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Adult Guardianship: Narrative Readings in the "Shadow" of the Law?

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Introduction

Adult guardianship is not a new idea; the concept was recognized in Roman times (McLaughlin, 1979; Sherman, 1980). Common law adult guardianship originated in the 13th century prerogative powers of the royal courts of England, who could appoint a person known as a "committee" of the person or his property (Krasik, 1989; Neugebauer, 1978). Over much of their life, these powers were administered through an institution of popular justice, the jury; this was later replaced by court adjudication (McLaughlin, 1979). Civil law systems, by contrast, relied more on family members (Blankman, 1997), a priority recently recognized in another way in common law countries through a durable power of attorney legislation that facilitates advance planning (Carney & Tait 1994b; Creyke, 1991).

Some civil law schemes have modified or replaced courts with other institutions, as was done for medical consents in New York (Sundram & Stavis, 1998). However, most previous reforms have concentrated on changing the image or philosophy of adult guardianship. In the 1970s, guardianship laws were reformed as deinstitutionalization led to placement of people in the wider community and greater recognition was given to the rights of disabled people. Much of that political energy crystallized around campaigns to improve the lot of the intellectually disadvantaged (Cocks Committee, 1982; Hodgson, 1973; McLaughlin, 1979; Murdock, 1973).[1] The object has been to

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[1]Thus the 17-country conference in 1969 in San Sebastian, Spain, held under the auspices of the international body, drew attention to a need for contemporary forms of guardianship (Hodgson, 1973). Weaknesses in American adult guardianship laws affecting this group were identified in a 1969 study, and endorsed in the 1970 President's committee report (Murdock, 1973). Hodgson (1973) said that failure to "recognize and provide for the unique guardianship needs" of this group was a "basic defect." A 1972 report sponsored by the Canadian National Institute on Mental Retardation did likewise (Hodgson, 1973). A U.S. Congressional committee highlighted concerns there about lack of accountability of guardianship services, and commissioned a report to develop a code of minimum acceptable standards (Hommell & Lisi 1989).

confine guardianship to an institution of last resort, and to replace an excessively paternalist philosophy with a genuine respect for individual autonomy and due process (Atkin, 1988; Carney & Singer, 1986).

Australia (a federation) and New Zealand (a unitary form of government) joined the reform movement quite early.[2] A blueprint was provided by an enquiry in the state of Victoria (Carney, 1982; 1989). Most other states and territories followed suit (though New South Wales took a somewhat more "welfarist" approach, with a different mix of institutions). The reformers demonstrated a close knowledge of developments of other Commonwealth countries in particular, and built incrementally on innovations introduced elsewhere.[3] Weight was given to principles contained in international instruments (Carney & Singer, 1986), but little or no account was taken of civil law developments. Unsurprisingly, then, Australian guardianship legislation is largely indistinguishable from its counterparts in North America and elsewhere in the common law world. Australia stood out in one particular respect, however. Its new legislation was entrusted to tribunals rather than courts.[4] This innovation was a deliberate attempt to take advantage of a legal narrative: that of "popular justice" (Cappelletti & Garth, 1978). It sought to promote "access" to justice, overcoming economic and psychological barriers associated with the courts (Cocks Committee, 1982)—an area where tribunals are thought to have a distinct edge (Sainsbury & Genn, 1995).[5] The tribunals adopt a more accessible and "user-friendly" culture, operate more informally, and assume primary responsibility for eliciting evidence by engaging in active (or inquisitorial) styles of hearing, rather than passively "adjudicating" between submissions and arguments, as is common in the courts.

This proved spectaculary successful in the boost to the sheer volume of work handled (Carney & Tait, 1991). Aggregate statistics comparing the work of tribunals with studies of courts doing equivalent work also tend to be quite flattering (Carney & Tait, 1997b). Tribunals prove to be more likely to avoid intervention, to make limited orders, and to revoke orders on review. Tribunals also run hearings in a more inquisitional way, providing greater testing of the reliability of medical judgments, more focused assessments of specific functional dimensions of "competency," and more testing evaluations of claims of "current need" for appointment of a substitute decision maker. But these aggregates could be an artifact of differences in populations, problems,

[2]Most U.S. states had already legislated for partial guardianship by the time Victoria's guardianship tribunal started work (Parry and Hurme, 1991).

[3]Alberta's *Dependent Adults Act 1976* was one early influence, and was explicitly mentioned in the terms of reference of the committee set up to develop the new Victorian legislation. In turn, the Victorian law and practices were cited by both British law commissions in their reports. The two British law commissions also provided considerable cross-referencing to each other, though very little to legal developments among their fellow members of the European Union. Civil law models likewise provided cross fertilization to each other.

