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Agency Contracts and the Scope of the Incapacity Defence in English Contract Law:

A Topic too Hot to Handle?

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**Abstract**

This article assesses the impact of a principal's mental incapacity on agency agreements in English contract law and calls for an approach compatible with the values pursued by the *UN Convention on the Rights of Persons with Disabilities*.

**Introduction**

The common law position regarding the validity of a contract where one party lacked the mental capacity to understand the nature of the transaction, outlined by the Court of Exchequer in *Molton* v *Camroux* (*Molton*)[[2]](#footnote-2) and reinforced by the Court of Appeal in *Imperial Loan* v *Stone* (*Imperial Loan*), considers such a contract to be valid, but could be rendered voidable if the party can prove both that he lacked the mental capacity to understand the transaction and that the other party knew about the incapacity.[[3]](#footnote-3) The incapacity defence under the *Imperial Loan* rule is generally relied on in cases short of profound mental incapacity, as parties with profound mental incapacities who entered into a written contract may seek to render the contract void on the basis of the *non est factum* defence.[[4]](#footnote-4) The question of whether the *Imperial Loan* rule applies to agency agreements has been the subject of debate. The Court of Appeal decision in *Yonge v Toynbee* (*Yonge*) suggests that a principal’s mental incapacity would terminate a contract of agency, rendering it void, irrespective of whether the agent had knowledge of the incapacity, and that the agent may be liable to the third party for breach of warranty of authority.[[5]](#footnote-5) In the latest editions of *Bowstead and Reynolds on Agency*, Watts argues that the *Imperial Loan* rule should apply to agency agreements and the agent’s knowledge of incapacity could render the contract voidable.[[6]](#footnote-6) This area of law has been described by the Supreme Court in *Dunhill* v *Burgin* (*Dunhill*) as being ‘in a state of some confusion’, and the Court considered it ‘fortunate’ that the issue did not need to be addressed.[[7]](#footnote-7) On a similar note, the Court of Appeal in *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* (*Blankley*) recognised this area of law as requiring ‘fresh examination’, but conceded that, in that case, it was unnecessary ‘to grasp the ‘hot potato’ left on one side by the Supreme Court in *Dunhill’*.[[8]](#footnote-8)

The question concerning the application of the *Imperial Loan* rule to agency agreements may be perceived as being too hot to handle, as it presents a difficult choice. A decision not to apply the rule to agency agreements protects the principal but leaves the agent who is unaware of the principal’s mental incapacity in a vulnerable position. On the other hand, a decision to apply the rule to agency agreements leaves the principal in a vulnerable position, as he would have to meet a high threshold of proving both his own mental incapacity and the agent’s knowledge of it. Given the criticism faced by the *Imperial Loan* rule for failing to protect the party who lacks the mental capacity to understand the nature of the transaction, this rule may provide an unattractive alternative to the approach adopted in *Yonge*.[[9]](#footnote-9) The *Imperial Loan* rule is not free from controversy, as a strict interpretation of this rule, limited to the other party’s actual knowledge of the incapacity, provides an imbalanced approach leading to the detriment of the party lacking mental capacity. This article contends that the *Imperial Loan* rule should apply to agency agreements, but that this rule should be interpreted broadly to include not only actual knowledge, but also constructive knowledge based on the circumstances of the transaction. Consequently, a party may be able to invalidate a contract (including an agency contract) on grounds of incapacity if he could show (i) the other party’s actual knowledge of the incapacity, or (ii) the other party’s constructive knowledge of the incapacity, if this was apparent or (iii) the other party’s constructive knowledge of the incapacity, based on the circumstances of the transaction.[[10]](#footnote-10) Rather than presenting courts with a difficult choice between protecting one party to the detriment of the other, this broad interpretation of the *Imperial Loan* rule would provide a balanced approach between the interests of the contracting parties. Part one of this paper navigates through conflicting authorities in English contract law to assess the scope of the incapacity defence, while part two suggests a way forward, seeking to untangle this area of law from a theoretical perspective, examining the current conundrum not only as a conflict of authorities but also as a conflict of ideologies, and searching for a solution that is compatible with the vision of universal legal capacity pursued by the UN *Convention on the Rights of Persons with Disabilities* (CRPD).[[11]](#footnote-11) Given the growing number of people who develop mental health conditions such as dementia and the likely increase in the number of cases with parties who lack the mental capacity to understand transactions, contract law has a role to play in responding to these wider social issues.[[12]](#footnote-12) Rather than being confined to a unidimensional role (to facilitate transactions in the economic sphere between actors in pursuit of self-interest), contract law has a multidimensional role, permeating the economic and social spheres and connecting people in mutual relations.[[13]](#footnote-13) In responding to the question regarding the validity of a contract where a party lacked the mental capacity to understand the transaction, this response must be compatible with the values pursued by the CRPD, including citizenship values such as equal respect for individual autonomy and human dignity.

