same, guidance to the legislation states that this was replaced by the term ‘because of’ to make it more accessible to claimants.

An early example of direct discrimination can be found in *James v Eastleigh*⁸³ in which the court considered the use of the previous ‘but for test’ unhelpful, stating that ‘it is better to simply ask what were the facts that the discriminator consider to be determinative when making the relevant decision.’⁸⁴ Furthermore, the court affirmed that motive was irrelevant for any part of the test for discrimination. The court’s viewpoint on motive was later reaffirmed twenty years later by the EAT in *Amnesty International v Ahmed*⁸⁵ in which the tribunal affirmed that motive should be irrelevant in deciding direct discrimination, and thus remains no defence to it.⁸⁶

A person with an honest belief that they are being treated less favourably does not itself establish ‘unfavourable treatment’ since this a matter for an employment tribunal to decide on, as was held in the EAT case of *Burrett v West Birmingham Health Authority*.⁸⁷ In the same year, the EAT affirmed such view in *Stewart v Cleveland Guest Ltd*⁸⁸ and stated that ‘there is room for disagreement as to what is or is not less favourable treatment and the tribunal is best placed to make a decision on the facts of a particular case.’⁸⁹

⁸³ *James v Eastleigh Borough Council* [1990] AC 751.

⁸⁴ Lord Phillips at page 768 of *James v Eastleigh Borough Council* [1990] AC 751.

⁸⁵ *Amnesty International v Ahmed* [2009] UKEAT 0447_08_1308.

⁸⁶ Also stated in *R (on the application of E) v Governing Body of JFS* [2010] IRLR 136 SC.

⁸⁷ *Burrett v West Birmingham Health Authority* [1994] IRLR 7 EAT.

⁸⁸ *Stewart v Cleveland Guest (Engineering) Ltd* [1994] IRLR 440 EAT.

⁸⁹ Page 291 of Smith, I and Baker, A (2010). *Smith & Woods Employment Law*. 10th ed. Oxford: OUP.

It was affirmed in *London Borough of Islington v Ladele*⁹⁰ that treating all employees in precisely the same way could not amount to direct discrimination. Furthermore, under S.13(2) EqA there are no grounds to justify direct discrimination for any of the protected characteristics, including disability, with age being the only exception.

From *Nagarajan v London Regional Transport*⁹¹ we know that the crucial question in cases of direct discrimination is to ask why the person received less favourable treatment. Was it on grounds of a disability? Or was it for another reason? If disability grounds were the primary reason for less favourable treatment, then direct discrimination must be established. When deciding whether discrimination occurred, the reason behind such reason must remain irrelevant. The court has been quite clear on motive in numerous cases and has held in: *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport*,⁹² *R (on the application of E) v Governing Body of JFS*,⁹³ *James v Eastleigh Borough Council*,⁹⁴ and *Singh v Biotechnology and Biological Sciences Research*⁹⁵ that there is no defence as to motive, and it should remain immaterial when establishing unfavourable treatment.

It was held in *High Quality Lifestyles Ltd v Watts*⁹⁶ that in order to establish direct discrimination, it is not sufficient for the claimant to show that his treatment was on the grounds his disability. It also has to be established that the treatment was less favourable than treatment that would be afforded to a hypothetical comparator in circumstances that are ‘not

⁹⁰ *London Borough of Islington v Ladele* [2009] IRLR 154 EAT.

⁹¹ *Nagarajan v London Regional Transport* [1999] IRLR 572 HL.

⁹² *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2002] IRLR 688 EAT.

⁹³ *R (on the application of E) v Governing Body of JFS* [2010] IRLR 136 SC.

⁹⁴ *James v Eastleigh Borough Council* [1990] IRLR 288 HL.

⁹⁵ *Singh v Biotechnology and Biological Sciences Research* [2011] EqLR 1248 CS.

⁹⁶ *High Quality Lifestyles Ltd v Watts* [2006] IRLR 850 EAT.

materially different.’⁹⁷

However, in *Aylott v Stockton on Tees Borough Council*⁹⁸ the Court of Appeal noted that there are possible dangers in attaching too much importance to constructing a comparator and to less favourable treatment as a separate issue. If a claimant was dismissed because of their disability then it is likely that they were treated ‘less favourably than a hypothetical comparator not having the particular disability that would have been treated in the same relevant circumstances.’

Furthermore, in *JP Morgan Europe Ltd v Chweidan*⁹⁹ the Court of Appeal held that an employment tribunal had erred in holding that the claimant had been subjected to direct discrimination on the grounds of disability in respect of his dismissal and the level of bonus he was paid. It had also concluded that his claims of disability related discrimination failed because the respondent had established that a non-disabled employee in the same circumstances would have been treated in the same way.

2.6 Indirect Discrimination.

S.19 EqA¹⁰⁰ states that indirect discrimination due to disability occurs when ‘a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a [disability] of B's. Furthermore, ‘for the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a [disability] of B's if:

- (a) A applies, or would apply, it to persons with whom B does not share the [disability]

⁹⁷ Paragraph 43 of *High Quality Lifestyles Ltd v Watts* [2006] IRLR 850 EAT.

⁹⁸ *Aylott v Stockton on Tees Borough Council* [2010] IRLR 994 CA / EqLR 69 CA.

⁹⁹ *JP Morgan Europe Ltd v Chweidan* [2011] IRLR 673 / EqLR 779 CA.

¹⁰⁰ Section 19(1,2) of the Equality Act (2010).

- (b) it puts, or would put, persons with whom B shares the [disability] at a particular disadvantage when compared with persons with whom B does not share it,
- (c) it puts, or would put, B at that disadvantage, and...
- (d) cannot show it to be a proportionate means of achieving a legitimate aim.

Therefore, indirect discrimination, which is mutually exclusive from direct discrimination, as per *R (on the application of E) v Governing Body of JFS*,¹⁰¹ occurs when a policy that applies to everybody has an unintentional effect that puts those with a disability at disadvantage. Where somebody with a disability is disadvantaged by such policy they are indirectly discriminated against unless an employer can demonstrate that it is a 'proportionate means to achieving a legitimate aim' as per S.19 EqA.¹⁰² The court stressed in *Mandla v Lee*¹⁰³ that whether a requirement or condition is justifiable, is a question of fact for the tribunal to discover. This belief was affirmed in *Raval v Department of Health and Security*¹⁰⁴ in which the EAT held that 'the issue of justifiability, being a question of fact, is one that has been left by Parliament for us [the tribunals] to consider.'

In introducing the concept of direct discrimination after *Clarke v Eley (IMI) Kynoch Ltd*,¹⁰⁵ the purpose of the legislature was to 'seek to eliminate those practices which had a disproportionate impact on women and were not justifiable for other reasons.'¹⁰⁶ Lady Hale

¹⁰¹ *R (on the application of E) v Governing Body of JFS* [2010] IRLR 363 HL.

¹⁰² S.19(2)(d) of the Equality Act (2010).

¹⁰³ *Mandla v Lee* [1983] IRLR 209 HL.

¹⁰⁴ *Raval v Department of Health and Security* [1985] IRLR 370

¹⁰⁵ *Clarke v Eley (IMI) Kynoch Ltd* [1982] IRLR 482 EAT.

¹⁰⁶ Tarrant, S. *The Specific Triggering Incident' in Provocation: Is the Law Gender Biased?* (1996) Vol. 26, Western Australian Law Review.

stated that ‘indirect discrimination should look beyond formal equality towards a more substantive equality of results.’¹⁰⁷

2.7 Discrimination Arising From a Disability.

Discrimination arising from a disability was examined by the court in the landmark case of *London Borough Council of Lewisham v Malcolm*¹⁰⁸ in which the defendant alleged that in seeking to evict him, after subletting a property without the council’s consent whilst suffering from schizophrenia,¹⁰⁹ the council was discriminating against him by treating him less favourably for a reason that related to his disability. On appeal, the House of Lords held that a disabled person must compare their treatment with someone who is in very similar circumstances to demonstrate that they have been treated less favourably for reasons relating to disability.

This decision emerged as incredibly controversial to some, and subsequently received large amounts of negativity and criticism from equality campaigners who put pressure on Parliament to rectify the inequality that the decision had caused and would continue to cause.

In response, the legislature effectively nullified the court’s decision in the drafting of S.15 EqA which states that discrimination arising from a disability occurs when ‘a person (A) treats a disabled person (B) unfavourably because of something arising in consequence of B’s disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.’ However, this does not apply if ‘A shows that they did not know, and could

¹⁰⁷ Lady Hale in *R (on the application of E) v Governing Body of JFS* [2010] IRLR 136 SC.

¹⁰⁸ *London Borough Council of Lewisham v Malcolm* [2008] UKHL 43.

¹⁰⁹ Schizophrenia is a long-term mental health condition that causes a range of different psychological symptoms, including hallucinations, delusions, muddled thoughts, and changes in behaviour. (www.nhs.uk/conditions/schizophrenia/pages/introduction.aspx) Last Accessed May 2014.

not reasonably have been expected to know that B had such disability.¹¹⁰

2.8 Remaining Forms of Discrimination.

S.21 EqA¹¹¹ states that ‘A discriminates against a disabled person if A fails to comply with [a duty to make reasonable adjustments] in relation to that person.’ Furthermore, S.26(1) and S.27(1) EqA respectively, outlaw harassment and victimisation of a person in the workplace.

2.9 S.6 Equality Act (2010).

In *Goodwin v The Patent Office*,¹¹² the EAT confirmed that the DDA¹¹³ requires the tribunals and courts to look at the evidence by reference to four different questions in deciding whether somebody is said to be disabled. These are as follows:

- 1) Does the person have a physical or mental impairment?
- 2) Does the impairment have a substantial adverse effect?
- 3) Can the impairment be said to be long-term?
- 4) Does the impairment affect the persons’ ability to carry out day-today activities?

For the purposes of disability-related discrimination, the legislature have agreed with this definition of disability, and as such it was legislated into S.6 Equality Act (2010) and can be seen on the next page:

¹¹⁰ Section 15(1) of the Equality Act (2010).

¹¹¹ Section 21(2) of the Equality Act (2010).

¹¹² *Goodwin v The Patent Office* [1999] IRLR 4 EAT.

¹¹³ Disability Discrimination Act (1995)



Equality Act (2010)

Part 2 Employee Equality: Key Concepts for Reform Chapter 1 Requirements of Reform

6 Disability

- (1) A person (P) has a disability if –
 - (a) P has a physical or mental impairment, and
 - (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of a disability –
 - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability
 - (b) a reference to persons who share a protected characteristic is a reference to a person who have the same disability
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) –
 - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had a disability, and
 - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.
- (5) A minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).
- (6) Schedule 1 (disability: supplementary provision) has effect.

Figure 2.1 (Taken From Section 6 Equality Act (2010))

Essentially, under Section 6 a disability is defined as ‘a physical or mental impairment, which has a substantial and long-term adverse effect on a persons’ ability to carry out normal day-to-day activities.’ Interestingly, this is not too dissimilar from America’s definition of disability, which is defined as ‘a physical or mental impairment that substantially limits a major life activity.’¹¹⁴ As with the EqA, the determination of whether any particular condition is considered a disability is made on a case-by-case basis, unless explicitly stated otherwise.¹¹⁵

Both definitions stress that a disability can be physical or mental, must be substantial, and limits a person’s life activity. The only notable difference is that the EqA explicitly states that the disability must be ‘long-term’. However, these seemingly simple definitions differ dramatically from both the Canadian and Australian definitions, which are prima facie, much longer, and more challenging to interpret and apply. In comparison, both the EqA and the ADA¹¹⁶ seem to provide a much broader definition of disability and may therefore be more inclusive, to the point in which the EqA may appear to be on the verge of a catch-all definition of disability.

Both Woodhams¹¹⁷ and Corby¹¹⁸ have often been critical of the legal definition of disability adopted by our judicial system and have stated that ‘for many years the definition for anti-discrimination purposes is extremely problematic both on a practical and theoretical basis.’¹¹⁹

¹¹⁴ Sec. 12102 (1)(A) Americans with Disabilities Act (1990).

¹¹⁵ A non-exhaustive list of inclusions and exclusions of disabilities can be found in ‘The Equality Act (2010) Guidance on matters to be taken into account in determining questions relating to the definition of disability’.

¹¹⁶ Americans with Disabilities Act (1990).

¹¹⁷ Carol Woodhams is a Professor in Human Resource Management at the University of Exeter, England.

¹¹⁸ Susan Corby is a Professor in Human Resource Management at Greenwich University, England.

¹¹⁹ Page 165, Woodhams, C. and Corby, S. *Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act (1995)*, (2003) 23 *Journal of Social Policy* 1.

Furthermore, Blackstone's 'Guide to the Disability Discrimination Act (1995)' stated that the definition of disability within the DDA was 'confused, contorted and unsatisfactory.'¹²⁰ However, prior to the drafting of the legislation, which provides us with the legal definition of disability, the Disability Task Force admitted the struggle they faced and described the task of providing a suitable definition of disability as 'the most difficult issue that we have ever considered.'¹²¹

Whether or not the legislature has got the definition of disability right, under Section 6 will now be considered in the following chapters.

¹²⁰ Page 1 of Gooding, C. Blackstone's Guide to the Disability Discrimination Act (1995) (Blackstone Press Ltd, 1996).

¹²¹ Page 24 of Disability Task Force (1999) 'From Exclusion to Inclusion' Department for Education and Employment.

Chapter Three - (1) There Must Be ‘A Physical or Mental Impairment’

Chapter Three - (1) There Must Be ‘A Physical or Mental Impairment’	37
3.1 The Court’s Approach.	38
3.2 The Meaning of Impairment.	39
3.3 Automatically Included Disabilities.	45
3.4 Past Disabilities.	46
3.5 Automatically Excluded Disabilities.	47
3.6 The Exclusion of Addiction.	47
3.7 Chapter Conclusion.	49

Chapter Three - (1) There Must Be ‘A Physical or Mental Impairment’

Under S.6 EqA the first requirement in satisfying the definition of disability is that ‘a person must have a physical or mental impairment.’

3.1 The Court’s Approach.

In *Goodwin v The Patent Office*¹²² the court stated that when faced with an issue as to whether a person has a disability within the meaning of the Act,¹²³ tribunals and courts should adopt an ‘inquisitorial or interventionist role.’ However, one could argue that there may be a risk of a difficult situation, in that some people with disabilities may be unable or unwilling to accept that they have one. Without the direct assistance of the tribunal at their hearing, there may be cases where the claimant, for a reason related to his disability, is unwilling to support the claim.