[4]The Northern Territory has a tribunal advising a court, and Western Australia has a judge as president of the tribunal.

[5]Not everyone joins the standing ovation, however. To the legal fraternity popular justice may also represent a lowering of standards, a challenge to due process, and perhaps even a threat to business (further, Carney & Tait, 1997b).

or practices. And mass access is not an end in itself, as shown by international experience.

Reforms in other countries stuck with courts.[6] Often reforms did little to change the lot of those served by the new legislation, as shown by Galt's study (1986) of the Utah Supreme court ruling insisting that guardianship be closely tailored to the specific needs of the person, which found that only 5% of lower court decisions reflected this change. In Germany, similarly, superior court rulings insisting on the procedural protection of a "personal hearing" were largely ignored (Zenz, 1989). The literature is littered with examples of courts that proved incapable of implementing changes even in basic policies such as preferring partial guardianship to plenary orders (Frolik, 1981; Galt, 1986; Schmidt, 1990; Turnbull, 1979). Does new legislative wine sour when placed in old judicial bottles? Or are there other differences in the narratives of Australia's"experiment" with institutions of popular justice?

Turning to the legislation is of little help in answering this question. In the first place, the legislation differs little from place to place. And it is a trap to "fetishize" legislation, forgetting that much of its meaning comes from outside the law: from professional practices, funding levels, systems interactions, and political perceptions (Bottomley, 1987). Our concern here is not with the appearance of the "law on the books" but with what happens on the ground (cf. Allen, 1969). Quantitative statistics, while valuable for other purposes, are equally unhelpful, since the data largely come from "outside looking in." They do not provide *explanations* for differences, or any grounding of decisions in the mental worlds of decision makers.

This paper reports some work about the "inside" story.[7] Do tribunals and courts differ in the process by which they handle evidence and form their decisions? Are tribunals more successful than courts in providing access, protecting rights, and improving opportunities for vulnerable people? Is a different style used by the two types of body, a different narrative used to anchor information into familiar stories? It is argued that there are significant differences in these narratives, and that this is why tribunal administration is one key to successful reform of guardianship laws (further, Carney & Tait, 1997b).[8]

The qualitative data reported here are part of a multi-strand comparative study of relevant courts and tribunals in Australia and New Zealand. The authors carried out evaluations of the guardianship systems in the two largest (New South Wales [NSW] and Victoria) of the six states and two small territories in Australia. Smaller comparative studies were also done of South Australia (SA), Queensland, New Zealand, Ontario, Scotland, and England and

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[6]Flanders has had a guardianship board since at least 1800, however.

[7]Another important issue is whether the disadvantaged person is treated by the tribunal as a valued member of society and a central figure in judicial deliberations. Our research has found that guardianship tribunals are more successful in incorporating the person into the hearing as a participant, and in operating in ways that better affirm the dignity of the person, and accommodate unconventional behavior (Carney and Tait, 1997b).

[8]Other features of the Australian system have been reviewed elsewhere, such as its philosophical balance between autonomy and paternalism (Carney and Singer, 1986); its procedural fairness and the balance between public (guardianship) and private planning (Carney 1992; Carney & Tait 1994b); and its relationship to youth guardianship (Carney and Tait, 1997a).

Wales, and equivalent international empirical studies were also reviewed (further, Carney & Tait, 1997b). The Australian studies used common methodologies, involving analysis of cases from file records (approximately 4,500 cases), personal interviews (with all affected parties) using a standard questionnaire for 100 representative cases[9] in each state (NSW and Victoria), observation of some 50 hearings in NSW and Victoria, and in-depth recorded interviews with 20 key persons in those states, including board members, applicants, professionals, and the person under guardianship (Carney & Tait, 1997b).

The case studies reviewed here are drawn from the "100 cases." Cases are drawn from tribunals in NSW and Victoria and are compared with equivalent court observations from the Australian Family Court (which retains some spheres of responsibility) or the New Zealand Family Court (which entirely administers reformed guardianship in that jurisdiction) (Evans & Took, 1993). Quantitative analyses reported elsewhere (Carney & Tait, 1997b) reinforce the findings reported below. An important method used in this study is what we are calling a "narrative analysis."[10] Different jurisdictions tend to have their own distinctive style of putting the story together, of constructing a dominant narrative that makes sense of the problem facing people and the role of judicial intervention or proxies. They may use the same words, and share many practices in common, but there are stylistic differences that give them their own particular stamp.