**Navigating through Conflicting Authorities in English Contract Law**

This section is divided into four parts. The discussion starts by looking at the incapacity defence under the *Imperial Loan* rule in the context of a direct contract between A and B. The second part looks at the application of the *Imperial Loan* rule to agency contracts, while the third part examines authorities that doubt the application of this rule in an agency context. The section concludes with a reflection on the current state of uncertainty surrounding this area of law and whether we are faced with a choice between two unattractive alternatives.

English contract law starts from a *prima facie* presumption that all adults have contractual capacity.[[14]](#footnote-14) A contract between A and B is valid unless, *inter alia*, A’s property or affairs are subject to court control (which would render the contract void)[[15]](#footnote-15) or A can show that he lacked the mental capacity to understand the nature of the transaction and B had knowledge of this (which would render the contract voidable).[[16]](#footnote-16) Even in such circumstances, A would have to pay a reasonable price if the contract concerned necessary goods or services.[[17]](#footnote-17) The definitions of mental incapacity under the common law and the *Mental Capacity Act* (MCA) 2005, in this context, are ‘broadly consistent’.[[18]](#footnote-18) Under the common law test, A must show that at the time of entering into the contract, he was ‘so insane’, that he ‘did not know what he was doing’ and the required level of understanding depends on the nature of the transaction.[[19]](#footnote-19) Under the MCA 2005 test, A needs to show that ‘at the material time’, he was ‘unable to make a decision for himself in relation to the matter, because of an impairment of, or a disturbance in the functioning of, the mind or brain’.[[20]](#footnote-20) The MCA test may by adopted in cases that fall within the scope of the common law as long as this is ‘appropriate’ and the courts have ‘regard to’ the existing common law principles.[[21]](#footnote-21) This discussion, however, focuses on the common law approach in contracts where A lacked the mental capacity to understand the transactions. Perhaps an effective common law response to these circumstances (that considers both economic and social factors and looks beyond A’s medical condition to consider the circumstances of the transaction) may influence positively the MCA test.

According to the rule in *Imperial Loan*, in order to rely on the mental incapacity defence, A must prove both his mental incapacity at the time of entering into the contract and B’s knowledge of this.[[22]](#footnote-22) Proving both elements of the defence renders the contract voidable. The 1892 Court of Appeal decision in *Imperial Loan* continued the trend recognised over four decades earlier by the Court of Exchequer in *Molton*,[[23]](#footnote-23) in seeking to find a balanced approach to protect the interests of both A and B. These decisions note a departure from the extreme approach confirmed in the seventeenth century decision in *Beverley’s Case*, which conferred absolute protection to B and prevented A from pleading his own mental incapacity (or ‘stultifying’ himself).[[24]](#footnote-24) As recognised by Pollock CB in *Molton*, the rule in *Beverley’s Case* ‘has been relaxed’ and mental incapacity could be a good defence if A could show both his mental incapacity and B’s knowledge of this condition.[[25]](#footnote-25) Earlier on in the ‘topsy-turvy’ history of mental incapacity in English contract law,[[26]](#footnote-26) including during the thirteenth century,[[27]](#footnote-27) A was the party who received absolute protection (as mental incapacity rendered the contract automatically void), while B’s interests were overlooked.[[28]](#footnote-28)