Shortly after, in *Rugamer v Sony Music Entertainment UK Ltd*¹²⁴ and *McNicol v Balfour Beatty Rail Maintenance*¹²⁵ the court stated that an employment tribunal is not an inquisitorial body in the same sense as a medical or other tribunal dealing with a disablement issue as part of the statutory machinery for determining benefits claims. The observations of Morison J in *Goodwin v The Patent Office*,¹²⁶ that the role of tribunals in a disability discrimination case contains an ‘inquisitorial element,’ mean no more than that the tribunal is obliged to conduct the hearing in a fair and balanced manner, intervening and making its own inquiries in the course of the hearing of such persons appearing before it and such witnesses as are called before it as it considers appropriate, so as to ensue due considerations of the issues raised by,

¹²² *Goodwin v The Patent Office* [1999] IRLR 644 EAT.

¹²³ Referring to the Disability Discrimination Act (1995), though now applicable to the Equality Act (2010).

¹²⁴ *Rugamer v Sony Music Entertainment UK Ltd* [2001] IRLR 644 EAT.

¹²⁵ *McNicol v Balfour Beatty Rail Maintenance* [2002] IRLR 71.

¹²⁶ *Goodwin v The Patent Office* [1999] IRLR 644 EAT.

or necessarily implicit in, the complaint being made. The role of the tribunal is not thereby extended so as to place on it the duty to conduct a freestanding inquiry of its own, or to require it to attempt to obtain further evidence beyond that placed in front of it on the issues raised by the parties, or to cause the parties to raise additional issues they have not sought to rely on at all.

Furthermore in *Goodwin v The Patent Office*,¹²⁷ the court stated that they should adopt a purposive approach to construction, construing the statutory language in a way which gives effect to the stated or presumed intention of the legislature, but with due regard to the ordinary and natural meanings of the words in question. Explicit reference should always be made to any relevant provision of the Guidance issued by the Secretary of State or of the Code of Practice, which the tribunal has taken into account. However, the Guidance should not be used as an extra hurdle over which the claimant must jump.

Finally, in *Ministry of Defence v Hay*¹²⁸ the court stated that a statutory approach is self-evidently a functional one directed towards what a claimant cannot, or can no longer, do at a practical level.

3.2 The Meaning of Impairment.

The meaning of ‘impairment’ has received both academic and judicial scrutiny because the concept ‘has been difficult to define.’¹²⁹ The Government’s Office for Disability Issues has produced guidance on matters to be taken into account when determining questions relating to the definition of disability when they published their Equality Act (2010) Guidance. It

¹²⁷ *Goodwin v The Patent Office* [1999] IRLR 644 EAT.

¹²⁸ *Ministry of Defence v Hay* [2008] IRLR 928 EAT.

¹²⁹ Page 10 of Wilkinson, R. ‘*The Single Equality Bill: A missed opportunity to Legislate on Genetic Discrimination?*’, (2009) 3 *Studies in Ethics, Law and Technology* 1.

states that the term mental or physical impairment should be given its everyday meaning.¹³⁰ This reaffirms the decision of the court in *McNicol v Balfour Beatty*.¹³¹ The judgment states that the term ‘impairment’ bears its ordinary and natural meaning. An impairment may result from an illness or it may consist of an illness. The essential question in each case is whether, ‘on a sensible interpretation of the relevant evidence, including the expert medical evidence and reasonable inferences, which can be made from all the evidence, the claimant can be fairly described as having a physical or mental impairment.’¹³² Furthermore, ‘such a decision can and should be made without substituting for the statutory language a different word or form of words in an attempt to describe or defined the concept of impairment.’¹³³ It should also be noted that in *Ministry of Defence v Hay*¹³⁴ and *McNicol v Balfour Beatty Rail Maintenance Ltd*¹³⁵ respectively, that the court affirmed a ‘disability’ is not the same as an ‘impairment’ and that the onus is on the claimant to prove the impairment ‘on the conventional balance of probabilities.’

Now repealed, claimants previously had great difficulty in proving that their impairment was ‘clinically well recognised.’¹³⁶ This is because the requirement failed to appreciate that many psychiatric illnesses have not always been clinically well recognised in the literal sense of the phrase, and regardless of this, such conditions may still have a negative impact upon applicants, and that for this reason, will subsequently be discriminated against.¹³⁷ One option

¹³⁰ Part 2 D4 of the Office for Disability Issues Equality Act (2010) Guidance.

¹³¹ *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] IRLR 71.

¹³² Page 44 of Painter, R, and Holmes, A (2010). *Cases & Materials on Employment Law*. 8th ed. Oxford: OUP.

¹³³ *Ibid*.

¹³⁴ *Ministry of Defence v Hay* [2008] IRLR 928 EAT.

¹³⁵ *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] IRLR 71.

¹³⁶ Paragraph 1, Schedule 1, Disability Discrimination Act (1995) - Now Repealed.

¹³⁷ Page 3, Phillips, C. *The Equality Act (2010): Impact on Mental Health-Related Disability Claims*, (2012), 109 *Employment Law Brief* June.

in establishing the existence of a mental impairment is to show proof that it is classified in the World Health Organisations' International Classification of Disease.¹³⁸

Within a classification, it requires that many parts require specific symptoms to manifest themselves over a specified period of time. As such, simply claiming 'anxiety' without further clarification is unlikely to be sufficient. This follows the decision in *Morgan v Staffordshire University*¹³⁹ in which the court held that medical notes which refer to 'anxiety', 'stress', and 'depression', do not amount to proof of a 'mental impairment.' Consequently, there was 'a strong need to put a label on the condition that was recognised by a significant body of respected medical opinion.'¹⁴⁰ Accordingly, it became 'virtually essential for both parties to call expert evidence, substantially adding to the cost of the proceedings.'¹⁴¹

Similarly, it was held in *Dunham v Ashford Windows*¹⁴² that it is unlikely to be sufficient for a claimant to bring his case only on the basis that he had 'difficulties at school' or is 'not very bright.' A tribunal hearing a mental impairment case based on learning difficulties should look for expert evidence as to the nature and degree of the impairment claimed and for evidence of a particular identified condition, which may have a specific or a generalised effect on function. Furthermore, the tribunal stated that there is no reason why the essential evidence, which establishes the nature of the claimant's condition, should not be provided by a suitably qualified psychiatrist or psychologist. However, what is important is that there

¹³⁸ World Health Organisation. (1990). *International Classification of Diseases*. Available: www.who.int/classifications/icd/en. Last accessed 1st May 2014.

¹³⁹ *Morgan v Staffordshire University* [2002] IRLR 190 EAT.

¹⁴⁰ Page 2 of Phillips, C. *The Equality Act (2010): Impact on Mental Health-Related Disability Claims* (2012), 109 Employment Law Brief June.

¹⁴¹ Page 43 of Pitt, G. *Employment Law* 8th Edition (Sweet and Maxwell) (2011).

¹⁴² *Dunham v Ashford Windows* [2005] IRLR 608 EAT.

should be evidence from a suitably qualified expert who can speak, on the basis of their experience and expertise, as to the relevant condition.

In *Millar v Inland Revenue Commissioners*¹⁴³ the court held that physical impairment can be established without reference to causation, and in particular, without reference to any form of ‘illness.’¹⁴⁴ It noted that many forms of physical impairment result from conditions that cannot be described as an illness, such as an amputated limb. This would clearly not be an illness, but would clearly be an impairment.¹⁴⁵

Furthermore, ‘it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded.’¹⁴⁶ An example that ‘liver disease as a result of alcohol dependency would count as an impairment, although an addiction to alcohol itself is expressly excluded from the scope of the definition of disability in the Act.’¹⁴⁷ However, what is important to consider is ‘the effect of an impairment, not its cause.’¹⁴⁸

In *Power v Panasonic UK Ltd*,¹⁴⁹ an area sales manager had the area in which she was responsible for expanded, following an organisational restructure consultation. After which, she became ill, and following a prolonged period of absence she was subsequently dismissed. There was no dispute that during her lengthy absence she was suffering from both clinical depression and drinking alcohol in a heavy manner. Originally, the tribunal concerned itself with whether the drinking or depression came first. However, the EAT later stated that it was

¹⁴³ *Millar v Inland Revenue Commissioners* [2005] CSHI 71.

¹⁴⁴ Paragraph 23, of *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Part 2, A7 Office for Disability Issues Equality Act (2010) Guidance.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Power v Panasonic UK Ltd* [2003] IRLR 151.

not necessary to consider how the impairment was initially caused. It went on to state that what was relevant, was to discover whether the person had a disability within the meaning of the Act¹⁵⁰ at the relevant time. Even if the applicant was not held to be disabled, then in accordance with Schedule 2 DDA (1995)¹⁵¹ they could be classed as having a past disability. This Schedule provides that where ‘where an impairment ceases to have a substantial adverse effect, then it may be treated as continuing if the effect recurs.’ The legislature decided to incorporate this into Schedule 1 of the EqA,¹⁵² which provides that ‘where an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities, it is still to be treated as continuing to have that effect if it is likely to recur.’

Following *Power v Panasonic*, in *Hospice of St Mary of Furness v Howard*¹⁵³ the court decided that it was not necessary for a claimant to establish the cause of a physical impairment, but where there is an issue as to the existence of a physical impairment, ‘it is open to a respondent to seek to disprove the existence of such impairment, including by seeking to prove that the impairment is not genuine or is a mental and not a physical impairment.’¹⁵⁴

Guidance stresses that it is important to look at the effect of the impairment on the individual’s ability to carry out day-to-day activities, providing several examples:

“Example 1 - A woman is obese. Her obesity in itself is not an impairment, but it causes breathing and mobility difficulties, which substantially adversely affect her ability to walk.”

¹⁵⁰ Referring to the S.1(1) Disability Discrimination Act (1995).

¹⁵¹ Paragraph 5(2), Schedule 2 of the Disability Discrimination Act (1995).

¹⁵² Paragraph 2(2), Schedule 1 of the Equality Act (2010).

¹⁵³ *Hospice of St Mary of Furness v Howard* [2007] IRLR 944 EAT.

¹⁵⁴ Page 67 of Painter, R, and Holmes, A (2010). *Cases & Materials on Employment Law*. 8th ed. Oxford: OUP

“Example 2 - A man has a borderline moderate learning disability, which has an adverse impact on his short-term memory and his levels of literacy and numeracy. For example, he cannot write any original material, as opposed to slowly copying existing text, and he cannot write his address from memory.”¹⁵⁵

Therefore, it is the effects of these impairments that need to be considered, rather than the underlying conditions themselves. An example of this can be found in *Goodwin v The Patent Office*,¹⁵⁶ which concerned an employee who was dismissed from their post following complaints of disturbing behaviour from female members of staff. The employee was a paranoid schizophrenic¹⁵⁷ and gave evidence that he heard voices, subsequently interrupting his concentration. The tribunal held that he was not disabled under the Act¹⁵⁸ because the effect of these hallucinations was not ‘substantial in relation to his normal day-to-day activities.’ However on appeal, the EAT reversed such decision and consequently held that the employee was in fact disabled, citing that the original tribunal had failed to consider the effect of the employee’s disability on his abilities. The employee was unable to have normal day-to-day conversations with other employees and as such, this was considered to be good evidence that his ability to both concentrate and communicate had been significantly adversely affected.

In 2010, the case of *J v DLA Piper UK LLP*¹⁵⁹ provided some guidance to determining what an impairment actually was. There are some instances where identifying the nature of the impairment would involve difficult medical questions for them to answer. In instances where

¹⁵⁵ Examples taken from Part 2, A7 Office for Disability Issues Equality Act (2010) Guidance.

¹⁵⁶ *Goodwin v The Patent Office* [1999] IRLR 4 EAT.

¹⁵⁷ Paranoid schizophrenia is a subtype of schizophrenia in which the patient has delusions (false beliefs) that a person or some individuals are plotting against them or members of their family.

<http://www.nhs.uk/conditions/schizophrenia/pages/introduction.aspx>. Last Accessed 1st May 2014.

¹⁵⁸ Referring to the S.1(1) Disability Discrimination Act (1995).

¹⁵⁹ *J v DLA Piper UK LLP* [2010] IRLR 936.

there may be a dispute as to the existence of an impairment, tribunals should start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected, and whether it is considered to be on a long term basis, and to then consider the question of impairment in the light of those findings. If the tribunal finds that, on a long-term basis, the claimant's ability to carry out normal day-to-day activities has in fact been adversely affected, it will follow that the claimant is suffering from a condition which has produced that adverse effect, in other words, an 'impairment.' If that inference can be drawn, then it will be unnecessary for the tribunal to then try to resolve difficult medical issues unnecessarily.

Furthermore, the court held that if a tribunal finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of clinical depression for 12 months or longer, in most cases it would be likely to conclude that they were suffering from 'clinical depression' rather than simply 'a reaction to adverse circumstances.'

3.3 Automatically Included Disabilities.

In order to avoid abnormal circumstances, the legislature decided to include certain medical conditions into the EqA¹⁶⁰ that would automatically render a person as having a disability. They are Cancer, HIV,¹⁶¹ and Multiple Sclerosis. One could argue that without this inclusion, you may encounter a peculiar situation in which a person has one of these conditions but does not meet the definition of disability because there may be periods in which the impairment

¹⁶⁰ Para 6(1), Schedule 1, of the Equality Act (2010).

¹⁶¹ Para 6(2), Schedule 1, of the Equality Act (2010) defines HIV as an infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

would not have interfered with their ability to carry out their day-to-day activities.¹⁶² This would mean that the person is protected by the Act from the point of diagnosis.¹⁶³

Furthermore, the EqA provides for certain people to be deemed to have met the definition of disability without having to show that they have an impairment that has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities.¹⁶⁴ A person who is certified as blind, severely sight impaired, sight impaired or partially sighted, by a consultant ophthalmologist is deemed to have a disability.¹⁶⁵

3.4 Past Disabilities.

The legislature has included protection from disability-related discrimination into the EqA¹⁶⁶ for those who have suffered from a disability in the past. The guidelines provide that ‘someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered by the Act.’¹⁶⁷ An example of this would be:

“Example 1 - Four years ago, a woman experienced a mental illness... (which met the Act’s definition of disability)... she has experienced no recurrence of the condition, but if she is discriminated against because of her past mental illness she is still entitled to the protection afforded by the Act, as a person with a past disability.”¹⁶⁸

¹⁶² This was the case with the Disability Discrimination Act (1995) until it was amended by the Disability Discrimination Act (2005).

¹⁶³ Part 2, Section A9, Office for Disability Issues Equality Act (2010) Guidance.

¹⁶⁴ Part 1(7), Schedule 1, of the Equality Act (2010).

¹⁶⁵ Regulation 7 of The Equality Act 2010 (Disability) Regulations (2010) (S.I. 2010/2128).