Conley and O'Barr (1990) provide such an analysis of small claims courts in the United States, showing the range of guiding narratives that judges use to organize their courtroom interactions. The differences between NSW and Victoria become more intelligible when this perspective is used (Tait, 1994),[11] but more importantly and dramatically, the difference between the tribunals and most of the court systems stands out (civil code experiences in France may be an exception).

To describe a set of ideas or practices as a narrative is to attribute a unity, a direction, and a patterning to them. But it also implies that there is a story-like character to the behavior, an endless repetition in various forms of a limited number of primeval myths that enliven our understanding of the present (cf., Booth & Booth, 1996; Ewick & Silbey, 1995). The approach to human behavior as texts that should be "read" is partly based on the works of "dead Frenchmen," such as Althusser and Foucault. It is also widely used in feminist social science, liberation theory, and critical legal scholarship (Seuffert, 1996). Ken Plummer, in his book *Telling Sexual Stories* (Plummer, 1995), adopted it in arguing that there are certain modern stories or narratives, such as the "coming out" story, that are endlessly repeated in different settings (such as gays

[9]The cases were selected to capture the range of clients and types of application handled by the two boards. The samples provide a reasonably good overview of the range of cases dealt with in the two states, but with over-sampling of more difficult and rarer types of case. A grid was used to select cases to try to get an equal number of cases from each combination of characteristics.

[10]The study used a variety of quantitative and qualitative methods to review the comparative operation of guardianship tribunals in Australia (esp. in NSW, Victoria, and SA), by comparing outcomes with equivalent observations or data on the operation of courts in New Zealand, North America (including Canada) and the United Kingdom. Further, Carney and Tait, 1997b; Chapter 1.

[11]NSW is more service- or "welfare"-oriented while Victoria adopts a more "civil rights"-oriented position.

or lesbians; people with mental illness, HIV infection, epilepsy, or head injury; gun owners; and survivors of sexual assault). Such narratives allow individuals to name themselves as members of a recognized category of people. They can now do this, unlike previous generations, because there is a "coming out" narrative available for use, a social space in which it is possible to recount the narrative, and an audience willing to listen. So too with Robert Cover's (1992) analysis of the "choice" open to the U.S. Supreme Court between two constitutional narratives for dealing with runaway slaves who had fled to the free states of the North. One was a narrative of the rights of the individual to liberty, the other a narrative of legal comity (states' respect for other states' legal codes). The Court in its wisdom always sided with the rights of the slave-owning states.

Earlier work by the authors has identified the significance to guardianship of the ceremonial and "process" side of its hearings (Carney & Tait, 1991). They have multiple roles other than in the legal narrative of providing for "fair" hearings and a basis for sound decisions (Carney & Tait, 1994a). They engage a network of family, friends, and service agencies in a dialogue that touches the past history and future course of relationships. Guardianship processes may serve to restore (or rupture) relationships, contribute to levels of communication and personal friction, or contribute to the formation of shared understandings about how issues might be handled *outside* the law. Linguists identify multiple layers of communicative, emotive, and social meaning in settings such as this (Marta, 1996). They emphasize that the room provided for their expression is what determines whether translations "lack meaning for the persons involved" (Marta, 1996), not least its "collective" dimension in connecting people with their group identity and history (Marta, 1996). Narrative analysis, then, speaks of the linguistic richness and diversity of human communication and the multiple levels of its operation in connecting with the personalities and social (including group) context of speakers. These insights are important to an understanding of the working of adult guardianship.

In this paper, we consider the narratives adopted when two types of case come before guardianship forums. One is more mundane, an issue of money management. The other is more serious, an issue of "protection." Drawing on these narrative observations, we argue that the unsung merit of the Australian experiment with a tribunal model of guardianship is its greater ability to accommodate the "narratives" of participants in hearings, its enhanced capacity to foster connections with family and community, and its heightened ability to reflect values of pluralism and cultural diversity. These are the elements of "popular justice" previously injected to some degree by the use of juries under earlier English models. It is speculated that these "narratives of engagement" may not only be effective within the tribunal itself, but may also convey messages that influence transactions conducted in the "shadow of law."

Narratives of Consensus, Social Citizenship, Power, and Persuasion

Narratives of Routine Money Management

One of the most common issues that come before guardianship forums is money management. Some 60% of cases before the Victorian Board involved

the issue of whether the person was able to handle his or her own money (according to the survey that board members completed for initial hearings). Houses may need to be sold, compensation payments handled, investments protected against fraud, and bills paid. Where formal financial transactions have to be made, valid signatures are usually required, so if the person lacks capacity, it is necessary to have someone to sign on the person's behalf. However, what if such persons live in a residential setting on a pension, with only small purchases required? Is it really necessary to transfer their legal rights over their money to someone else, even if they agree?