Whether the approach confirmed in *Molton* and *Imperial Loan* provides a balanced approach to A and B’s interests is open to debate. The requirement placed on A in having to prove both his mental incapacity and B’s knowledge of it appear to be burdensome.[[29]](#footnote-29) By insisting on B’s knowledge of A’s mental incapacity, English contract law takes a stricter approach than that adopted in other jurisdictions (e.g. in Scotland, B’s knowledge of A’s mental incapacity is not crucial),[[30]](#footnote-30) and the approach it adopts for contracts with minors (where it is not required to show that the other party knew that he was contracting with a minor).[[31]](#footnote-31) Insufficient weight is placed on the need to protect A who, at the time of entering into the contract, may have lacked not only the mental capacity to understand the transaction, but also the awareness that he lacked this understanding.[[32]](#footnote-32) The *Imperial Loan* rule places insufficient emphasis on the fact that, due to A’s mental incapacity, it may be difficult to conclude that A gave his free consent to the contract.[[33]](#footnote-33) Moreover, unlike *Molton*, the *Imperial Loan* decision makes no distinction between executory and executed contracts, being willing to uphold the validity of a contract even when this is executory and A and B could be restored to their original position.[[34]](#footnote-34) Furthermore, the incapacity defence under the *Imperial Loan* rule appears to be confined to face-to-face contracting and may not protect A when his dealings with B were by remote communications (including letters or electronic forms of communication), although the position remains unclear.[[35]](#footnote-35) In searching for a way out of such ‘penumbral uncertainties’, Watts rightly questions whether the law should allow B ‘to be better off by having dealt by post, email or the internet’, where A’s incapacity ‘would have been apparent in a face-to-face transaction’.[[36]](#footnote-36) However, the need to protect A in such circumstances needs to be balanced against the need to protect B, especially in situations where A’s incapacity would not have been apparent to the reasonable person in B’s position.[[37]](#footnote-37) Perhaps a broader interpretation of constructive knowledge to include the circumstances of the transaction may provide a more balanced response and a way forward in such situations where A and B deal remotely.

While the current focus seems to be on protecting B’s expectations and the security of transactions, insufficient emphasis is placed on fairness considerations. Lopes LJ’s judgment in *Imperial Loan* makes a brief reference to fairness (as he notes that the two part test must be met if A seeks to set aside a ‘fair contract’ on grounds of mental incapacity),[[38]](#footnote-38) but there is no explicit confirmation that A could set aside an unfair contract irrespective of B’s knowledge of the mental incapacity.[[39]](#footnote-39) The remaining two judgments of the Court of Appeal in *Imperial Loan* (by Lord Justice Fry and Lord Esher) make no reference to fairness. This reluctance to recognise unfairness as a separate ground for A to invalidate a contract with B was confirmed over nine decades later by the Privy Council decision in *Hart* v *O'Connor* (*Hart*), where Lord Brightman noted that the validity of a contract involving a party who alleges mental incapacity ‘is to be judged by the same standards as a contract by a person of sound mind’ and is not voidable on grounds of unfairness, ‘unless such unfairness amounts to equitable fraud’.[[40]](#footnote-40) *Hart* confirmed the approach adopted in *Imperial Loan* and its emphasis on the security of transactions, and rejected the fairness-based approach adopted by the New Zealand Court of Appeal in *Archer* v *Cutler* (*Archer*).[[41]](#footnote-41) In *Archer*, McMullin J sought to extend the grounds that would allow A to set aside a contract, to include not only situations where B had knowledge of A’s mental incapacity, but also circumstances where, irrespective of B’s knowledge, the contract was unfair.[[42]](#footnote-42) While fairness should play a role in assessing the validity of a contract, *Archer* put forward an unclear framework that failed to articulate how fairness-based assessments would work in practice. It alluded to both procedural factors (such as the absence of independent legal advice or disparity in the parties’ mental capacity) and substantive matters (such as a sale significantly below the market value),[[43]](#footnote-43) but did not clarify the relation between procedural and substantive fairness and could have opened up the possibility for substantive fairness alone to invalidate a contract. *Hart* was correct to reject an approach based on an unclear framework,[[44]](#footnote-44) particularly given the ambiguity surrounding substantive fairness,[[45]](#footnote-45) but it did not consider sufficiently the potential for procedural fairness (alone or alongside substantive fairness) to play a role in assessing the validity of a contract within a clearly defined framework.[[46]](#footnote-46)