¹⁶⁶ Part 1(9), Schedule 1, of the Equality Act (2010).

¹⁶⁷ A 16, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

¹⁶⁸ Example taken from A16, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

3.5 Automatically Excluded Disabilities.

As well as including some conditions that are automatically deemed to be a disability, the legislature also included some conditions that are automatically excluded from being a disability. These are inclusive of (1) addiction to, or dependency on alcohol nicotine, or any other substance (other than in consequence of the substance being medically prescribed), (2) seasonal allergic rhinitis (hay fever) except where it aggravates the effect of another condition, (3) tendency to set fires, (4) tendency to steal, (5) tendency to physically or sexually abuse others, (6) exhibitionism, and (7) voyeurism.¹⁶⁹

3.6 The Exclusion of Addiction.

The decision to omit addiction has been received as fairly controversial and has been met with huge negativity from some campaigners. As seen in *Power v Panasonic UK Ltd*,¹⁷⁰ the courts and tribunals have attempted to sustain a pragmatic approach that focuses on ‘whether the disability from which they are suffering at the material time is a disability within the meaning of the EqA.’¹⁷¹ This leaves the court in a position that most alcoholics suffering from alcohol addiction may not be classed as disabled. However, if they then continued to drink so heavily, to such extent as to damage their liver and induce liver disease, it is then likely that they would be afforded such protection.¹⁷² This is because ‘where a person suffers such a condition, its effects may amount to an impairment under the Act’¹⁷³ because ‘when looking at impairments, the cause is not relevant.’¹⁷⁴

¹⁶⁹ Regulation 4 of The Equality Act 2010 (Disability) Regulations (2010) S.I. 2010/2128.

¹⁷⁰ *Power v Panasonic UK Ltd* [2003] IRLR 151.

¹⁷¹ Paragraph 12 of *Power v Panasonic UK Ltd* [2003] IRLR 151.

¹⁷² Section A8, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

¹⁷³ Page 2 of Connolly, M. ‘Has the Disability Discrimination Act (1995) Become a Charter for Addicts and Perverts?’ (2006) 75 Employment Law Bulletin December.

¹⁷⁴ *Patel v Oldham Metropolitan Borough Council* [2010] IRLR 280.

This results in the bizarre situation that those attempting to recover from drug addiction that have healthy organs are not provided with the protection they need in order to turn their life around, as opposed to those who voluntarily¹⁷⁵ abuse themselves to such extent that they suffer organ damage, thus finally providing themselves with protection. This seems to go against the grain for everything that the EqA stands for. However, it must be stressed that in contrast to this view, the majority of medical professionals that treat addiction would argue that it is not a voluntary action, but a disease of the mind in which the patient will suffer from ‘compulsive drug use, despite obvious negative consequences.’¹⁷⁶ Before the EqA was enacted, the UK Drug Policy Commission pressed for Parliament to ‘explicitly include substance misuse addiction’¹⁷⁷ within the definition of disability and to ‘consider the issue of fairness and equality for those who experience unequal treatment and discrimination on the grounds of their substance misuse addiction or dependence.’¹⁷⁸ This tug of war over the inclusion of addiction appears to be between the legislature that thinks addiction is formed by choice,¹⁷⁹ and expert medical opinion that concludes otherwise.

The justification for exclusion from the legislature is claimed to be in public interest, because ‘society should not be obliged to bear the cost of their choice.’¹⁸⁰ It has also been claimed that it would be morally wrong to ‘put junkies, most of whom are enemies of society, in the same category as blind people, and people in wheelchairs.’¹⁸¹

¹⁷⁵ It must be noted that many psychiatrists would argue that drug addiction is not a voluntary state of mind. See: A. Mold & V. Berridge, *Voluntary Action and Illegal Drugs: Health and Society in Britain Since the 1960s*. Twentieth Century Brit Hist (2011) 22 (3): 449-451.

¹⁷⁶ Steven E. Hyman, *Addiction: A Disease of Learning and Memory*, *Am J Psychiatry* 2005;162:1414-1422.

¹⁷⁷ UK Drug Policy Commission (2009) ‘Memorandum to the House of Commons Work and Pensions Committee’.

¹⁷⁸ *Ibid.*

¹⁷⁹ Page 84 of Key, E. *Voluntary Disabilities and the ADA: A Reasonable interpretation of Reasonable Accommodation*, (1996) 48 *Hastings Law Journal*.

¹⁸⁰ *Ibid.*

¹⁸¹ Page 404 of Gibson, F. *Drugs, Discrimination and Disability*, (2009) 17 *Journal of Law and Medicine* 3.

3.7 Chapter Conclusion.

From the aforementioned discussion, it is clear that the inclusion of the word 'impairment' by the legislature has caused several difficulties for the court to consider in the application of the definition, or lack thereof. This has resulted in the courts largely shaping the definition as it stands today through the well-enshrined principle of common law legal precedence. However, the courts have provided us with many well received decisions to provide those with a disability with better protection from discrimination, as can be seen from the cases of *Power*, *Hospice of St Mary*, *Goodwin* and *J*. This is parallel to the decision in *Dunham*, which is likely to prevent both frivolous and malicious claims against employers.

There have been several important provisions that have been kept or were drafted within the EqA that also helps provide adequate protection. The first is the inclusion of future recurrences of impairments providing employees with protection, which originally stemmed from the DDA and was examined in *Power v Panasonic*. The decision to include protection from the DDA into the EqA to those who suffer with Cancer, HIV and MS as having automatic protection has also been positive, as well as those who have had a disability in the past.

The decision to remove the requirement of mental illnesses being 'clinically well recognised' from the definition within the EqA has been welcomed by many and was a great step forward for providing protection against mental health discrimination. The shift from focusing more onto the impairment than the cause, in *McNicol*, provided excellent guidance for future cases by simplifying the process and allowing more legitimate claims to succeed.

Nevertheless, whilst there seems to be some progress within this part of the definition, the decision to exclude addiction as an impairment has been met with a lot of negativity from some campaigners. As has been stated, despite claims that addiction is the cause of voluntary actions, the vast majority of medical opinion would state otherwise. It seems largely unfair to include protection from the majority of diseases of the mind, whilst explicitly excluding addiction which has been describe as ‘[another] disease of the mind in which the patient will suffer from ‘compulsive drug use despite obvious negative consequences.’ Furthermore, ‘work has been shown to be an important component of rehabilitation and reintegration into society, reducing the likelihood of relapse.’ Research has debunked many myths of PDU’s¹⁸² and demonstrated that ‘employment is as an integral part of a PDU’s recovery’¹⁸³ and that ‘[they] generally demonstrate a high level of commitment to their work’¹⁸⁴ with ‘few examples of endangering other employees or any reported acts of dishonesty.’¹⁸⁵

Overall, the courts appear to have recovered from the originally poor drafting by the legislature and have been integral in providing us with clearer guidance, which on balance, appears to be fairly satisfactory in delivering equality.

¹⁸² A ‘Problem Drug User’ who usually has an addiction to a particular narcotic.

¹⁸³ Chapter 6 of the UK Drug Policy Commission’s *Getting Problem Drug Users (Back) Into Employment, Part Two*, (2008).

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

Chapter Four - (2) It Must Have ‘A Substantial Adverse Effect’

Chapter Four - (2) It Must Have ‘A Substantial Adverse Effect’	52
4.1 Meaning of Substantial Adverse Effect.	52
4.2 The Time and Way in Which an Activity is Carried Out.	53
4.3 Cumulative Effects of an Impairment.	54
4.4 Effects of Behaviour and Environment.	54
4.5 Effects of Medication or Other Treatment.	55
4.6 Progressive Conditions.	58
4.7 Severe Disfigurements.	59
4.8 Chapter Conclusion.	60

Chapter Four - (2) It Must Have ‘A Substantial Adverse Effect’

Under S.6 EqA the second requirement in satisfying the definition of disability is that the impairment ‘must have a substantial adverse effect.

4.1 Meaning of Substantial Adverse Effect.

Influenced by the decision in *Goodwin v The Patent Office*,¹⁸⁶ under S.212(1) EqA a ‘substantial’ effect is one that is ‘more than minor or trivial rather than very large’¹⁸⁷ and should be read in conjunction with Section D,¹⁸⁸ which considers what is meant by ‘normal day-to-day activities.’ The tribunal may take into account how the claimant ‘appears to the tribunal to manage, although to should be slow to regard an person’s capabilities in the relatively strange adversarial environment as an entirely reliable guide to the level of ability to perform normal day-to-day activities.’¹⁸⁹ However, in *Goodwin*, a tribunal erred in finding that a paranoid schizophrenic who was dismissed after complaints relating to his behaviour, was not ‘disabled’ because the adverse effect of the impairment was not substantial. The claimant was unable to carry on a normal day-to-day conversation with work colleagues, which was good evidence that his capacity to concentrate and communicate had been adversely affected in a significant manner.

It was stated in *Abadeh v British Telecommunications plc*¹⁹⁰ that it is not the task of a medical expert to tell the tribunal whether an impairment was or was not substantial, and that is a question which the tribunal itself has to answer. The medical report should deal with the doctor’s diagnosis of the impairment, the doctor’s observation of the claimant carrying out

¹⁸⁶ *Goodwin v The Patent Office* [1999] IRLR 4 EAT.

¹⁸⁷ Justice Morison at Page 310 of *Goodwin v The Patent Office* [1999] IRLR 4 EAT.

¹⁸⁸ Section D, Office for Disability Issues Equality Act (2010) Guidance.

¹⁸⁹ Page 292 of Painter, R. *Cases and Materials on Employment Law* (2012).

¹⁹⁰ *Abadeh v British Telecommunications plc* [2001] IRLR 23 EAT.

day-to-day activities, and the ease with which he was able to perform those functions, together with any relevant opinion as to prognosis and the effect of medication.

4.2 The Time and Way in Which an Activity is Carried Out.

When assessing whether the effect of an impairment is substantial, the time taken to carry out a normal day-to-day activity by an employee with an impairment should be considered and compared to an employee who does not have such impairment.¹⁹¹

Another factor to be considered is the way in which an employee carries out a normal day-to-day activity. Here, comparison should be ‘with the way that an employee might be expected to carry out the activity, compared with an employee who does not have the impairment.’¹⁹²

*Paterson v Commissioner of the Police*¹⁹³ concerned the issue of dyslexia¹⁹⁴ in which a chief inspector claimed that, consequently, he was disabled under the DDA. Although there was a considerable disadvantage in sitting a promotional exam, his case was originally dismissed by the tribunal, which held that this was not a day-to-day activity. The adverse effects were not substantial, but minor. On appeal, the EAT held that sitting examinations were day-to-day activities since they generally involved both reading and comprehension. It held that the only way in deciding whether an impairment was substantial was to consider how the activity was actually carried out, and compare this to how it would be carried out if the employee did not suffer from such impairment, stating, ‘if that difference is more than the kind of difference one might expect taking a cross section of the population, then the effects are substantial’.¹⁹⁵

¹⁹¹ Section B2, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

¹⁹² Section B3, of *Ibid.*

¹⁹³ *Paterson v Commissioner of the Police* [2007] IRLR 763.

¹⁹⁴ Dyslexia is a common learning difficulty that mainly affects the way people read and spell words. <http://www.nhs.uk/conditions/dyslexia/pages/introduction.aspx>. Last Accessed 1st May 2014.

¹⁹⁵ Paragraph 68 of *Paterson v Commissioner of Police* [2007] IRLR 763.

4.3 Cumulative Effects of an Impairment.

When, in isolation, an impairment has no substantial adverse effect, it is important to consider its cumulative effects when performing several activities together, since overall, this may then result in a substantial adverse effect.¹⁹⁶ An example of this may be when ‘an employee whose impairment causes breathing difficulties may, as a result, experience minor effects on the ability to carry out a number of activities such as getting washed and dressed, going for a walk or travelling on public transport. But taken together, the cumulative result would amount to a substantial adverse effect on [their] ability to carry out these normal day-to-day activities.’¹⁹⁷

4.4 Effects of Behaviour and Environment.

Furthermore, account should also be taken of how an employee can reasonably be expected to alter their behaviour in order to prevent or reduce the effects of an impairment on their normal day-to-day activities.¹⁹⁸ For example, an employee using CBT¹⁹⁹ techniques in order to prevent or reduce the effects of anxiety on their day-to-day activities. Such coping therapies may alter the effects of an impairment to a point in which it would no longer be considered as a substantial one, in turn, meaning that an employee would no longer be considered as disabled. However, it was held in *Paterson v Commissioner of Police of the Metropolis*²⁰⁰ that in some cases, coping strategies such as CBT, will prevent the impairment having adverse effects, but only where they can be relied on in all circumstances.

¹⁹⁶ Section B3, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

¹⁹⁷ Example provided by Section B5, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

¹⁹⁸ Section B3, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

¹⁹⁹ Cognitive Behavioral Therapy (CBT) is a psychotherapeutic approach that addresses dysfunctional emotions, maladaptive behaviors and cognitive processes and contents through a number of goal-oriented, explicit systematic procedures. <http://www.nhs.uk/conditions/dyslexia/pages/CBT.aspx>. Last Accessed 1st May 2014.

²⁰⁰ *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 EAT.

Similarly, the environment may also have profound effects on a person's impairment, whether that be exacerbating or lessening the effects will be circumstantial. Some factors may include; 'temperature, humidity, lighting, the time of day or night, [fatigue], or stress.'²⁰¹

4.5 Effects of Medication or Other Treatment.

It is becoming increasingly common for those with a disability to control it to some degree with the use of medication. Whilst this would usually mean that somebody is then able to carry out their normal day-to-day activities, it does not mean that they are no longer regarded as being disabled.

Originally governed by Schedule 1, Paragraph 6(1) DDA, Schedule 1, Para 1(5)(1) EqA now states that 'an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if; (a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.'²⁰² So essentially, a person's ability to carry out normal day-to-day activities is to be assessed only as if they are not taking any measures to treat it. In this context, 'measures' includes any medical treatment and the use of prosthesis or other aid.²⁰³ In this context, medical treatment must be interpreted to include counselling, other therapies, and dietary and nutritional stipulations, in addition to medication.²⁰⁴ However, an exception is made in circumstances in which impairment of sight can be corrected by the wearing of spectacles or contact lenses.²⁰⁵

²⁰¹ Section B11, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

²⁰² Para 1(5)(1), Schedule 1, of the Equality Act (2010).

²⁰³ Para 1(5)(2), Schedule 1, of the Equality Act (2010).

²⁰⁴ Section B12, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

²⁰⁵ Para 1(5)(3)(a), Schedule 1 of the Equality Act (2010).