In New Zealand, a mass application for property guardianship came from a nursing home in a small town. The Family Court received the applications, appointed lawyers to represent the residents, and proceeded to hear the applications. The medical reports for each person provided evidence of incapacity, there were no objections, and family members (where available) were happy to take on the job of property guardians. All the applications were granted.

A similar pressure for mass administration orders came to the Victorian Board. The State Welfare Department claimed that it would provide greater protection for residents of its facilities with intellectual disabilities if family members rather than staff were responsible for daily banking requirements. Local residential staff were no longer permitted to handle clients' money directly and had to refer to regional staff for authority to withdraw clients' money, or try to get an administrator appointed. The Guardianship Board believed that this was not the least restrictive option, but one designed to protect the department's liability. Once it picked up the pattern of applications, the board asked the specialist statutory advocacy watchdog (the public advocate)[12] to take the matter up as a systemic advocacy issue. The public advocate worked with the department, arguing that the duty of care of service provides required them to be accountable for what they did with clients' money, just as with other parts of their clients' lives. (The Scottish Law Commission came up with a detailed proposal for how this might work in Scotland; Scottish Office, 1997).

New procedures were developed that, to some extent, avoided the appointment of administrators. If the clients were not currently competent to manage their daily money needs, procedures could be put into place to assist them to manage competently. While some administrators were appointed, for other clients informal money management procedures were put into place.

The Court Style: Endorsing Consensus. The court style in dealing with equivalent issues favored consensus. Family Courts might be thought of as particularly susceptible to the attractions of harmony and family peace, although probate courts in the United States have a similar preference for conciliation and minimal intervention in private matters (Carney & Tait, 1997b). The court also respected medical authority, generally accepting the professional opinions of doctors about the person's competence.

[12]Under the Victorian (and SA) legislation, the public advocate has a free-ranging brief to take up individual or systemic grievances, both before the Board or by direct representations to agencies The mandate here is effectively that of an "ombudsman" and it differs from other jurisdictions (such as WA), where responsibilities are confined to acting in the interests of clients under guardianship or subject to an application.

The New Zealand legislation had attempted to deal with the inequalities of power in the situation by requiring a lawyer to be appointed to represent the interests of the person in every case. However, the individuals for whom an order was proposed were usually unable to give instructions, so in the absence of strongly expressed objection from the person, the presence of lawyers in this capacity tended to smooth the process even more. Rarely were doctors cross-examined about their assessments, or medical opinions challenged.

The Tribunal Style: Control the Institution Not the Person. The Victorian tribunal took a "common-sense" approach to competency (cf. Silberfeld & Fish, 1994): it considered capacity to operate in a particular social environment in the context of other ways of handling the problem. The board considered that ability to carry out tasks like buying cigarettes, paying for a haircut, or meeting electricity payments (these were the sorts of example they used) was best assessed by asking the person and the person's friends. They would check whether persons' memory was as bad as doctors said it was by talking to them directly and to people who knew them well. They would confirm that medical reports reflected the current situation, scrutinize the tests that were done, and examine the interpretation of the results.

Another feature of the Victorian approach was that it focused on the nature of the crisis that led to the applications. If the crisis was brought about by a service provider's change in administrative arrangements, then that was where (in their view) remedial efforts should be focused. So one aspect of looking at competence within a specific social environment is recognizing the institutional *context* of the problem; if the problem was produced by an institution, a systemic approach may be required. The perceived competence of individuals was in part a product of the flexibility and responsiveness of their carers. The availability of the systemic approach of the public advocate tended to shift the gaze of popular justice from the competence of the person to the competence of care.

Narratives of Power: Court-Tribunal Differences. Judicial decisions can be seen as acts of an "institution" in which state power is exercised, new realities are proclaimed, and decisions with political consequences are made (Garapon, 1997). What sort of power is reflected in these two cases? What is the political character of the narratives used by the two bodies?

One phrase that sums up the difference between the Victorian and the New Zealand approaches was used by a Victorian Board member in a hearing: "If you all agree, you don't need an order." If there was consensus, the existing goodwill and informal arrangements should be enough in many cases to solve the problem. In a group interview with New Zealand Family Court judges, they were asked explicitly what they would do if the parties came before the court without an agreement. The answer was that the judge would ask the lawyers to go away and work out an agreement. So perhaps the New Zealand court could be seen as reversing the Victorian phrase about need for an order: *Unless* you all agree, you don't get an order.