Such a framework could be accommodated by expanding the requirement for B’s knowledge of A’s mental incapacity to include not only actual knowledge but also constructive knowledge. While *Hart* left room for constructive knowledge in situations where A’s incapacity was ‘ostensible’[[47]](#footnote-47) (an approach not incompatible with *Molton*[[48]](#footnote-48) and *Imperial Loan*),[[49]](#footnote-49) it did not consider in sufficient depth the issue of B’s knowledge and the potential triggers for constructive knowledge, focusing instead on justifications for rejective the fairness-based approach put forward in *Archer*.[[50]](#footnote-50) Constructive knowledge should be interpreted broadly to refer to not only to situations where B should have known about A’s mental incapacity because this was apparent, but also where B ought to have known about the incapacity because of the circumstances of the transaction. This framework could accommodate considerations of fairness not as an alternative to the knowledge requirement, as suggested in *Archer*, but as a factor for assessing whether B ought to have known about A’s mental incapacity either due to procedural factors alone or based on a combination of substantive and procedural factors (e.g. a grossly imbalanced contract between A and B, where A received no independent legal advice). Support for such an interpretation of the knowledge requirement in *Imperial Loan* can be found in the twentieth century decision of the Court of Appeal in *York Glass* v *Jubb* (*York Glass*), where Warrington LJ noted that the requirement to show B’s knowledge of A’s mental incapacity could be met, even in the absence of actual knowledge, if the circumstances were as such that a reasonable person in B’s position ‘would have inferred’ that A lacked the mental capacity to understand the transaction.[[51]](#footnote-51) Further support can be found in the twenty-first century decision of the Supreme Court in *Dunhill*, where Lady Hale confirmed that B’s knowledge of incapacity required in *Imperial Loan* is not limited to actual knowledge and can include constructive knowledge if B ‘ought to have known’ about A’s condition.[[52]](#footnote-52) While Lady Hale’s comments were made obiter, subsequent cases have adopted this reasoning.[[53]](#footnote-53)

The effectiveness of the *Imperial Loan* rule in ensuring a balanced approach between A and B’s interests rests, to a great extent, on how the courts interpret the knowledge requirement in the second part of the test. An insistence on a strict interpretation of Lord Esher’s judgment in *Imperial Loan* (which required A to show that B ‘knew him’ to lack the mental capacity to understand the transaction)[[54]](#footnote-54) as being limited to actual knowledge, sets the bar too high for A. On the other hand, a wider interpretation of the knowledge requirement (as suggested in *York Glass* and *Dunhill*) to include constructive knowledge, has the potential to redress the imbalance between A and B’s interests, as it extends the circumstances when A can rely on the mental incapacity defence.

The question whether the *Imperial Loan* rule applies to agency contracts has led to conflicting answers.[[55]](#footnote-55) The first editions of *Bowstead and Reynolds on Agency* (the first to the twelfth editions from 1896 to 1959) and the latest editions of this publication (from the twentieth edition of 2015 to present),[[56]](#footnote-56) as well as Watts’ writing on this subject rightly suggest a positive answer.[[57]](#footnote-57) If a principal (A) who appears to have mental capacity appoints an agent (B) whilst A lacks the mental capacity to understand the nature of the transaction, that appointment should be valid but could be voidable if A could show both his mental incapacity at the time of the appointment and B’s (actual or constructive) knowledge of this condition.[[58]](#footnote-58) Consequently, A could confer B actual authority to contract on his behalf with another party (C) and the contract between A and C would be valid if A could have entered into that contract in person and C had no knowledge of A’s mental incapacity.[[59]](#footnote-59) Furthermore, A’s representations to C about B’s authority to act on his behalf could confer B apparent authority, subject to C’s knowledge about A’s mental incapacity.[[60]](#footnote-60)

The *Imperial Loan* rule should also apply in cases concerning A’s supervening mental incapacity.[[61]](#footnote-61) If A appoints B as agent whilst A has full mental capacity, but A subsequently loses his mental capacity, the agency contract between A and B should remain valid and B should continue to have actual authority to act on A’s behalf, as long as B has no actual or constructive knowledge of A’s mental incapacity, and A and B did not agree expressly that A’s mental incapacity would terminate B’s actual authority.[[62]](#footnote-62) Furthermore, where A made representations to C about B’s authority, which conferred B apparent authority to act on A’s behalf,[[63]](#footnote-63) A’s subsequent mental incapacity should not terminate B’s apparent authority without C’s knowledge of A’s mental incapacity.[[64]](#footnote-64) The general rule in *Imperial Loan* should also apply to the relation between A and C, and the contract between these parties should remain valid, even after A’s subsequent loss of mental capacity (if A would have been bound had he contracted directly with C), unless C had knowledge of A’s mental incapacity.[[65]](#footnote-65)