Inter alia, in cases such as General Anxiety Disorder²⁰⁶ where anxiolytic medications such as Benzodiazepines,²⁰⁷ for example Valium,²⁰⁸ Xanax²⁰⁹ and Klonopin,²¹⁰ prove to be highly successful in acute symptomatic relief of anxiety, which renders the impairment to be completely under control or not at all present, then this provision will still apply.²¹¹ Likewise, in cases of Clinical Depression²¹² where treatment with the use of SSRI's,²¹³ SNDRI's²¹⁴ or TCA's,²¹⁵ or is continuing, it may be having the effect of masking or ameliorating such impairment, so that it no longer has a substantial adverse effect. However, as is often with the cases of psychiatric disorders such as Psychosis,²¹⁶ where the final outcome of the use of medication cannot always be determined, or if it is known that the removal of the medication would result in either a relapse or worsened condition, then under Schedule 1, Part 1(5) Schedule 1, you must disregard the effect of medical treatment.

However, it is important to recall that if a person received treatment, which had the effect of 'curing' an impairment, who would otherwise have met the definition of disability, then they would still be afforded protection under Schedule 1, Part 9(1) EqA as a person who had a past disability.

²⁰⁶ GAD, or General Anxiety Disorder, is characterised by excessive, uncontrollable and often irrational worry about everyday things that is disproportionate to the actual source of worry.

<http://www.nhs.uk/conditions/anxiety/pages/introduction.aspx>. Last Accessed 1st May 2014.

²⁰⁷ Benzodiazepines are a class of psychoactive drugs that act as central nervous system depressants for the relief of anxiety and inducement of sleep

²⁰⁸ Valium is a trade name of the drug Diazepam

²⁰⁹ Xanax is a trade name of the drug Alprazolam

²¹⁰ Klonopin is a trade name of the drug Clonazepam

²¹¹ Section B13, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

²¹² Clinical Depression is a severe, typically prolonged, feeling of despondency and dejection.

<http://www.nhs.uk/conditions/depression/pages/introduction.aspx>. Last Accessed 1st May 2014.

²¹³ An SSRI is a Selective-Serotonin-Reuptake-Inhibitor, commonly used for first-line treatment of Depression.

²¹⁴ An SNDRI is a Selective-Serotonin-Norepinephrine-Dopamine-Reuptake-Inhibitor, commonly used for second-line treatment of Depression.

²¹⁵ A TCA is a Tricyclic-Antidepressant, commonly used for second-line treatment of Depression.

²¹⁶ Psychosis is defined as a severe mental disorder in which thought and emotions are so impaired that contact is lost with external reality. <http://www.nhs.uk/conditions/psychosis/pages/introduction.aspx> Last Accessed 1st May 2014.

In *SCA Packaging Ltd v Boyle*,²¹⁷ the House of Lords stated that when a person is following a course of treatment as per medical advice, in the absence of any indication to the contrary, an employer could assume that, without the treatment, the impairment is ‘likely’ to recur. Similarly if it had a substantial adverse effect on the individual’s day-to-day life before it was treated, the employer can also assume that, in the absence of any contraindication, if it does recur, its effect will be substantial. In this instance, ‘likely’ is used in the sense of ‘could well happen’ rather than ‘whether it is more probable than not.’

It was held in *Woodrup v London Borough of Southwark*²¹⁸ that 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 which would have the relevant adverse effect?

In *Kapadia v London Borough of Lambeth*²¹⁹ a person suffering from clinical depression was receiving counselling but despite uncontested medical opinion, an employment tribunal failed to find that the individual was disabled within the terms of the DDA. The EAT held that the employment tribunal had erred in doing so and had arrived at a judgment based on how the complainant seemed when giving evidence. In light of this decision, counselling is now a recognised form of ‘treatment’ and has since been legislated within the EqA as being one.²²⁰

In *Carden v Pickering Europe Ltd*²²¹ the EAT held that a plate and pins that was surgically inserted in the claimant’s ankle, and thus requiring no further treatment, could be regarded as

²¹⁷ *SCA Packaging Ltd v Boyle* [2009] IRLR 746.

²¹⁸ *Woodrup v London Borough of Southwark* [2003] IRLR 111 CA.

²¹⁹ *Kapadia v London Borough of Lambeth* [2000] IRLR 14.

²²⁰ Section B12, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

²²¹ *Carden v Pickering Europe Ltd* [2005] IRLR 720 EAT.

‘an other aid’ within the definition of ‘measures’ which includes, ‘in particular, medical treatment and the use of a prosthesis or other aid’ so long as there was continuing support or assistance being given by the pins and plate to the functioning of the claimants ankle.

4.6 Progressive Conditions.

In 2005, the DDA was amended²²² to ensure that anyone suffering from conditions that are progressive in nature such as Cancer, Multiple Sclerosis, and HIV²²³ are automatically deemed to have a disability. This introduction by the legislature was warmly welcomed, since previously, patients were still required to show that their conditions had a substantial adverse effect on their ability to carry out day-to-day activities.²²⁴

Effectively, the EqA states that an employee has a progressive condition if their impairment has an effect on their ability to carry out normal day-to-day activities, but the effect is not yet deemed to be substantial.²²⁵ Therefore, if an employee has a progressive condition such as Dementia²²⁶ then they will meet the definition of disability, even if at the time, there is no actual impairment. This is because eventually, Dementia will impair the employee’s ability, and such they are therefore provided protection from discrimination. Other examples of progressive conditions may include SLE,²²⁷ and Motor Neurone Disease.²²⁸

²²² The Disability Discrimination Act (1995) was amended by the Disability Discrimination Act (2005).

²²³ Under Schedule 1, Part 6(2) Equality Act (2010) HIV infection is infection by a virus capable of causing the Acquired Immune Deficiency Syndrome.

²²⁴ See Paragraph 6(A) Schedule 1, Disability Discrimination Act (1995).

²²⁵ Schedule 1, Paragraph 8, Equality Act (2010).

²²⁶ Dementia is a general term for a decline in mental ability severe enough to interfere with daily life. <http://www.nhs.uk/conditions/dementia-guide/pages/about-dementia.aspx>. Last Accessed 1st May 2014.

²²⁷ Systemic Lupus Erythematosus is a condition that affects many parts of the body and causes symptoms ranging from mild to life-threatening. <http://www.nhs.uk/conditions/lupus/pages/introduction.aspx> Last Accessed 1st May 2014.

²²⁸ Motor Neurone Disease is the name for a rare condition where parts of the nervous system become damaged. This causes progressive weakness, usually with muscle wasting. <http://www.nhs.uk/conditions/motor-neurone-disease/pages/introduction.aspx>. Last Accessed 1st May 2014.

In 2002 the EAT held in *Mowat-Brown v University of Surrey*²²⁹ that it is not enough for a claimant to simply establish that they have a progressive condition and that it has or has had an effect on their ability to carry out normal day-to-day activities. They must go on and show that it is more likely than not that at some stage in the future they will have an impairment, which will have a substantial adverse effect on their ability to carry out normal day-to-day activities. In some cases it may be possible to produce medical evidence of their likely prognosis, but in others, it may be possible to discharge the onus of proof by statistical evidence.

Just 12 months later, in *Kirton v Tetrosyl Ltd*,²³⁰ the Court of Appeal held that 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 cancer. Impairment in this context also includes the ordinary consequences of an operation to relieve the disease. Therefore, a claimant who had an operation for prostate cancer, which led to urinary incontinence, fell within the definition of disability relating to a progressive condition, notwithstanding that his incontinence was not a direct result of the progressive condition, but was a result of the surgery by which the progressive condition was treated.

4.7 Severe Disfigurements.

The EqA provides that where an impairment consists of a severe disfigurement, such as: scars, birthmarks, limb or postural deformation, and disease of the skin,²³¹ under Schedule 1²³² such disfigurements will qualify as having a substantial adverse effect on an employee’s ability to

²²⁹ *Mowat-Brown v University of Surrey* [2002] IRLR 235 EAT.

²³⁰ *Kirton v Tetrosyl Ltd* [2003] IRLR 353 CA.

²³¹ Section B24, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

²³² Schedule 1, Part 3(1), of the Equality Act (2010).

carry out normal day-to-day activities. However, it should be stressed that even obvious disfigurements will not always be classed as severe. In assessing the degree of severity, factors such as the: nature, size, prominence, and location of the disfigurement must be considered.²³³ Interestingly, Schedule 1²³⁴ prohibits ‘deliberately acquired disfigurements’ such as tattoo’s and non-medical body piercings.²³⁵

It was held in *Cosgrove v Northern Ireland Ambulance Service*²³⁶ that an impairment ‘consisting of disfigurement’ means that the impairment relates solely to the cosmetic aspect of the condition, and not to a condition - one aspect of which is disfigurement. Therefore, the severe disfigurement provisions did not protect a claimant with psoriasis,²³⁷ where the reason he was not employed as an ambulance worker was not as a result of his disfigurement but because it was judged that he was at risk of infection and that his condition carried the danger that he would infect others.

4.8 Chapter Conclusion.

Once again, the court seem to have leant a great helping hand in shaping the definition of disability with several important decisions, as seen in *Paterson*, *Carden*, *Kapadia*, and *SCA Packaging*.

However, it must be noted that the first three were all elevated to the Employment Appeal Tribunal. It is very worrisome that the original tribunals heavily erred in law and seem to

²³³ Section B25, Part 2, Office for Disability Issues Equality Act (2010) Guidance.

²³⁴ Schedule 1, Part 3(1), Equality Act (2010).

²³⁵ See SI 1996/1455 The Disability Discrimination (Meaning of Disability) Regulations (1996).

²³⁶ *Cosgrove v Northern Ireland Ambulance Service* [2007] IRLR 397 NICA.

²³⁷ Psoriasis is a skin condition that causes red, flaky, crusty patches of skin covered with silvery scales. <http://www.nhs.uk/conditions/psoriasis/pages/introduction.aspx>. Last Accessed 1st May 2014.

have gravely misunderstood the concept of what a substantial adverse effect should be, reflecting the lack of clarity that the definition obviously requires.

Chapter Five - (3) That it's Effect Must be 'Long-term'

Chapter Five - (3) That it's Effect Must be 'Long-term'	63
5.1 The Effect Must be Long-Term.	63
5.2 Assessing Whether a Past Disability Was Long-Term.	65
5.3 The Meaning of Likely.	65
5.4 Recurring or Fluctuating Effects.	65
5.5 Predicting The Length of Mental Health Illnesses.	68
5.6 Chapter Conclusion.	69

Chapter Five - (3) That it's Effect Must be 'Long-term'

Under S.6 EqA the third requirement in satisfying the definition of disability is that the impairment must be 'long term.'

5.1 The Effect Must be Long-Term.

The EqA defines long term as meaning 'an impairment that has lasted 12 months, is likely to last at least 12 months from the time of onset, or is likely to last for the rest of the life of the person affected.'²³⁸ However, it should be noted that a person who is deemed to be disabled does not need to satisfy the long-term requirement.²³⁹ This was evidenced in the decision in *Richmond Adult Community College v McDougall*²⁴⁰ in which the Court of Appeal held that the point in time for determining whether the effect of an impairment is likely to last for at least 12 months should be the time decision was complained of. Additionally, Lord Justice Pill stated that tribunals should make their judgment 'on the basis of evidence as to the circumstances prevailing at the time of that decision.'²⁴¹

For the purposes of meeting the definition of a disability, when determining whether the person has experienced a long-term effect, the cumulative effect of related impairments should be taken into account.²⁴² Guidance states that 'the substantial adverse effect of an impairment which has developed from, or is likely to develop from, another impairment should be taken into account when determining whether the effect has lasted, or is likely to last at least twelve months, or for the rest of the life of the person affected.'²⁴³

²³⁸ Schedule 1, Paragraph 2(1), Equality Act (2010).

²³⁹ Part 2, C1, Office for Disability Issues Equality Act (2010) Guidance.

²⁴⁰ *Richmond Adult Community College v McDougall* [2008] IRLR 227 CA.

²⁴¹ Lord Justice Pill at Paragraph 24 of *Richmond Adult Community College v McDougall* [2008] IRLR 227 CA.

²⁴² Part 2, C2, Office for Disability Issues Equality Act (2010) Guidance.

²⁴³ *Ibid.*

This issue was addressed in *Patel v Oldham Metropolitan Borough Council*²⁴⁴ in which an employee, who suffered from Transverse Myelitis,²⁴⁵ a mild inflammation of the spinal cord, developed a secondary syndrome, which affected the same part of her. Whilst completing a phased return to work, she suffered from another injury, which aggravated her original pain. Following a long period of absence she was ultimately dismissed. Originally, the tribunal held that she was not disabled on the basis that she suffered from two different impairments, over two different period, that lasted less than 12 months.

However, on appeal, the EAT held that whilst determining whether the duration of the effects of the two impairments should be aggregated, the original tribunal had erred in failing to consider whether the employee's secondary impairment had developed from the first. In light of this, the EAT remitted the case back to the tribunal for further consideration. It is important to note that if an employee experiences adverse effects which arise from two separate and unrelated conditions over a period of 12 months, these effects will not be aggregated and thus they will not be held to be disabled under the EqA.

Furthermore, in *Greenwood v British Airways Plc*²⁴⁶ the EAT held that in order to assess whether a person was said to have had a long-term impairment, tribunals must look at the whole period up to the hearing. *Cosgrove v Caesar & Howie*²⁴⁷ concerned an employee that prior to her dismissal had been absent from work for over 12 months due to clinical depression. The question was whether she had been treated less favourably for a reason related to disability. The EAT held in favour of the employee, since the reason for her

²⁴⁴ *Patel v Oldham Metropolitan Borough Council* [2010] IRLR 280.

²⁴⁵ Transverse Myelitis is an uncommon neurological condition caused by disease or damage to the brain, spinal cord or nerves. <http://www.nhs.uk/conditions/neuromyelitis-optica/Pages/Introduction.aspx>. Last Accessed 1st May 2014.

²⁴⁶ *Greenwood v British Airways Plc* [1999] IRLR 600.

²⁴⁷ *Cosgrove v Caesar & Howie* [2001] IRLR 653.

dismissal was sustained absence on medical grounds relating to a disability, and there would have been no reason to dismiss someone to whom such reason did not apply.