If we look only at the New Zealand practice of endorsing consensus applications, it might appear that the process was completely nonpolitical. It was a simple judicial process, there was no conflict, professionals carried out assess-

ments, and judges made orders. What could be less political than that? Indeed, the Fram review of substitute decision making in Ontario recommended that uncontested applications should not even require a hearing (Fram, 1987).

And yet, when we hold it up against the systemic advocacy response of Victoria, the politicized character of the process stands out: first, the decision to handle the cases as individual matters (why deal with the cases one by one rather than as a class action or systemic matter?); second, the decision to regard the social environment as given and make all the adjustments to the civil statuses of the individuals involved (why not reshape the institutional practices?); and third, the decision to measure competence simply as a present condition rather than a future possibility (could the person be more autonomous with more support?). It is not so much that the popular tribunal was politicized. The court was just as "political," but its politics were less confrontational, more supportive of both institutional practices and professional wisdom. So in the first "matched case" comparison, the popular tribunal appears as active, interventionist, and protective of individual autonomy, while the court displayed a more formal and respectful style.

The differences brought out by the two cases can be summarized as being a narrative of professional accountability and institutional reform in Victoria, and a narrative of professional ratification and family consensus in New Zealand. What narrative analysis helps to identify in this instance is the supportive role played by the public advocate in Victoria.

However, this is only one sort of case, a routine money matter. Perhaps the tribunal was simply more efficient, in being able to find collective solutions to common problems. Even the Victorian Board conceded that property management orders were relatively unintrusive. But what happens when serious civil liberties issues are involved, such as attempts to control persons who are mutilating or harming themselves? Here we see the New Zealand court taking on a more active role in relation to protecting rights and challenging professional wisdom.

Narratives of Self-Harm

The second comparison involves two individual cases, one before the NSW Guardianship Board, the other before the New Zealand Family Court. Both cases involved a man who was placing his personal safety at risk. In both situations the forum tried to increase the client's access to necessary services while avoiding unnecessary interventions.

Mr. York was 52 years old and lived in the open ward of a psychiatric hospital. Since he was not classified as "mentally ill" the hospital could not detain him under the NSW *Mental Health Act*. But he did wander away, being returned by the police after hurting himself or drinking too much. He wanted to live with his mother and brother, but they did not feel they could cope. The hospital wanted to be able to keep him in hospital against his will, for his best interests, and to do this they needed a guardian with detention powers; and they also needed the Guardianship Board to approve his admission as an informal patient.

The board wanted to improve Mr. York's quality of life and if possible find a less restrictive environment. So they appointed a guardian, his mother, to investigate other options and to make sure he had access to day programs, outings, and

holidays. In the meantime, she was given powers of authorizing his detention, and the board consented to his admission to the psychiatric hospital as an informal patient. The guardian's primary task was to persuade managers of residential facilities to find a place for her son. This was not going to be easy, as the Board told Mr. York at the hearing: "Mr. York, you will not have to stay here. But you will unless there is an alternative. Unfortunately there are no alternatives."

They were right. Five months later Mr. York was still in the psychiatric hospital. He was kept in pajamas during the day to prevent him from escaping. Control over the body was maintained through control over clothing (The Manson report on advocacy in psychiatric hospitals in Ontario reported similar strategies of control: Manson Review, 1987). Mr York himself was unhappy, and told the interviewer: "This is not my home I live in. Do I have to die to get out of here? I'd like to do some gardening. All I do all day is watch TV."

His social worker saw the order as a way of ensuring that the hospital was able to carry out its "duty of care." His personal safety was now protected, and there was less chance he would cause injury to himself. But the lack of more suitable accommodation meant that his asserted claim to a "home" where he could do gardening was being rejected. He was being confined "in his best interests" (but against his stated wishes) to a psychiatric hospital because of a shortage of resources over which neither he nor the board had much control.

The New Zealand Family Court heard an application in relation to Mr. S., as he is called in the published report of the case. Like Mr. York, Mr. S. was also injuring himself and placing himself at risk. In this case, he had been vomiting his food, forcing himself to defecate, and poking his fingers into his eye sockets (Re S, [1992] NZFLR: 208). An application was made to the Family Court for Mr. S. to be given shock treatment, using an experimental procedure developed by a manufacturer of cattle prods. Judge Twaddle (his real name) rejected the request, based on an agreement worked out in a pretrial hearing, and made a series of "personal orders." He ordered that Mr. S. live in a community house and be provided with educational, rehabilitative, and therapeutic services. An expert panel was set up to monitor how well the order was being implemented. A year later, he had improved substantially, according to a panel member interviewed. He had been placed in the community house, and the various services were being provided.