When assessing the impact of A’s mental incapacity on the validity of a contract, that assessment should rely on the same principles, whether we are looking at a direct contract between two parties, or whether the transaction is an agency contract between A and B, or a contract between A and C negotiated by B (as agent) on A’s behalf.[[66]](#footnote-66) There should be no distinction between the approach adopted in direct contracts and contracts adopted in an agency context, particularly if we consider that the law of agency aims to ensure that A’s decision to appoint B as agent, to act on his behalf in a contract with C, should not place A in a different position than A would have been in, had he contracted with C directly.[[67]](#footnote-67) As Pollock noted, ‘by agency, the individual’s legal personality is multiplied in space’.[[68]](#footnote-68) Adopting the *Imperial Loan* rule in an agency context has the advantage of clarity, as it moves away from any ambiguities that may be associated with an exception from the general rule. However, there is also a risk that adopting this approach comes at a cost, as the application of the *Imperial Loan* rule in an agency context also brings with it the challenges associated with this rule highlighted earlier, including the insufficient protection conferred to A’s interest if the courts were to insist on a strict interpretation of the knowledge requirement. It is, therefore, crucial that knowledge is not limited to actual knowledge and includes constructive knowledge which attaches to the other party (B or C) if either A’s mental incapacity ought to have been apparent to the other party, or the circumstances were such that the other party ought to have known about A’s mental incapacity.

The agency contract, however, presents an additional set of challenges, particularly when we look at the relation between B and C.[[69]](#footnote-69) In this three-party setting, the way in which we assess the validity of the contract between A and B has consequences for the contractual relation (and any liability that may arise under these contracts), involving B and C, and A and C respectively. If the agency contract between A and B remains valid even after A’s subsequent mental incapacity (because B had no actual or constructive knowledge of A’s mental incapacity), B continues to have actual authority to bind A, which could lead to a valid contract between A and C. Furthermore, by continuing to have authority to bind A, B is not liable for breach of warranty of authority under the implied collateral contract with C.[[70]](#footnote-70) If the agency contract between A and B becomes voidable following B’s actual or constructive knowledge of A’s mental incapacity, B may lose the actual authority to act on A’s behalf, although he may continue to have apparent authority if A made representations to C about B’s authority, which were relied on by C and C had no knowledge of A’s mental incapacity.[[71]](#footnote-71) If B acts without authority from A, B may be liable for breach of warranty of authority under a collateral contract between B and C, where B impliedly warranted his authority to act on A’s behalf,[[72]](#footnote-72) unless C had knowledge that B acted without authority.[[73]](#footnote-73) However, the trigger for this liability depends on a range of factors. If *Imperial Loan* applies to agency relations, the contract between A and B (the agency contract) becomes voidable upon B’s knowledge of A’s mental incapacity. In such circumstances, B would likely lose his actual authority, although there is some suggestion that if B is acting under an agency contract (e.g. as a solicitor acting on behalf of a client), that may enable B to retain residual authority to take steps to ensure that B’s wishes are ‘properly adhered to’.[[74]](#footnote-74) Questions can be raised regarding the scope of such residual authority and the extent to which court assessments of such residual authority would operate, within a framework that takes into consideration values such as the protection of autonomy and dignity. The application of the *Imperial Loan* rule to the complex setting of agency contracts is not free from challenges but, as the discussion below will emphasise, it is preferable to an alternative where A’s mental incapacity automatically terminates the contractual relations between A and B, irrespective of A’s wishes, and renders B vulnerable to liability for breach of warranty of authority without regards to B’s (actual or constructive) knowledge of A’s mental incapacity.