5.2 Assessing Whether a Past Disability Was Long-Term.

The EqA states that an employee who has suffered from a disability is protected from some forms of discrimination,²⁴⁸ even if the effects have become less significant, and even if they have fully recovered. In deciding this, if the effects have lasted 12 months or more after the first occurrence, then they will be held to be ‘long-term.’²⁴⁹

5.3 The Meaning of Likely.

The meaning of likely is relevant when determining; whether an impairment has a long-term effect,²⁵⁰ whether an impairment has a recurring effect,²⁵¹ whether adverse effects of a progressive condition will become substantial,²⁵² how an impairment should be treated for the purposes of the Act when the effects of that impairment are controlled or corrected by treatment or behaviour.²⁵³ Guidance indicates that in these contexts ‘likely’ should be interpreted as meaning that ‘it could well happen.’²⁵⁴

5.4 Recurring or Fluctuating Effects.

The EqA states that if an impairment ceases to have effect, the substantial effect is treated as continuing if it is likely to recur. When deciding whether an employee has had a past

²⁴⁸ For the forms of discrimination covered by this provision, see Part 2, A16, Office for Disability Issues Equality Act (2010) Guidance.

²⁴⁹ Section 6(4) Equality Act (2010) and Schedule 1, Paragraph 2 Equality Act (2010).

²⁵⁰ Schedule 1, Paragraph 2(1)(b,c) Equality Act (2010).

²⁵¹ Schedule 1, Paragraph 2(2) Equality Act (2010).

²⁵² Schedule 1, Paragraph 2(2) Equality Act (2010) and Part 2, B18-23, Office for Disability Issues Equality Act (2010) Guidance.

²⁵³ Schedule 1, Paragraph 5(1) Equality Act (2010) and Part 2, B7-17, Office for Disability Issues Equality Act (2010) Guidance.

²⁵⁴ Part 2, C3, Office for Disability Issues Equality Act (2010) Guidance.

disability, the question is whether a substantial adverse effect has recurred. Conditions with effects which recur on a sporadic basis, or for short periods of time, can still qualify as impairments under the EqA in respect of the meaning ‘long-term.’²⁵⁵

When considering likelihood of recurrence, all the circumstances should be taken into account, including what the employee could reasonably be expected to do in order to prevent a recurrence.²⁵⁶ However, it is recognised that it is not always possible for a person to control or cope with the effects of an impairment. If treatment is expected to cure a condition ‘so that recurrence of its effects would then be unlikely even if there were no further treatment’²⁵⁷ then this should be taken into consideration when examining the likelihood of recurrence. However, if treatment only delays recurrence, and recurrence would be likely if the treatment stopped,²⁵⁸ then the treatment is to be ignored and the effect is to be regarded as likely to recur.²⁵⁹

It was held in *Swift v Chief Constable of Wiltshire Constabulary*²⁶⁰ that when considering a recurring condition for the purpose of Schedule 1, Paragraph 2(2) EqA a tribunal must ask: (1) at some stage, was there an impairment which had a substantial adverse effect, (2) did such impairment cease to have a substantial adverse effect, and if so when, (3) what was the substantial adverse effect, (4) is such substantial adverse effect likely to recur. If so, then the tribunal must be satisfied that the same effect is likely to recur and will once again amount to

²⁵⁵ Schedule 1, Paragraph 2(2) Equality Act (2010) and Part 2, C3-4, Office for Disability Issues Equality Act (2010) Guidance.

²⁵⁶ Part 2, C9, Office for Disability Issues Equality Act (2010) Guidance.

²⁵⁷ Part 2, C11, Office for Disability Issues Equality Act (2010) Guidance.

²⁵⁸ This is the case with most types of ‘Antidepressants’ such as Selective Serotonin Reuptake Inhibitors, Tricyclic Antidepressants, Monoamine Oxidase Inhibitors, Noradrenaline and Specific Serotonergic Antidepressants, Melatonergic Antidepressants, Dopamine Reuptake Inhibitors, and Atypical Antidepressants.

²⁵⁹ Part 2, C11, Office for Disability Issues Equality Act (2010) Guidance.

²⁶⁰ *Swift v Chief Constable of Wiltshire Constabulary* [2004] IRLR 540 EAT.

a substantial adverse effect on the employee's ability to carry out normal day-to-day activities.

However, although the tribunal must be satisfied that the substantial adverse effect is likely to recur, it is important to note that it does not need to be satisfied that the recurrence is likely to last for at least 12 months. Therefore, the effect of Paragraph 2(2)²⁶¹ is that the impairment is treated as continuing for as long as its substantial adverse effect is likely to recur, even if such impairment has ceased to have a substantial adverse effect. Consequently, the question for the tribunal is not whether the illness is likely to recur, but whether the substantial adverse effect is likely to recur. One could argue that in some cases an illness may run its course but still leave behind an impairment, this distinguishment is imperative to make.

In *J v DLA Piper UK LLP*²⁶² an employee suffered from several short episodes of depression, which had a substantial adverse effect on her ability to carry out normal day-to-day activities over a five-year period. However, between such episodes she was non-symptomatic and did not require treatment. The EAT held that in such circumstances, tribunals should regard her as suffering from a mental impairment throughout the entire period. Mr. Justice Underhill described the model as 'a single condition producing current symptomatic episodes.'²⁶³

However, it appears from both the Report of the Committee and the evidence referred to in it, that in principle, 'psychiatrists recognised the existence of a condition producing recurrent

²⁶¹ Schedule 1, Paragraph 2(2) Equality Act (2010).

²⁶² *J v DLA Piper UK LLP* [2010] EqLR 164 EAT.

²⁶³ Mr. Justice Underhill Paragraph 45, *J v DLA Piper UK LLP* [2010] EqLR 164 EAT.

episodes of this kind but there may be controversy as to questions of aetiology and classification; and inevitably diagnoses in particular cases may be difficult.²⁶⁴

5.5 Predicting The Length of Mental Health Illnesses.

One issue of mental health discrimination is the fact that under the EqA an employee's impairment must have lasted or is likely to last for 12 months before an employee is awarded protection. The 'continuation of the long-term requirement disadvantages people with mental health conditions in which many can be usually short-term in nature.'²⁶⁵

With Clinical Depression affecting approximately 66% of people²⁶⁶ at some point in their lifetime, it is critical that employees are afforded sufficient protection. Medical evidence suggests that depression typically lasts for between 6-8 months.²⁶⁷ This falls short of the 12-month requirement under the EqA, and thus exposes the majority of people who suffer from depression to discrimination without protection. 'If an individual has depression which has lasted for only 6 months but an employer refuses to promote them because of this, there is nothing that they can do under the current Act.'²⁶⁸

²⁶⁴ Employment Cases Update. (2011). *J v DLA Piper UK LLP* UKEAT/0263/09/RN. Available: <http://www.employmentcasesupdate.co.uk/site.aspx?i=ed5537>. Last accessed 1st May 2014.

²⁶⁵ Paragraph 11 of Cloisters Chambers (2008) '*Memorandum Submitted by Cloisters Chambers*' UK Parliament.

²⁶⁶ Mental Health Foundation. (2012). *Mental Health Statistics*. Available: www.mentalhealth.org.uk/help-information/mental-health-statistics. Last accessed 1st May 2014.

²⁶⁷ Evidence of the period for which depression is expected to last is listed below:

4-8 months www.mydr.com.au/mental-health/depression-q-and-a Last accessed 1st May 2014.

6 months www.rcpsych.ac.uk/healthadvice/problemsdisorders/depression.aspx Last accessed 1st May 2014.

6-8 months www.blackdoginstitute.org.au/public/depression/qas.cfm#5 Last accessed 1st May 2014.

6-8 months www.patient.co.uk/health/depression-leaflet Last accessed 1st May 2014.

6-8 months www.emedicinehealth.com/depression-health/page5_em.htm Last accessed 1st May 2014.

8 months www.clinical-depression.co.uk/depression-faq/how-long-does-depression-last Last accessed 1st May 2014.

²⁶⁸ Paragraph 11 of Cloisters Chambers (2008) '*Memorandum Submitted by Cloisters Chambers*' UK Parliament.

Dr. Leon van Huyssteen,²⁶⁹ a Clinical Psychiatrist and member of the Royal College of Psychiatrists, has stated that ‘without evidence of a previous bout of clinical depression, predicting that it will last for at least 12 months is virtually impossible’ and that ‘any claims to a tribunal that this is the case, should be dismissed as both wholly untruthful and misleading.’ He also points out that ‘anybody who is treated with conventional medication will almost certainly be instructed to continue taking them for a period of at least 6 months.’ This claim has been backed up by The Royal College of Psychiatrists,²⁷⁰ The British Journal of Psychiatry,²⁷¹ and the National Institute for Healthcare and Excellence,²⁷² which is the body that advises the NHS on clinical decision-making.

5.6 Chapter Conclusion.

Although this part of the definition has not been litigated as much as the others, the decisions aforementioned in *Cosgrove*, *Swift* and *J* have all been positive in establishing the current definition of disability within S.6. The part that appears to be the most problematic is the actual length of time as defined as ‘long-term.’ In the interest of equality and providing protection from disability discrimination, which is at the heart of the EqA, there is clearly a strong case for the time length of time to be reduced from 12 months to 6 months.

²⁶⁹ Dr. Leon van Huyssteen MBChB, MRCPsych is a Consultant Psychiatrist for The Priory Clinic, London.

²⁷⁰ Royal College of Psychiatrists. Coming off of Anti-Depressants. Available: www.rcpsych.ac.uk/healthadvice/treatmentwellbeing/antidepressants/comingoffantidepressants.aspx. Last accessed 1st May 2014.

²⁷¹ British Journal of Psychiatry. Clinical importance of long-term antidepressant treatment. Available: <http://bjp.rcpsych.org/content/179/42/s4.full>. Last accessed 1st May 2014.

²⁷² National Institute for Health and Care Excellence. Depression: the treatment and management of depression in adults (update). Available: <http://guidance.nice.org.uk/CG90>. Last accessed 1st May 2014.

Chapter Six - (4) 'Ability to Carry Out Normal Day-To-Day Activities'

Chapter Six - (4) 'Ability to Carry Out Normal Day-To-Day Activities'	71
6.1 The Meaning of Normal Day-to-Day Activities.	71
6.2 The Role of Medical Evidence.	75
6.3 The Effect of Time of Day.	76
6.4 Specialised Activities.	77
6.5 Adverse Effect.	78
6.6 Environmental Effects.	79
6.6 Chapter Conclusion.	80

Chapter Six - (4) ‘Ability to Carry Out Normal Day-To-Day Activities’

Under S.6 EqA the final requirement in satisfying the definition of disability is that the impairment ‘must affect the persons’ ability to carry out day-to-day activities.’

6.1 The Meaning of Normal Day-to-Day Activities.

The EqA does not define what it means by ‘day-to-day’ activities because it is neither possible nor practical to provide an exhaustive list. In *Goodwin v Patent Office*²⁷³ Morison J stated that ‘what is day-to-day activity is best left unspecified, easily recognised, but defined with difficulty.’²⁷⁴ As such, it falls largely on common law, which is heard on a case-to-case basis, and somewhat on the guidance provided to assist the courts. Although the relevant guidance is not exhaustive, it is somewhat indicative, stating that day-to-day activities are things that people do on a regular or daily and include:

“Shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities.”²⁷⁵

And normal day-to-day activities can include:

“General work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving,

²⁷³ *Goodwin v The Patent Office* [1999] IRLR 4 EAT.

²⁷⁴ Morison J at Paragraph 26 of *Goodwin v The Patent Office* [1999] IRLR 4 EAT.

²⁷⁵ Part 2, D3, Office for Disability Issues Equality Act (2010) Guidance.

carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.²⁷⁶

Therefore, if an employee worked as a car mechanic at an MOT garage and their duties included: maintaining and ordering stock, negotiating with suppliers via phone and e-mail, advising customers on services provided, and performing MOT tests, all of these tasks would be regarded as a normal day-to-day activity and as such, could be adversely affected by the presence of a physical or mental impairment.

However, the intention behind the definition of ‘normal day-to-day activities’ was not to include activities, which may be ‘normal’ only particular to either one person or a small group. Consequently, ‘normal’ should be given its ordinary and every day meaning, and account must be taken of ‘how far it is carried out by people on a daily or frequent basis.’²⁷⁷ Contrariwise, Sargeant states that ‘normal does not mean something that is carried out by the majority of people. It might be an activity carried out by only one particular gender, so it might be normal but not done by the majority.’²⁷⁸

In *Paterson v Commissioner of Police of the Metropolis*²⁷⁹ the EAT stated that the EqA must be read in a way which gives effect to EU law by giving a meaning to day-to-day activities that encompasses the activities that are relevant to participation in professional life. Where it is not disputed that the employee is suffering a substantial disadvantage because of the effects of their disability in the procedures adopted for deciding between candidates for promotion,

²⁷⁶ Part 2, D3, Office for Disability Issues Equality Act (2010) Guidance.

²⁷⁷ Part 2, D4, of *Ibid.*

²⁷⁸ Page 68 of Sargeant, M (2013). *Discrimination and the Law*. Oxon: Routledge.

²⁷⁹ *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 EAT.

the only proper inference is that those effects must involve more than a trivial effect on their ability to undertake normal day-to-day activities

The case of *Law Hospital NHS Trust v Rush*²⁸⁰ involved the work of a nurse in which it was held that evidence of the nature of a claimant's duties at work, and the way in which they are performed, particularly if they include 'normal day-to-day activities' can be relevant to the assessment which the tribunal has to make of the claimant's case.

In *Ekpe v Commissioner of Police of the Metropolis*²⁸¹ an employee suffered from the wasting of muscle in her right hand. Her employer, the Metropolitan Police, moved her to a different job, which involved use of a computer-keyboard. She claimed that she was unable to do this due to her condition. Evidence that her condition had an adverse effect on her ability to do carry out normal day-to-day activities was inclusive of carrying heavy shopping, scrubbing pans, peeling, grating, sewing, and putting rollers in her hair. Controversially, the tribunal held that this did not amount to a substantial effect because some of these activities were only carried out by women.

However, on appeal, the EAT stated that 'normal' should mean anything that was not considered to be 'abnormal'. Consequently, because many, many woman carried out these activities, this meant that they could not be said to be 'abnormal' and were thus considered 'normal'. Just because activities such as putting rollers in her hair and applying make-up were only performed by women did not stop them from being 'normal'. The EAT held that it was plainly wrong to exclude activities that were usually only done by either women or men. The

²⁸⁰ *Law Hospital NHS Trust v Rush* [2001] IRLR 611 CS.

²⁸¹ *Ekpe v Commissioner of Police of the Metropolis* [2001] IRLR 605 EAT.

antithesis for the purposes of the Act is between that which is ‘normal’ and that which is ‘abnormal’ or ‘unusual’ as a regular activity, judged by an objective population standard.