Court Style: Crafting Consensus. The court's preference for endorsing consensus, which came out in the routine property cases, was also evident here. But it was a different sort of consensus. In this case it was not a residential care provider initiating a mass application, which was not opposed by family members. The court itself called what was effectively a case conference to generate a consensus. While the role of the judge was largely confined to endorsing what the experts said, the framework of the legislation allowed the conference of experts to be held and gave legal ratification to their consensus. In this case, professional wisdom was overturned, but it was overturned by other professionals who had reached a consensus that could be ratified by the court. The court clothed a service agreement with legal authority.

So, as in the first case, the court was not inquisitional. But it was proactive, and it used its authority to provide protection for a vulnerable person. Con-

sensus, which in the first example came out looking like a form of conspiracy, comes out in this example as a foundation for effective support.

There is also a twist to the narrative of intervention. With property orders, the court appeared to be more intrusive than the tribunal, appointing proxies, when better institutional management practices might have been a less restrictive option. But in the case of self-harm, the court used the more flexible "personal orders" to specify the form of service required without the need for appointing a substitute. It could be argued that a decision by a judge is more intrusive than a decision by a family member, but at least there is no ongoing assumption of incapacity or loss of civil status.

A court might also be more "authoritative" than a tribunal in getting service providers to commit themselves to a plan of treatment. For those few people who can get a court order, there can be greater certainty that the entitlements endorsed by the court will be achieved. The image of citizenship presented in the court narrative is of a person with legal rights; the court's job is to provide the authority necessary to enforce those entitlements. The "consensus" was not just a private arrangement between providers and a client. It was constructed under the supervision of the judicial arm of the state and gave the person the right to be protected from intrusive treatment, the right to specified services, and the right to judicial oversight of these services.

The Tribunal Style: Social Citizenship, a Place in the Queue. The NSW Board did not order service providers to carry out its instructions. It appointed a guardian to negotiate, lobby, and persuade service providers to give Mr. York the services he needed.

It may seem that the powers of persuasion of a guardian appointed by the NSW Guardianship Board were weak compared with the formal powers of the New Zealand court, which could instruct service providers to deliver necessary services. Indeed, with Mr York, the only coercive powers were used *against* him, to detain him against his will, not against the providers who were failing to meet his needs.

To put this question into focus, it is useful to examine the narrative that shapes the story. What the NSW Board did, we argue, was to ensure that Mr. York's social citizenship rights were protected. Those rights involved being able, *like any other citizen*, to assert claims to rationed social resources, or have someone else do so on his behalf. Accommodation options for people with organic brain damage or head injuries were limited in most parts of NSW, as the board frequently pointed out. But that did not stop it from appointing guardians to lobby, cajole, and put pressure on the services. The social outcome may not have been satisfactory in this case, but Mr. York was given a place in the queue. The board did not pick its clients; it often got the hardest cases, with issues that no one else could solve either. Mr. York was described by his social worker as "our worst patient, a real pain."

The image of the citizen presented in the tribunal story is more tentative than that presented by the courts. It is of a person who has a right to assert his claims on the resources of society, like any other citizen. The entitlement such a citizen has is to ask, to demand, and to wait. It is also the right to have a substitute making claims on the person's behalf.

In the routine money management case, the tribunal was the more radical body, trying (together with the public advocate) to challenge institutional practices. In this case the tribunals show themselves as the more conservative bodies. They accepted the nature of the welfare state as a system of limited resources for which different groups and individuals make claims. It is the courts that seem to be making universalistic claims to social goods on behalf of individuals (Carney & Akers, 1991).

A Difference of Access. The universalistic claims to specified services would seem to offer more support and protection for vulnerable people than just the right to assert a claim. Was the narrative of the court one that challenged the authority of mean-fisted governments and demanded services "to each according to his need?" Conversely, was the narrative of the tribunal simply an exhortation to patience for disadvantaged people whose needs had been persistently ignored?

It is true that Mr. S. received a ticket to services, rather than just a place in the queue. The New Zealand Family Court established and ratified a firm entitlement to specified services. Meanwhile, Mr. York continued to wait, perhaps not patiently, but at least resigned to his fate.

However, the claim of unrationed access to services was made in the context of rationed access to the court. The court tended to get cases in which an answer had already been found and was agreeable to the parties. The court rarely got cases when an agreement had not been reached. Indeed, parties were not bound by an order unless they had already agreed to it in advance.