The thirteenth to the nineteenth editions of *Bowstead and Reynolds on Agency* (from 1968 to 2010) doubted the application of the *Imperial Loan* rule to agency contracts and considered instead that a principal (A)’s mental incapacity rendered the contract with an agent (B) automatically void.[[75]](#footnote-75) This approach is also reflected in Hudson’s writing, who considered that *Imperial Loan* did not apply to the relation between A and B (whether mental incapacity affected A at the time of appointing B or subsequently), nor did it apply to the relation between A and C.[[76]](#footnote-76) He commented that the source of A’s liability to C may derive from B’s apparent authority to act on A’s behalf (in cases where A, before being affected by mental incapacity, made representations to C about B’s authority),[[77]](#footnote-77) but conceded that C may be ‘depriv[ed] of all rights’ against A in cases that fall outside the scope of apparent authority.[[78]](#footnote-78) Hudson’s support for an exception from the *Imperial Loan* rule for agency contracts was influenced by his concern that this rule fails to protect A effectively,[[79]](#footnote-79) which, as he noted, led to considerable ‘hostile criticism’ of the decision in *Imperial Loan*.[[80]](#footnote-80) Nevertheless, a broad reading of the knowledge requirement in *Imperial Loan* (to include constructive knowledge based on the circumstances of the transaction) would address such concerns and make *Imperial Loan* a more attractive alternative.

Those who doubt the application of the *Imperial Loan* rule to agency contracts tend to refer, as authority, to the early twentieth century decision of the Privy Council in *Daily Telegraph v McLaughlin* (*McLaughlin*),[[81]](#footnote-81) which affirmed a decision of the High Court of Australia.[[82]](#footnote-82) The courts noted that a principal who lacked the mental capacity to understand the nature of the transaction could not execute a power of attorney and that the deeds of transfer executed under that power of attorney were also a nullity.[[83]](#footnote-83) However, this decision was based on the *non est factum* doctrine, which applies when a party, without being negligent, mistakenly signs a document that is fundamentally different from what he thought he was signing.[[84]](#footnote-84) The party who mistakenly signed a power of attorney in *McLaughlin* (a document rendered void on the basis of *non est factum*) had been affected by ‘profound’ and ‘self-evident’ mental incapacity.[[85]](#footnote-85) As the decision in *McLaughlin* was not based on the mental incapacity defence, this decision should not be used to undermine the application of the *Imperial Loan* rule to agency contracts.[[86]](#footnote-86)

Those reluctant to apply the *Imperial Loan* rule to agency contracts tend to refer, as a further source of support, to the mid twentieth century decision of the High Court of Australia in *Gibbons v Wright* (*Gibbons*).[[87]](#footnote-87) This decision appears to confirm that a person who lacks the mental capacity to understand the nature of the transaction cannot appoint an agent.[[88]](#footnote-88) If *Gibbons* is to be understood as ‘an accurate statement of the law’ which confirms an exception from the *Imperial Loan* rule in an agency context, this exception is ‘odd’.[[89]](#footnote-89) More likely, however, is that the court in *Gibbons* appears to have ‘misread’ its previous decision in *McLaughlin*,[[90]](#footnote-90) which found that A could not execute a power of attorney on the basis of the *non est factum* doctrine. Furthermore, as Watts accurately notes, cases referred to in *Gibbons* to support the non-application of the *Imperial Loan* rule to agency contracts[[91]](#footnote-91) do not support that approach on closer inspection.[[92]](#footnote-92) For example, *Elliot v Ince* is concerned with a gift rather than a contract,[[93]](#footnote-93) *Stead v Thornton* and *Tarbuck v Bispham* involve situations where B had knowledge of A’s mental incapacity,[[94]](#footnote-94) as did the case of *Drew v Nunn* (*Drew*) which was decided on the basis of apparent authority,[[95]](#footnote-95) while in *Yonge*, the automatic termination of B’s authority by A’s mental incapacity was assumed without further analysis.[[96]](#footnote-96)