This view was later discussed in *Hewett v Motorola Ltd*²⁸² in which an engineer who was suffering from Asperger’s Syndrome²⁸³ argued that without medication his memory would be affected and he would have difficulties in ‘concentrating, learning and understanding.’²⁸⁴ The EAT held that one would have to have a broad view of the meaning of ‘understanding’ and that any person who had their normal human interaction affected might also be regarded as having their ‘understanding’ affected. Once again, they reiterated that ‘normal’ is best defined as anything that is not ‘abnormal’ or ‘unusual’ and it does not depend upon whether the majority of people do it, referring back to the issue of male and female dominated tasks.

In *Kapadia v London Borough of Lambeth*²⁸⁵ the Court of Appeal held that an employment tribunal was obliged to conclude that a claimant’s mental impairment had a substantial adverse effect on his normal day-to-day activities, in circumstances in which there was direct medical evidence that their anxiety, neuroses and depression would have had such an effect but for the fact that he had received medical treatment, and there was no contrary expert medical evidence or challenge to the factual bases of those opinions.

²⁸² *Hewett v Motorola Ltd* [2004] IRLR 545.

²⁸³ Asperger’s Syndrome is a condition that affects social interaction, communication, interests and behaviour. It includes Asperger syndrome and childhood autism. <http://www.nhs.uk/conditions/autistic-spectrum-disorder/pages/introduction.aspx>. Last Accessed 1st May 2014.

²⁸⁴ See Schedule 1, Paragraph 4(G) to the Disability Discrimination Act (1995) which includes in the list of day-to-day activities ‘memory or ability to concentrate, learn or understand’.

²⁸⁵ *Kapadia v London Borough of Lambeth* [2000] IRLR 699 CA.

6.2 The Role of Medical Evidence.

However, on the topic of medical evidence, it should be noted that in *Vicary v British Telecommunications plc*²⁸⁶ the EAT stated that it is not for a doctor to express an opinion as to what is a normal day-to-day activity. Nor is it for the medical expert to tell the tribunal whether the impairments, which had been found, proved substantial or not. Those are matters for the tribunal to arrive at its own assessment.

The topic of medical evidence and the lack of weight in which should be placed upon it seems somewhat worrisome. This is because, despite uncontested medical evidence from expert medical witnesses proposing something about a person's disability, or even lack of, the courts have sometimes disregarded such evidence and held otherwise, as seen in *Rugamer*,²⁸⁷ and *McNicol*.²⁸⁸ This is highly problematic for several reasons. Firstly, it is very peculiar practice for the courts, who studied and trained in Law, to defy the doctors, who studied and trained in Medicine. For the claimant to be denied their claim of disability discrimination on grounds of legal technicalities over medical diagnosis, must be hard to accept as either equality or justice.

Secondly, it is incredibly undermining the talent, skill and knowledge of the medical professionals who are asked to submit a critically informed opinion, to then have it disregarded and dismissed.

Finally, it makes it incredibly challenging for the legal profession to advise on the possibility of a claim, which will result in less being brought by those who have truly been discriminated against on the grounds of their disability. For equality in disability discrimination to progress,

²⁸⁶ *Vicary v British Telecommunications plc* [1999] IRLR 680 EAT.

²⁸⁷ *Rugamer v Sony Music Entertainment UK Ltd* [2001] IRLR 644 EAT.

²⁸⁸ *McNicol v Balfour Beatty Rail Maintenance* [2002] IRLR 71.

the courts must cease such practice of interference and give more weight to the expert medical opinion. Whether this be for, or against the diagnosis of a disability, that is wherein their specialty lies and this should be relied upon. This issue also seems to be problematic in America, in which a law review stated that unfortunately, ‘the intense focus is on the abilities and impairments of the complainant instead of on the allegedly discriminatory conduct of the employer.’²⁸⁹

6.3 The Effect of Time of Day.

Furthermore, just because an employee may still be able to carry out a normal day-to-day activity does not mean that their ability to do so has not been impaired. Interestingly, time of day may also have an effect when determining whether an activity is a normal day-to-day activity. For example ‘getting out of bed and getting dressed are activities that are normally associated with the morning. They may be carried out much later in the day by workers, who work night shifts, but they would still be considered to be normal day-to-day activities.’²⁹⁰

The issue night shifts was discussed in *Chief Constable of Dumfries & Galloway Constabulary v Adams*²⁹¹ in which the EAT upheld a claim that there were enough people working on night shifts for it to be considered as a normal day-to-day activity. Furthermore, they held that the European Court of Justice’s use of the term ‘participation in professional life’ in *Chacón Navas*²⁹² means that when assessing whether a person is limited in their normal day-to-day activities, it is relevant to consider whether they are limited in an activity, which is to be found across a range of employment situations. Although work of a particular

²⁸⁹ White, A. *Paralyzing Discord: Workplace Safety, Paternalism, and the Accommodation of Biological Variance in the Americans with Disabilities Act*, 63 La. L. Rev. (2003).

²⁹⁰ Example provided by Part 2, D6, Office for Disability Issues Equality Act (2010) Guidance.

²⁹¹ *Chief Constable of Dumfries & Galloway Constabulary v Adams* [2009] IRLR 612 EAT.

²⁹² *Chacón Navas v Euresst Colectividades SA* (2006) C-13/05.

form is not a ‘normal day-to-day activity’, something that a person does only at work may be classed as normal if it is common to different types of employment.

However, in the 2010 case of *Chief Constable of Lothian and Borders Police v Cumming*²⁹³ the EAT stated that *Paterson*²⁹⁴ and *Chacón*²⁹⁵ are not authority for the broad proposition that being afforded general participation in or access to professional life is a day-to-day activity. The status of disability for the purposes of the statute cannot be dependent on the decision of the employer as to how to react to the employee’s impairment.

Under the DDA, ‘an impairment was said to have an effect upon a person’s ability to carry out normal day-to-day activities only if it affects: mobility, manual dexterity, physical co-ordination, continence, the ability to lift or move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, perception of the risk of physical danger.’²⁹⁶ This will be inclusive of impairments that affect the individual’s ability to carry out duties at work, particularly if they include these normal day-to-day activities. A major reform in the definition in the DDA to the EqA was the removal of the requirement for one of these eight specific capacities to be affected, for an impairment to be recognised.²⁹⁷

6.4 Specialised Activities.

Even if a highly specialised activity is a regular part of an individual’s life, it should not be held to be a ‘normal’ activity. A classic example, and one mentioned in the guidance,²⁹⁸ is of

²⁹³ *Chief Constable of Lothian and Borders Police v Cumming* [2010] IRLR 109 EAT

²⁹⁴ *Paterson v Commissioner of Police of the Metropolis* [2007] IRLR 763 EAT.

²⁹⁵ *Chacón Navas v Eurest Colectividades SA* (2006) C-13/05.

²⁹⁶ See Schedule 1, Paragraph 4, Disability Discrimination Act (1995).

²⁹⁷ Page 106 of A. Talbot and L. Brownsell, *The Equality Act 2010: Changes to Previous Law* (2010) 2 Private Client Business.

²⁹⁸ Example provided by Part 2, D8, Office for Disability Issues Equality Act (2010) Guidance.

a watchmaker who carries out delicate work with highly specialised tools, after developing tenosynovitis,²⁹⁹ their ability to carry out such delicate work is rendered unmanageable. Although the delicate work is considered to be a normal activity for somebody in such profession, it is not a normal day-to-day activity for most other people.

However, the question of when a specialised activity is classed to be a normal activity needs to be considered. If the watchmaker, who suffers from tenosynovitis, is not only unable to perform their specialised and delicate work, but consequentially, their impaired dexterity means that they are unable to operate a computer keyboard, meaning that they can no longer send emails to suppliers, scan their designs, or write letters to customers, this will be held to have an adverse effect on their normal day-to-day activity.

6.5 Adverse Effect.

In order to help the courts, employers and employees, a non exhaustive list of examples covering circumstances in which it would be reasonable to regard the adverse effect on the ability to carry out a normal day-to-day activity are listed in the appendix of the Office for Disability Issues Equality Act (2010) Guidance. Similarly, examples are also given of when it would not be reasonable to regard the effect as having a substantial adverse effect. As explicitly stated in Part 2, Paragraph D13, such examples are not to be regarded as tests and are indicative only.³⁰⁰

²⁹⁹ Tenosynovitis, or tendonitis, is a term often used to describe an inflamed and painful tendon, which is a strong band or cord of tissue that attach muscle to bone, helping move the bones and joints when the muscles contract. www.nhs.uk/conditions/tendonitis/Pages/Introduction.aspx. Last Accessed 1st May 2014.

³⁰⁰ Part 2, D13, Office for Disability Issues Equality Act (2010) Guidance.

6.6 Environmental Effects.

The impact of environmental conditions should also be taken into consideration of employee's with impairments such as Tinnitus,³⁰¹ RP,³⁰² or Asthma,³⁰³ which can be aggravated by environmental conditions such as background noise, lighting, and dust, respectively.³⁰⁴ However 'consideration should be given to whether there may also be an adverse effect on the ability to carry out a normal day-to-day activity outside of that particular environment.'³⁰⁵

In *Cruickshank v VAW Motorcast Ltd*³⁰⁶ the EAT held that in cases where the effects of an impairment on the ability to carry out normal day-to-day activities fluctuate and could be exacerbated by conditions at work, as a result of a medical condition, then the tribunal should consider whether or not the impairment has a substantial and long-term adverse effect on the employee's ability to perform normal day-to-day activities both at work and not at work. If, while at work, a claimant's symptoms have a significant and long-term effect on their ability to perform day-to-day tasks, then such symptoms are not to be overlooked simply because the work itself may be specialised or unusual, as long as the consequences of the disability can be measured in terms of the ability of a claimant to undertake day-to-day tasks.

³⁰¹ Tinnitus is a term that describes a condition in which a person can hear a sound from inside their body rather than from an outside source. www.nhs.uk/conditions/tinnitus/Pages/Introduction.aspx. Last Accessed 1st May 2014.

³⁰² RP, or Retinitis Pigmentosa, is the name given to a diverse group of inherited eye disorders, which effect the retina, causes permanent changes to your vision such as difficulty with vision in dim light or the dark and the loss of your side or peripheral vision. www.rnib.org.uk/eyehealth/eyeconditions/eyeconditionsoz/Pages/retinitis_pigmentosa.aspx. Last Accessed 1st May 2014.

³⁰³ Asthma is a common long-term condition that can cause a cough, wheezing, and breathlessness. www.nhs.uk/conditions/asthma/Pages/Introduction.aspx. Last Accessed 1st May 2014.

³⁰⁴ Part 2, D20, Office for Disability Issues Equality Act (2010) Guidance.

³⁰⁵ Part 2, D21, Office for Disability Issues Equality Act (2010) Guidance.

³⁰⁶ *Cruickshank v VAW Motorcast Ltd* [2002] IRLR 24 EAT.

6.6 Chapter Conclusion.

Considering that this part of the definition appears rather problematic, we have actually witnessed several positive decisions from the court, particularly *Chief Constable of Dumfries and Cruickshank*, which have certainly helped bring clarity to the meaning of ‘Normal Day-to-Day Activities’ as per S.6. Another positive step was the decision for the legislature to remove the eight specific capacities from the definition, since this has ‘[made] it easier for some people to demonstrate that they meet the definition of disabled person’³⁰⁷ without ‘opening the floodgates to litigation.’³⁰⁸

However, on balance there seems to be more negativity than positivity surrounding this part of the definition. Considering Morison J’s aforementioned quote that what is day-to-day activity is ‘best left unspecified, easily recognised, but defined with difficulty,’ it appears that it is not so ‘easily recognised’ after all. Evidence of which is found in *Ekpe*, in which it remains deeply disturbing that the original tribunal had made such an atrocious blunder in getting it so obviously wrong, with the need to resort to an EAT to rectify the situation. Describing such ambiguity, Pfeiffer³⁰⁹ submitted the question of ‘what is the normal way to cover a mile? Some people would walk. Some people would ride a bicycle. Some people would get the bus... others would use a skateboard... some people use wheelchairs, there is no ‘normal’ way to travel a mile.’³¹⁰

Another problematic area is that of ‘specialised activities’ that are not considered as a normal day-to-day activity, and thus denying an employee protection, even if such duty forms a large

³⁰⁷ Page 142, Equality Act Explanatory Notes (2010) ‘*Explanatory Notes Revised Edition*’ The Crown.

³⁰⁸ Page 106 of A. Talbot and L. Brownsell, *The Equality Act 2010: Changes to Previous Law (2010)*, 2 Private Client Business.

³⁰⁹ Dr. David Pfeiffer was a Scholar in the Center of Disability Studies at University of Hawaii, Manoa.

³¹⁰ Page 8, D. Pfeiffer ‘*The Disability Paradigm and Federal Policy Relating to Children with Disabilities*’ (1998) *Journal of Health Law and Policy*.

part of their job role. Since the S.6 was partially designed to protect employee's at work it seems unjust that more weight is not put on what an employee does at work, than they do at home. There are good grounds for changing this definition to afford protection that to those that need it. One could argue a case to widening the wording to instead state: '... P's ability to carry out normal work-related duties.' There would then be no doubt that those that have specialised duties at work such as delicate jewelry construction, watch making or piano playing would be afforded the protection from discrimination that they fairly, justly and reasonably deserve.

The final issue is that of medical evidence and the court's reluctance to place weight on it or even total dismissal of it in critical cases such as *Ekpe*, which has since been described as 'plainly wrong.' If true equality is to be achieved, the courts need to accept the information detailed to them by specialists in medicine, who often have a genuinely superior understanding of whether somebody is disabled, than they do.

Chapter Seven - Options for Reform and Remediating The Situation

Chapter Seven - Options for Reform and Remediating The Situation	83
7.1 Have The Legislature Got it Right?	83
7.2 Identified Problem Areas.	83
7.3 Is the Medical Model to Blame?	84
7.4 Action for Reform.	85
7.5 Long-Term Reform Solution.	85
7.5 Short-Term Reform Solution.	86

Chapter Seven - Options for Reform and Remedying The Situation

7.1 Have The Legislature Got it Right?

Ultimately, this research project involved a critical analysis of Section 6 EqA to examine the real definition of disability, in order to answer the crucial question, which is ‘have the legislature got it right?’ Firstly, in order to answer this question, one needs to ascertain what is proposed by ‘have they got it right?’ Arguably, the right, correct, or even ideal, definition of disability is the one that attempts to bring ‘the most equality’ to those that seek it. In this instance equality for those with a disability is to be equal in regards to: status, rights and opportunities.

It is clear from each chapter conclusion that whilst each part of the current definition provides equality to people with a disability some extent, it does not always provide equality to those who require it. Thus one can argue that the answer to the question ‘have the legislature got it right?’ – the answer is clearly ‘No.’

7.2 Identified Problem Areas.

As aforementioned in the subsequent chapter conclusions, there are numerous problems that the current definition under S.6 EqA causes for achieving equality, and will be addressed accordingly.