Since judicial bodies do not generally control welfare budgets, the resources allocated to those who receive orders demanding treatment could be diverted from others whose needs might be as great. So the intervention of courts could, in some circumstances, be seen as a form of legalized queue-jumping. (There were occasional accusations that guardianship was having a similar result in NSW, so this problem was not specific to a court system).

There was a difference between the two bodies in what could be called the narrative of access. The court asserted an absolute right to services, but it asserted this in relatively few cases, in which the claim was uncontested and providers were willing to deliver the services. The tribunal asserted its claims for more people; it was a more modest claim, the right to demand services. But it made the claim *regardless* of the immediate availability of the services. Indeed, it was more likely to appoint a substitute when the matter was contested, and the issues complex. A public guardian was also available to serve this claim on behalf of the person, if the extra "clout" was required. New Zealand (largely for cost reasons) had no public guardian. So, as with the routine money management matters, the tribunal was attempting to change institutional practices, to demand more, to stake out a claim for services.

The difference between the two styles can be summarized in terms of a narrative of *asserting claims for access* in NSW,[13] while the NZ court used a narra-

[13]For reasons of space we do not report a third comparison, in the area of sterilization. For our present purposes, the most striking feature from that case study is the way in which tribunals pursue a narrative of seeking access to services, by working with institutions like the public advocate. The heightened moral dilemma facing courts and tribunals led to greater ultimate convergence in this field, with courts also developing procedures to encourage resolution through the intervention of advocacy bodies.

tive of *selectively clothing service agreements with legal authority*. The NSW approach enfranchised its clients, and gave them a voice, but no certainty of getting what they needed. The New Zealand approach ratified any agreements reached by the parties and provided legal endorsement for strategies to promote clients' interests; but it limited its intervention to the immediate case.

Overview

In each of these case comparisons, the courts lived up to their statistical "profile" as bodies with a clear and consistent preference for consensus. The consensus took a different form in each case. With money management, consensus arose from an initiative of institutional service providers, supported by compliance from relatives and facilitation by lawyers. With the self-harm case, the consensus was a service agreement between professionals to protect a person from the proposed treatment of another professional. In comparing these forms of consensus, it is perhaps just as important to note who was *excluded* from the consensus as who was brought into the agreement.

The tribunals were more inquisitorial in all cases, but again this took different forms. With money management, the enquiries focused on institutional practices and the least restrictive ways of protecting the finances of residential facilities. In the self-harm case, the investigations examined the level of risk and the level of protection required, and sought out relevant evidence, including evidence from the person himself. Whereas the court appeared to display a preference for certain sources of evidence, the tribunal was more able to balance evidence from a range of professional perspectives. The tribunals also used the hearing procedures more effectively to obtain new evidence, particularly in relation to incapacity and current need in specific practical contexts.

In general, the tribunals tended to act in a more proactive, systemic way than the courts. In the case of money management, the tribunal tried to change institutional practices, whereas the court seemed content to restrict the freedom of vulnerable people to fit in with institutional needs. In the self-harm situation, the difference was less clear-cut. The tribunal appointed what was essentially an advocate to enter the realm of welfare politics and assert claims on the person's behalf; while the court gave legal weight to a service agreement to protect a person from threatened medical abuse. However, what was distinctive about tribunal interventions was that the tribunal worked alongside the public advocate (or in the NSW case, the public guardian). Indeed, the success of diverting cases from unnecessary interventions was largely dependent on the skills of those advocates.

Conclusion

The comparison of the tribunals and courts in these areas has confirmed a marked difference between styles and practices of the two types of judicial forum. The courts do use a narrative of consensus, although this takes different forms in different sorts of cases. The tribunals, for their part, are consistently more inquisitorial, and more skilled at scrutinizing, seeking out, and balancing evidence from a variety of sources than are the courts. They also tend to un-

derstand their decisions in terms of a narrative of systemic reform or social change. This narrative would be largely empty talk without the other crucial institutional element of the reformed guardianship system: the public advocate (body responsible for monitoring and advocating systemic change).

The role of the institutional context in shaping guardianship practice has been demonstrated previously, though it too has been a rather neglected area in Australia. It is always very tempting for lawyers to conclude that similarities in legislative framework, funding, administrative structures, and working philosophy of members of an institution will lead to similar outcomes in different jurisdictions. Australian data demonstrated that this is only part of the truth. Differing configurations of "neighboring" institutions (such as offices of public advocate, or disability services panels) will have at least two demonstrated effects. First, they affect the distribution of work *between* agencies (Carney & Akers, 1991). Second, some human dilemmas presented by applicants are sufficiently appealing (or compelling) that cases are channeled in the direction of any available agency, or—if the agency is not available (or not accessible)—existing powers and practices of guardianship tribunals will be molded to permit the issue to be resolved there. Systems strive to find ways of filling policy "holes" (Tait & Carney, 1995), even though the leaders of those systems may be unaware of the practice, or even seek to deny evidence of its existence (Tait, 1994). Boundaries between adult and child guardianship services may shift, and attitudes alter regarding the extent to which guardianship should legitimately be used as a "ticket into welfare services" (Carney & Tait, 1997a). The local narrative cannot be understood in isolation from these structural forces.