If agency contracts were to be rendered automatically void by A’s mental incapacity, as appeared to be suggested in *Yonge*, B would be left with insufficient protection.[[97]](#footnote-97) B would automatically lose his actual authority to act on A’s behalf, irrespective of his knowledge of A’s mental incapacity. Under this approach, in the choice between two innocents (A and B), A appears to receive absolute protection to B’s detriment (although, as it will be discussed below, this approach fails to consider A’s wishes, as it renders the contract void rather than voidable). Once B loses the authority to act on A’s behalf, he becomes vulnerable to liability for breach of warranty of authority under the implied collateral contract with C,[[98]](#footnote-98) unless C is aware that B acted outside authority.[[99]](#footnote-99) Once again, B’s knowledge of the loss of authority is irrelevant[[100]](#footnote-100) and once again, at a choice between two innocents (this time the choice being between B and C), B loses out.[[101]](#footnote-101) This would be a double blow for B, and the difficulty would stem from a framework where the *Imperial Loan* rule did not apply to the agency contract between A and B and where B’s knowledge of A’s mental incapacity was irrelevant.

On the other hand, in a framework that does apply the *Imperial Loan* rule to agency contracts, the contract between A and B is rendered voidable (rather than void) only if B had knowledge of A’s mental incapacity. Therefore, B would lose his actual authority to act on A’s behalf if he knew or ought to have known about A’s mental incapacity, and there is an argument that even in such circumstances, B may retain residual authority to take steps that would protect A’s interests.[[102]](#footnote-102) Then, when examining B’s potential liability under his collateral contract with C, B’s liability for breach of warranty of authority would depend on whether B had originally lost his actual authority under the contract with A, based on his knowledge of A’s mental incapacity and on the scope of any residual authority to act on A’s behalf.[[103]](#footnote-103) Consequently, B’s knowledge (which should include both actual and constructive knowledge) of A’s mental incapacity becomes indirectly relevant for assessing B’s potential liability under the collateral contract between B and C.

Such an approach would undermine *Yonge* (which could be explained as being isolated to its facts)[[104]](#footnote-104) but would not necessarily undermine *Collen*, because *Collen* ‘left uncertain’ the time at which liability for breach of warranty of authority attached to B.[[105]](#footnote-105) *Yonge* took the view that liability attached to B as soon as authority ceased and that B’s authority ceased automatically with A’s loss if mental capacity.[[106]](#footnote-106) However, if the *Imperial Loan* rule applied in an agency context, liability could attach to B only once he had knowledge of A’s mental incapacity (and would depend, *inter alia*, on the scope of any residual authority that B may have).[[107]](#footnote-107) The application of the *Imperial Loan* rule to the agency context would resurrect, to some extent, the approach adopted in *Smout v Ilbery* (*Smout*) (a mid-nineteenth century case of the Court of Exchequer), according to which liability could attach to B when he had actual or constructive knowledge that authority had been revoked.[[108]](#footnote-108) This case, which some believed to be compatible with *Collen*,[[109]](#footnote-109) was given a final blow in *Yonge*, when the latter confirmed that *Smout* had been overruled by *Collen*.[[110]](#footnote-110) The departure from *Smout* may be seen as regrettable, as the incorporation of both actual and constructive knowledge (when B ought to have known about A’s mental incapacity by exercising ‘due diligence’)[[111]](#footnote-111) in assessing B’s liability, had the potential to ensure an objective and balanced approach which considered the circumstances of the transaction and the interests of both parties. Nevertheless, the application of the *Imperial Loan* rule in the context of agency contracts, if based on a broad reading of knowledge to include both actual and constructive knowledge, brings back some of the positive elements previously associated with *Smout*, but does so indirectly, focused not on the contractual relation between B and C, but on the contract between A and B. In *Yonge*, the potential for B to be found liable for breach of warranty of authority was ‘carried too far’.[[112]](#footnote-112) Holding B ‘personally responsible’ where his actual authority to act on A’s behalf is lost without his fault or knowledge, is ‘unreasonable’ and ‘inconsistent’ with the general principle confirmed in *Imperial Loan*.[[113]](#footnote-113) In assessing the parties’ obligations and liabilities under a contract where A lost the mental capacity to understand the nature of the transaction, the other party (B or C)’s knowledge of A’s mental incapacity should be relevant[[114]](#footnote-114) and it should make no difference that A is contracting via an agent.[[115]](#footnote-115)