1) As per Chapter Three, the current definition of impairment does not allow for addiction to substance abuse to be classed as an impairment. For the aforementioned reasons including, *inter alia*, the successful reintegration into society, if this were not established as an impairment, then those with an addiction to substance abuse would not be able to achieve true equality in the workplace.

2) As evident from the cases of *Paterson*, *Carden* and *Kapadia* discussed in Chapter Four, the courts have had many serious problems with the interpretation and application of the term ‘substantial adverse effect.’

3) As per Chapter Five, the current duration of ‘long-term’ is set at a period of 12 months. Whilst it is understood that a specific duration must be chosen, as aforementioned, if this is not lowered then a significant amount of people with mental-health related impairments, such as clinical depression, will not be able to achieve true equality in the work place.

4) As discussed in Chapter Six, the current term ‘Normal Day-to-Day Activities’ is not suitable for the current definition of disability. This is no more evident than in the case of *Quinlan v B&Q Plc*³¹¹ in which an employee who had open-heart surgery could not lift heavy objects, which was fundamental to his job, was able to lift ‘normal day-to-day objects.’ Because he could still perform normal day-to-day activities he was not held to be disabled, despite not being able to perform activities that were fundamental to his job. For purposes of equality within the workplace, this must be addressed.

5) Another problem highlighted in Chapter Six, was the courts constant dismissal of medical evidence to prove the presence of an impairment leading to a disability.

7.3 Is the Medical Model to Blame?

The main reason for the problems caused by the current definition lies within the fact that our legislature has chosen to legislate our governing statutes based mainly on the medical model of disability alone. Paraphrasing Sargeant’s argument that, ‘[historically] the legislation has

³¹¹ *Quinlan v B&Q Plc* [1999] Disc. L.R. 76.

focused on the disabled person and measures to help them cope with an unequal society, [however], a more positive model would be to [shift] the focus [from] the individual to society.’³¹² He goes on to further argue that ‘It is society’s fault that some of its citizens cannot access the transport system or stand an equal chance of finding employment. The social model of disability encourages [us] to take this societal approach, rather than the narrower medical model [that only focuses] on the disability.’³¹³ Adopting a social model for the purpose of defining disability has the potential to eradicate all the negative consequences that the medical model has caused, thus increasing equality for those with a disability.

7.4 Action for Reform.

However, it is acknowledged that to shift from a medical model towards a social model of disability would be an incredibly substantial task to be undertaken by numerous parties, involving an exceptionally lengthy and intricate consultation period. Therefore, since the move towards a social model of disability would be considered as a long-term solution, there is also a need for the legislature to enforce a short-term solution, aimed at rectifying the main issues within the current definition of disability that have been identified. Consequently, in an attempt to bring ‘the most equality’ to those who seek it, this research project proposes two solutions of reforming equality: long-term reform, and short-term reform.

7.5 Long-Term Reform Solution.

As aforementioned, the legislature should look towards introducing new legislation based on the social model of disability, as a long-term remedy to the inequality created by the medical model. This is because currently, disabled persons have to prove that they are not ‘normal’

³¹² Page 69 of Sargeant, M (2013). *Discrimination and the Law*. Oxon: Routledge.

³¹³ *Ibid.*

because they cannot carry out ‘normal day-to-day activities’ and that ‘the able-bodied person is explicitly and overtly held up as the norm.’ Furthermore, as has been argued in Parliament, ‘the social model [of disability] would bring the law into alignment with best practice’³¹⁴

By adopting a social model, the focus on impairments will reduce, in turn making us realise that ‘it is society that disables people, not impairments.’³¹⁵ Thus a social model would not focus on ‘what somebody cannot do in everyday life and what ‘normal’ activities they cannot do, but rather on what society can do to assist those who are put at a disadvantage.’³¹⁶ Therefore, this research paper would submit that a social model definition of disability will enable society to appreciate that ‘disabled people [are] the collective victims of an uncaring or unknowing society, [which] will be translated into social policies geared towards alleviating oppression.’³¹⁷

7.5 Short-Term Reform Solution.

Whilst the obvious long-term solution of both developing and introducing a social model of disability is in progress, as a preliminary measure aimed at rectifying the main issues caused by the current definition in the short-term, this research paper would propose the ‘Disability and Equality (Reform) Bill 2014.’

The Reform Bill will aim to legislate the following:

- 1) The reduction in length of ‘long-term’ from 12 months to 6 months for mental impairments in order to provide greater equality and protection from discrimination to those with mental health conditions such as clinical depression and general anxiety disorder.

³¹⁴ Page 28, House of Commons Work and Pension Committee, no. 167.

³¹⁵ Page 20, UPIAS (1997) ‘*Fundamental Principles of Disability*’ Disability Studies Leeds.

³¹⁶ Page 45 of T. Shakespeare ‘*Disability Rights and Wrongs*’ (Routledge, 2006).

³¹⁷ Page 22 of M. Oliver ‘*The Politics of Disablement*’ (Palgrave Macmillan, 1990).

2) Addiction as an impairment for the purposes of in order to provide greater equality and protection from discrimination to those with substance abuse addiction.

3) 'Normal day-to-day activities' is to be replaced with 'Normal day-to-day work-related activities and duties' in order to provide greater equality and protection from discrimination to those whose activities and duties at work involve such activities and duties that are not always considered to be 'normal day-to-day activities.'

However, the Bill does have foreseen some limitations. In order to rectify the vast problems concerning the court's interpretation and application of the term 'substantial adverse effect' and the need to put more weight on medical evidence, the legislation will eventually have to succumb to drafting the definition of disability based upon a social-model of disability.



Employee Equality for Disabilities Reform Bill (2014)

An Act to make provision to require Ministers of the Crown and others when making strategic decisions about the exercise of their functions to have regard to the desirability of reducing socio-economic inequalities; to reform Section 6 of the Equality Act (2010) and to enable greater equality to employees with a disability in the workplace.

[6th May 2014]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Part 2

Employee Equality: Key Concepts for Reform

Chapter 1

Requirements of Reform

4 Disability

- (1) An employee (E) has a disability if -
 - (c) E has a physical or mental impairment, and
 - (d) The impairment has a substantial and long-term adverse effect on E's ability to carry out normal day-to-day or work-related activities and duties.
- (2) A long-term impairment is one that is to last for at least -
 - (a) A period of 6 months for mental impairments
 - (b) A period of 12 months for physical impairments
- (3) Any impairment under S.4(2) will include any addiction to substance abuse
 - (c) a reference to a person who has an addiction to substance abuse is a reference to a person who is an addict

Figure 2.2 – Proposed ‘Employee Equality and Disabilities (Reform Bill (2014))’

Chapter Eight - Final Conclusion

The findings from the literature review displayed a clear frustration towards the adopted legal definition of disability under both the DDA and the EqA, with a clear calling for the legislature to look at basing it on the social model of disability.

Along with providing statistical data on disability-related discrimination and examining history of the sources of the definition, this research proposal also provided a critical analysis of each requirement of the current definition. Furthermore, it provided a balanced evaluation on the positives and negatives of each requirement in the chapter conclusions. This resulted in exploiting areas of concern for improvement, and proposing subsequent solutions for reform, both in the short and long term.

The results of this research proposal support the initial theory that whilst the definition of disability within Section 6 provides a fair level of equality for those who suffer from disability-related discrimination. However, so long as the definition remains based on the medical model of disability, it will always have restricted limitations.

The core objective was to critically analyse the current definition of disability and determine whether or not it is suitable. The definition was critically analysed in Chapters: Three, Four, Five and Six, and its suitability was determined in Chapter Seven, along with proposed options for reforming the definition. As such, the original objective of this research proposal was met in full.

The purpose of the literature review, *inter alia*, was to review the current literature on the topic to ascertain whether there are any gaps in the current body of research. As

aforementioned in the literature review, a gap was identified which demonstrated little-to-no current research that provided a critical analysis of Section 6. There was however, substantial research on older definitions of disability, such as under the DDA. Although the definition under the EqA is based upon older definitions, there are some critical differences. As such, it can be said that this research proposal has made an original contribution, though it is recognised that this is only to a certain extent.

It is recommended that further research be undertaken on the definition of disability in jurisdictions that have based their definition on the social model of disability. An evaluation and further comparison should then be drawn between their definitions and Section 6, to determine what the effect of implementing a definition based on a social model would be.

Recommendations

As per Chapter Seven, this research study would propose two recommendations in an attempt to bring equality back to the heart of Section 6 EqA.

Firstly, it is recommended that the adjustments to Section 6, as proposed in the ‘Employee Equality for Disabilities (Reform) Bill (2014)’ be enacted by parliament immediately, as a rapid way in remedying the inequality left by the poor drafting of the section. It is noted that this is not suitable as a long-term solution and is merely intended as a method of improving protection in the immediate future.

Lastly, it is recommended that both parliament and the legislature co-operate together in drafting a proposal to reform the current philosophy of disability discrimination, which is based on a the medical model of disability, towards a social model of disability. It is acknowledged that the changes brought about by such move would bring huge transformation to employers, employees, the court, and alike. And in order to truly achieve equality in the area of disability discrimination, this transformation must involve serious consultation with numerous stakeholders and must not be rushed at any cost.

Total World Count: 17,788/18,000³¹⁸

³¹⁸ Not including permissible exclusions such as: Abstract, Bibliography, Appendices, Tables and Footnotes, as per the directions of the Dissertation Handbook.

References and Bibliography

Journals and Reports

- Alexander, L., (1992). *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies* (1992), 141, Penns UL Rev 149. p.201
- Alldrige, P., (2006). *Locating Disability Law*, (2006) 59 Current Legal Problems 1. p.289.
- Burgdorf, R., (1996). *Substantially Limited Protection from Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*. Villanova Law Review, 42 (2), pp. 409-586.
- Butlin, S-F., (2011). *The UN Convention on the Rights of Persons With Disabilities: Does the Equality Act (2010) Measure Up to UK International Commitments?* Industrial Law Journal, 40 (4), pp. 428-438.
- Barnes, C., (2000). *A Working Social Model? Disability, Work and Disability Politics in the 21stC.* 20, Critical Social Policy 4. p. 445
- Collins. H., (2003). *Discrimination, Equality and Social Inclusion*. 66 M.L.R. pp.16-17.
- Connolly, M., (2006). *Has the Disability Discrimination Act (1995) Become a Charter for Addicts and Perverts?* 75 Employment Law Bulletin December. p.2.
- Degener, T. and Quinn, G., (2000). *A Survey of International Comparative and Regional Disability Law Reform October*. Disability Rights Education and Defense Fund. p.7
- Disability Task Force, (1999). 'From Exclusion to Inclusion' Department for Education and Employment. p.24.
- Flacks, S., (2012). *Deviant Disabilities: The Exclusion of Drug and Alcohol Addiction From the Equality Act (2010)*. Social and Legal Studies, 21 (3), pp. 395-412.
- Gardner. J., (1998). *Liberals and Unlawful Discrimination*'(1998) 9 OJLS 1. pp.2-8.
- Gibson, F., (2009). *Drugs, Discrimination and Disability*. 17 Journal of Law and Medicine 3. p.404.
- Hepple, B., (2011). *Equality: The New Legal Framework*. Hart Publishing Ltd. p.32.
- HMSO (2007). *Fairness and Freedom: The Final Report of the Equalities Review*. London: The Equalities Review.
- Hull, R., (1998). *Defining Disability – A Philosophical Approach*. Res Publica, 4 (2), pp. 199-210.
- James, G., (2002). *The Meaning of Disability: Physical and Mental Impairment*. Industrial Law Journal, 31 (2), pp. 156-161.

- Kaplan, D., (1999-2000). *Definition of Disability: Perspective of the Disability Community*. Journal of Health Care Law & Policy, 3 (2), pp. 352-364.
- Key, E., (1996). *Voluntary Disabilities and the ADA: A Reasonable interpretation of Reasonable Accommodation*. 48 Hastings Law Journal.
- Leonard, M., et al., (2006). *The Definition of Disability: What is in a Name?* The Lancet, 368 (9543), pp. 1219-1221.
- McTigue, P., (2007). *Critiquing Disability: The DDA's Interplay With Society*. In-Spire E-Journal, June 2007, pp. 1-5
- Mold, A., & Berridge, V., (2011). *Voluntary Action and Illegal Drugs: Health and Society in Britain Since the 1960s*. Twentieth Century Brit Hist. 22 (3): 449-451.
- Office for Disability Issues. (2011). *Guidance on Matters to be Taken Into Account In Determining Questions Relating to the Definition of Disability*.
- Pfeiffer, D. 'The Disability Paradigm and Federal Policy Relating to Children with Disabilities' (1998) Journal of Health Law and Policy. p.8.
- Phillips, C., (2012). *The Equality Act (2010): Impact on Mental Health-Related Disability Claims*, 109 Employment Law Brief June.
- Rutherglen, G., *Discrimination and its' Discontents* (1995) 81 Virginia L Rev 11. pp.127-128.
- Scullion, P., (2010). *Models of Disability: Their Influence in Nursing And Potential Role in Challenging Discrimination*. Journal of Advanced Nursing, 66 (3), pp. 697-707
- Stanley, P., (2013). *A New Approach To Disability Discrimination*. Solicitors Journal, 157 (20), pp. 19-21
- Steven. E., (2005). *Addiction: A Disease of Learning and Memory*. Am J Psychiatry 162:1414-1422.
- Talbot. A., and Brownsell, L., (2010). *The Equality Act 2010: Changes to Previous Law*. 2 Private Client Business. p.106.
- Tarrant, S., (1996). *The Specific Triggering Incident' in Provocation: Is the Law Gender Biased?* (1996) Vol. 26, Western Australian Law Review.
- UK Drug Policy Commission, (2008). *Getting Problem Drug Users (Back) Into Employment, Part Two*. Chapter 6.
- UK Drug Policy Commission, (2009). *Memorandum to the House of Commons Work and Pensions Committee*.
- Wallace, S., (2010). *The Sting in The Tail*. Employment Law Journal, May (110), pp. 5-6.

White, A., (2003). *Paralyzing Discord: Workplace Safety, Paternalism, and the Accommodation of Biological Variance in the Americans with Disabilities Act*, 63 La. L. Rev.

Wilkinson, R., (2009). *The Single Equality Bill: A Missed Opportunity to Legislate on Genetic Discrimination?* *Studies in Ethics, Law and Technology*, 3 (1), pp. 1-16

Woodhams, C. and Corby, S. (2003). *Defining Disability in Theory and Practice: A Critique of the British Disability Discrimination Act (1995)*. (32 *Journal of Social Policy* 1 2003) pp. 165

Text Books

Connolly, M., (2011). *Discrimination Law*. 2nd ed. Sweet & Maxwell. Chapter 1.