Overall, this study has shown that guardianship tribunals pay more attention to social context and functioning (as it happens, they are also better at gathering evidence and less likely to agree to appoint a guardian than is the case with courts). This may have something to do with the tribunal form or the more inquisitorial style of hearing. But it also reflects a different narrative, a different vision of what the jurisdiction is about. They need social information to identify sociolegal crises. They may be reluctant to appoint substitutes, but they are more interventionist than courts in addressing systemic issues. The tribunals also pay more attention to incorporating the person for whom the application was made into an alliance. Courts meanwhile tend to endorse existing alliances between the parties, or between parties and other agencies.

Given these results, and given that both tribunals and courts are agents of the state, it is reasonable to ask which of them might be preferred on other grounds. Are courts or tribunals better at recognizing and protecting pluralism? In accepting a mandate to protect the vulnerable? Or in being responsive to legitimate value preferences of families? Or in resisting (often venal) pressures of government designed to sway decision making? This paper is not the place to address those questions (though there is evidence here to show that tribunals are as "independent" as the courts,[14] and that they are more open to

[14]In the financial management cases, the tribunal directly took on the powerful state welfare department and residential service providers, so it might be concluded that the tribunal seemed less inclined to popular solutions than the court. With self-harm, the issue of winning popular acclaim did not really arise, although stopping the experimental use of cattle prods on human beings was a safe issue for the court to take a stand on.

hearing the views of families), nor was the present study designed to address those questions.

Certainly, there is a small literature suggesting that tribunals are more receptive than courts in allowing opportunities for people to tell their stories in the ways that are important to them, and in having greater flexibility when crafting orders (Bush, 1979; Mouffe 1992). The narratives we report from tribunal hearings are definitely more inclusive. And there is much evidence that minority, disrespectful, and challenging parts of those stories are received and respected by tribunals in ways that would not be tolerated by the courts. These straws in the wind suggest to us that respect for pluralism is enhanced. However, much further research is needed on this question, one that is crucial in a multicultural community such as Australia. So too with the issue of acceptance of a moral duty toward the vulnerable: the institutional change narrative of tribunals is suggestive, but it is not definitive of respect for this aspect of civil citizenship.

Finally, there is a wider question of whether the choice of tribunals rather than courts makes a difference to the way citizens go about their lives *short* of coming to court. As Galanter (1981) observed, one of the more reliable measures, what was termed civic justice, is the extent to which the formal system of justice (and the "messages" it sends to indigenous, or informal/customary law) equips people to achieve justice *outside* its walls (Galanter, 1981). It might be speculated from the thin gruel of evidence surveyed here that tribunals may indeed convey more effective messages. Their greater ability to accommodate the "narratives" of participants in hearings, enhanced capacity to foster connections with family and community, and heightened ability to reflect values of pluralism and cultural diversity might justify that optimistic hypothesis. But equally there is evidence the other way. By blessing "consensus," courts may better engage popular culture. Tribunals may be promoting the interests of disabled people at the expense of alienating families and influential professions (medicine and law).

These are important questions, which call for further detailed empirical exploration to test the tentative hypotheses generated by the study reported here. For lawyers more than most other professions, one of the most galling outcomes of an evaluation is to find that a pet reform (such as binding powers of attorney for health care) is poorly known and infrequently used.[15] But is it lack of knowledge of the law or its lack of harmony with social needs that is responsible? Only through empirical observation can light be shed on such questions.[16] Often social *process* (such as fostering a family discussion) will prove to be a more critical variable than are the "legal" markers or aggregate through-put statistics, so often relied on as proxies for meaningful enquiry. This study suggests that real success can only be measured by also examining the rich source of information revealed through narrative analysis.

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[15]Very few citizens of South Australia expressing a close interest in finding ways to manage a terminal illness were aware of relevant laws a decade after their enactment (Ashby & Wakefield, 1993).

[16]The Canadian research by Singer (1995) suggests that it may be the latter in this instance. Even *after* extensive personal education, utilization rates among aged people discharged from hospital rose only from under 0.5% to 18% (see Rubin, Strull, Failkow, Weiss, & Lo, 1994).

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