Fredman, S., (2005). *Disability Equality: A Challenge to The Existing Anti-Discrimination Paradigm?* Hart Publishing, 2005, pp. 199-218.

Gooding, C., (1996). *Blackstone's Guide to the Disability Discrimination Act (1995)* (Blackstone Press Ltd) p.1.

Oliver, M., (1990). *'The Politics of Disablement'* (Palgrave Macmillan). p.22.

Pitt, G., (2011). *Employment Law* 8th Edition (Sweet and Maxwell) (2011). p.43.

Sargeant, M., (2013). *Discrimination and the Law*. Oxon: Routledge. Chapter 5.

Shakespeare. T., *Disability Rights and Wrongs*. (Routledge, 2006). p.45.

Smith, I., and Baker, A., (2010). *Smith and Wood's Employment Law*, 10th ed. Oxford University Press Inc. Chapters 6-7.

Taylor, S. and Emir., (2009). A. *Employment Law - An Introduction*, 3rd Ed, (OUP). p.265.

Websites

British Journal of Psychiatry.
Clinical Importance of Long-term Antidepressant Treatment.
<http://bjp.rcpsych.org/content/179/42/s4.full>.
Last Accessed 1st May 2014.

Chadwick, A.
Defining Impairment and Disability.
www.disability-studies.ac.uk/files/library/Northerhn-Officers-Group-Defining-Impairment-And-Disability.pdf
Last Accessed 1st May 2014.

COMRES, (2011).
Poll Digest - Social - Scope Discrimination Survey.
www.comres.co.uk/poll/8/scope-discrimination-survey-15-may-2011.htm.
Last accessed 1st May 2014.

Department for Work and Pensions, (2012).
Disability Prevalence Estimates 2011/12.
<http://odi.dwp.gov.uk/docs/res/factsheets/disability-prevalence.pdf>.
Last Accessed 1st May 2014.

DLF, (2010).
Key Facts.
www.dlf.org.uk/content/key-facts.
Last Accessed 1st May 2014.

Dr. R. Laing, (2001).
The Development and Critique of the Social Model of Disability.
http://www.ucl.ac.uk/lc-ccr/lccstaff/raymond-lang/development_and_critique_of_the_social_model_of_disability.pdf
Last Accessed 1st May 2014.

Employment Cases Update, (2011).
J v DLA Piper UK LLP UKEAT/0263/09/RN.
www.employmentcasesupdate.co.uk/site.aspx?i=ed5537
Last Accessed 1st May 2014.

European Commission, (2010).
Discrimination in the EU.
http://ec.europa.eu/public_opinion/archives/ebs/ebs_263_fiche_be.pdf.
Last Accessed 1st May 2014.

HMSO, (2007).
Fairness and Freedom: The Final Report of the Equalities Review.
www.gov.uk/government/uploads/system/uploads/attachment_data/file/85010/disability-definition.pdf
Last Accessed 1st May 2014.

House of Commons Work and Pensions Committee, (2008-09).
The Equality Bill: How Disability Equality Fits Within a Single Act.
www.publications.parliament.uk/pa/cm/200809/cmselectcmworpen/158/158i.pdf
Last Accessed 1st May 2014.

Kaplan, D., (2002).
The Definition of Disability.
www.accessiblesociety.org/topics/demographics-identity/dkaplanpaper.htm.
Last accessed 1st May 2014.

The Equality and Human Rights Commission.
UN Convention on the Rights of Persons with Disabilities.
www.equalityhumanrights.com/human-rights/our-human-rights-work/international-framework/un-convention-on-the-rights-of-persons-with-disabilities
Last Accessed 1st May 2014.

MDRC, (2007).
Religious/Moral Model of Disability.
www.copower.org/models-of-disability/177-religiousmoral-model-of-disability.html
Last accessed 1st May 2014.

Mental Health Foundation, (2012).
Mental Health Statistics.
www.mentalhealth.org.uk/help-information/mental-health-statistics.
Last Accessed 1st May 2014.

Ministry of Justice, (2013).
Eligibility Calculator.
www.justice.gov.uk/legal-aid/assess-your-clients-eligibility/civil-eligibility/civil-eligibility-calculator
Last Accessed 1st May 2014.

National Institute for Health and Care Excellence.
Depression: The Treatment and Management of Depression in Adults.
<http://guidance.nice.org.uk/CG90>
Last accessed 1st May 2014.

NHS UK.
Conditions.
www.nhs.uk/conditions/asthma/Pages/Introduction.aspx
www.nhs.uk/conditions/anxiety/pages/introduction.aspx
www.nhs.uk/conditions/autistic-spectrum-disorder/pages/introduction.aspx
www.nhs.uk/conditions/dementia-guide/pages/about-dementia.aspx
www.nhs.uk/conditions/depression/pages/introduction.aspx
www.nhs.uk/conditions/dyslexia/pages/introduction.aspx
www.nhs.uk/conditions/lupus/pages/introduction.aspx
www.nhs.uk/conditions/motor-neurone-disease/pages/introduction.aspx
www.nhs.uk/conditions/neuromyelitis-optica/Pages/Introduction.aspx
www.nhs.uk/conditions/psoriasis/pages/introduction.aspx
www.nhs.uk/conditions/psychosis/pages/introduction.aspx

www.nhs.uk/conditions/schizophrenia/pages/introduction.aspx

www.nhs.uk/conditions/tinnitus/Pages/Introduction.aspx

www.nhs.uk/conditions/tendonitis/Pages/Introduction.aspx

Last Accessed May 2014.

Public and Commercial Services Union, (2012).

Disability Models and Attitudes.

www.pcs.org.uk/en/equality/guidance-and-resources/disability_equality_toolkit/disability-models-and-attitudes.cfm

Last accessed 1st May 2014.

Reeve, D., (2004).

Psycho-Emotional Dimensions of Disability and the Social Model.

www.disability-studies.leeds.ac.uk/files/library/Banes-implementing-the-social-model-chapter-6.pdf

Last Accessed 1st May 2014.

Rieser, R, (2010).

Medical Model / Social Model.

http://www.worldofinclusion.com/medical_social_model.htm

Last accessed 1st May 2014.

Royal College of Psychiatrists.

Coming off of Anti-Depressants.

www.rcpsych.ac.uk/healthadvice/treatmentwellbeing/antidepressants/comingoffantidepressants.aspx.

Last Accessed 1st May 2014.

Scope, (2012).

Latest Attitudes Survey.

www.scope.org.uk/news/latest-attitudes-survey

Last accessed 1st May 2014.

Welsh Government, (2013).

Social Model of Disability.

www.wales.gov.uk/topics/equality/rightequality/disability/socialmodel

Last accessed 1st May 2014.

World Health Organisation, (1990).

International Classification of Diseases.

www.who.int/classifications/icd/en.

Last accessed 1st May 2014.

Table of Cases

A

Abadeh v British Telecommunications plc [2001] IRLR 23 EAT. ... 52

Amnesty International v Ahmed [2009] UKEAT 0447_08_1308. ... 28

Aylott v Stockton on Tees Borough Council [2010] IRLR 994 CA / EqLR 69 CA. ... 29

B

Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT. ... 28

C

Carden v Pickerings Europe Ltd [2005] IRLR 720 EAT. ... 57, 60, 83

Chacon Navas v Eurest Collectividades SA [2006] IRLR 706 ECJ. ... 24, 76-77

Chief Constable of Dumfries & Galloway Constabulary v Adams [2009] IRLR 612 EAT. ... 76, 80

Chief Constable of Lothian and Borders Police v Cumming [2010] IRLR 109 EAT ...77

Clarke v Eley (IMI) Kynoch Ltd [1982] IRLR 482 EAT. ... 31

Clarke v Novacold [1999] I.C.R. 951. ... 24

Cosgrove v Northern Ireland Ambulance Service [2007] IRLR 397 NICA. ... 64, 69

Cruickshank v VAW Motorcast Ltd [2002] IRLR 24 EAT. ... 79-80

D

Dunham v Ashford Windows [2005] IRLR 608 EAT. ... 41, 49

E

Ekpe v Commissioner of Police of the Metropolis [2001] IRLR 605 EAT. ... 73, 80-81

G

Goodwin v The Patent Office [1999] IRLR 4 EAT. ... 33, 38-39, 44, 49, 52, 71

Greenwood v British Airways Plc [1999] IRLR 600. ... 64

H

Hewett v Motorola Ltd [2004] IRLR 545. ... 74

High Quality Lifestyles Ltd v Watts [2006] IRLR 850 EAT. ... 29

Hospice of St Mary of Furness v Howard [2007] IRLR 944 EAT. ... 43, 49

J

J v DLA Piper UK LLP [2010] IRLR 936. ... 44, 49, 67, 69

James v Eastleigh Borough Council [1990] AC 751. ... 28-29

JP Morgan Europe Ltd v Chweidan [2011] IRLR 673 / EqLR 779 CA. ... 30

K

Kapadia v London Borough of Lambeth [2000] IRLR 14. ... 57, 60, 74, 84

Kirton v Tetrosyl Ltd [2003] IRLR 353 CA. ... 59

L

Law Hospital NHS Trust v Rush [2001] IRLR 611 CS. ... 73

London Borough of Islington v Ladele [2009] IRLR 154 EAT. ... 28

London Borough Council of Lewisham v Malcolm [2008] UKHL 43. ... 31

M

Mandla v Lee [1983] IRLR 209 HL. ... 31,

McNicol v Balfour Beatty Rail Maintenance [2002] IRLR 71. ... 38, 40, 49, 75

Ministry of Defence v Hay [2008] IRLR 928 EAT ... 39-40

Millar v Inland Revenue Commissioners [2005] CSHI 71. ... 42

Morgan v Staffordshire University [2002] IRLR 190 EAT. ... 41

Mowat-Brown v University of Surrey [2002] IRLR 235 EAT. ... 59

N

Nagarajan v London Regional Transport [1999] IRLR 572 HL. ... 29

P

Patel v Oldham Metropolitan Borough Council [2010] IRLR 280. ... 47, 64

Paterson v Commissioner of the Police of the Metropolis [2007] IRLR 763. ... 53-54, 60, 72, 77, 84

Power v Panasonic UK Ltd [2003] IRLR 151. ... 42-43, 47, 49

Q

Quinlan v B&Q Plc [1999] Disc. L.R. 76 ... 84

R

Raval v Department of Health and Security [1985] IRLR 370 ... 31

R (on the application of E) v Governing Body of JFS [2010] IRLR 136 SC. ... 28, 31

R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport [2002] IRLR 688 EAT. ... 29

Richmond Adult Community College v McDougall [2008] IRLR 227 CA. ... 63

Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 644 EAT. ... 38, 75

S

SCA Packaging Ltd v Boyle [2009] IRLR 746. ... 57, 60

Singh v Biotechnology and Biological Sciences Research [2011] EqLR 1248 CS. ... 29

Stewart v Cleveland Guest (Engineering) Ltd [1994] IRLR 440 EAT. ... 28

Swift v Chief Constable of Wiltshire Constabulary [2004] IRLR 540 EAT. ... 66, 69

V

Vicary v British Telecommunications plc [1999] IRLR 680 EAT. ... 75

W

Woodrup v London Borough of Southwark [2003] IRLR 111 CA. ... 57

Table of Legislation

Legislation

C

Civil Rights Act (1964) ... 21,

D

Disability Discrimination Act (1995) ... 4, 5, 23-24, 27, 33, 36, 38, 46, 49, 57-58, 77, 89-90

s 1(1) ... 43, 54

Para. 1, Sch. 1 ... 40

Para 4, Sch. 1 ... 77

Para. 5(2), Sch. 2 ... 43

Disability Discrimination Act (2005) ... 58

Disabled Persons (Employment) Act (1945) ... 23

E

Equal Pay Act (1970) ... 23, 48

Equality Act (2010) ... 4,-7, 16, 23, 26, 35, 39, 47, 49, 52, 57, 59, 63, 65, 68, 71, 77, 89-90

s 5 ... 27

s 6 ... 1-5, 7, 27, 33, 36, 38, 63, 69, 71, 80, 83, 89-91

s 6(4) ... 65

s 7 ... 27

s 8 ... 27

s 9 ... 27

s 10 ... 27

s 11 ... 27

s 12 ... 27

s 13 ... 27

s 13(1) ... 27

s 13(2) ... 28

s 15 ... 27, 32

s 15(1) ... 32

s 19 ... 27, 30-31

s 21 ... 27, 32

s 21(2) ... 32

s 26 ... 27, 32

s 26(1) ... 32

s 83(2)(a) ... 27

s 212(1) ... 52

Para. 1(5) ... 56

Para. 1(5)(1) Sch. 1 ... 55

Para. 1(5)(3)(a) Sch. 1 ... 55

Para. 1(7) Sch. 1 ... 46

Para. 1(9) Sch. 1 ...	46
Para. 2(1) Sch. 1 ...	63
Para. 2(1)(b)(c) Sch. 1 ...	65
Para. 2(2) Sch. 1 ...	43, 65-67
Para. 3(1) Sch. 1 ...	59-60
Para. 5(1) ...	65
Para. 5(2) Sch. 1 ...	43
Para. 6(1) Sch. 1 ...	45
Para. 6(2) Sch. 1 ...	45
Para. 8 Sch. 1 ...	58
Para. 9(1) Sch. 1 ...	56

H

Human Rights Act (1998) ...	26
-----------------------------	----

R

Race Relations Act (1976) ...	21, 23
-------------------------------	--------

S

Sex Discrimination Act (1975) ...	23
-----------------------------------	----

Statutory Instruments

E

Equality Act 2010 (Disability) Regulations (2010) (S.I. 2010/2128).	
Reg. 7 ...	46
Reg. 4 ...	47

Employment Equality (Age) Regulations (2006) ...	23
--	----

Employment Equality (Religion and Belief) Regulations (2003) ...	23
--	----

Employment Equality (Sexual Orientation) Regulations (2003) ...	23
---	----

T

The Disability Discrimination (Meaning of Disability) Regulations (1996) ...	60
--	----

International Acts, Directives, Regulations, Treaties and Conventions

A

Americans with Disabilities Act (1990) ...	35
--	----

C

Charter of Fundamental Rights of the European Union (2000)
Art 21(1) ... 26

T

The European Convention for the Protection of Human Rights and Fundamental Freedoms
(1950) ... 26

The Framework Directive on Equal Treatment in Employment and Occupation (Directive
2000/78/EC) ... 24-25

U

United Nations' Universal Declaration of Human Rights (1948)
Art 1 ... 25
Art 2 ... 25
Art 7 ... 25