Further challenges are posed by the inconsistency between *Yonge* and *Drew* in determining the parties’ liabilities.[[116]](#footnote-116) Both cases seem to agree that A’s mental incapacity revokes B’s actual authority to act on A’s behalf, rendering the agency contract void.[[117]](#footnote-117) However, *Drew* seems to suggest that B may retain power to bind A to a contract with C if there is apparent authority,[[118]](#footnote-118) while *Yonge* appears to confirm that B is deprived of such power.[[119]](#footnote-119) As Higgins rightly notes, *Drew* and *Yonge* should be ‘confined to their special facts’, which would ‘leave the door open’ for the development of ‘a reasonable rule to cover all cases’ involving A’s loss of mental capacity.[[120]](#footnote-120) Both *Drew* and *Yonge* are decisions where the courts were concerned with protecting C’s interests. In *Yonge*, Buckley LJ agreed with Willes J’s approach in *Collen*, that in a choice between B and C’s interests, the party more deserving of protection was C, as B represented to C that he had authority to act on A’s behalf.[[121]](#footnote-121) In *Drew*, when faced with a choice between protecting A or C’s interests, Bramwell LJ indicated a preference for C, commenting with reference to A that ‘insanity’ was ‘a misfortune’ rather than ‘a privilege’ and justified the choice to protect C by stressing that A’s condition ‘must not be allowed to injure innocent persons’.[[122]](#footnote-122)

The focus on protecting C’s interests indicates a concern for protecting the security of transactions. Nevertheless, the protection of C’s interests must be balanced against the need to also protect A and B’s interests. In a framework where A’s mental incapacity renders the contract with B automatically void and B loses the actual authority to act on A’s behalf irrespective of B’s knowledge of A’s condition, neither A, nor B are effectively protected. The failure to consider B’s knowledge (whether actual or constructive) of A’s mental incapacity leaves B vulnerable to breach of warranty of authority under the implied collateral contract with C.[[123]](#footnote-123) Furthermore, if A’s mental incapacity renders the agency contract with B automatically void, this fails to provide sufficient protection to A’s interests, as it overlooks his preferences and choices. Bramwell LJ’s dictum in *Drew*, that ‘if a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting’,[[124]](#footnote-124) appears to equate A’s mental incapacity with his ‘civil death’[[125]](#footnote-125) and reflects no concern for A’s wishes and for the need to respect his autonomy and dignity.

On the other hand, a framework that recognises the application of the *Imperial Loan* rule to the agency context and which relies on a broad interpretation of the knowledge requirement to include both actual and constructive knowledge has the potential to achieve a more balanced approach between the interests of A, B and C. B’s loss of his actual authority to act on A’s behalf would depend on his knowledge of A’s mental incapacity. The inclusion of constructive knowledge, in addition to actual knowledge, would protect A (or C respectively), as it would cover the situations where B ought to have known about A’s mental incapacity (including on the basis of the circumstances of the transaction). Even where B loses his actual authority to act on A’s behalf, based on his (actual or constructive) knowledge of A’s mental incapacity, he may still retain residual authority to take steps to ensure that A’s interests are effectively protected.[[126]](#footnote-126) Furthermore, a framework where the agency contract between A and B is rendered voidable (rather than void), places more weight on A’s preferences and provides greater protection for values such as autonomy and dignity.[[127]](#footnote-127) In addition, a broad interpretation of constructive knowledge moves the focus away from A’s medical condition (and whether this was known by, or apparent to B) to include the circumstances of the transaction.

When Brett LJ delivered his judgment in the Court of Appeal decision in *Drew*, at the end of the nineteenth century, he reflected on the question whether a principal’s mental incapacity ended the agent’s authority and remarked that ‘one would expect to find that this question has been long decided on clear principles’ but that ‘no satisfactory conclusion has been arrived at’.[[128]](#footnote-128) The Court of Appeal found ultimately that ‘insanity’ of the kind affecting the principal did ‘put an end to’ the agent’s authority, but that this conclusion may not apply to every type of ‘insanity’.[[129]](#footnote-129) A case comment published shortly after the decision in *Drew* noted that this decision ‘can hardly be said to have settled the general question’ regarding the effect of a principal’s mental incapacity on the agent’s authority.[[130]](#footnote-130) In the twenty-first century, despite the fact that both the Court of Appeal and the Supreme Court have engaged with this question,[[131]](#footnote-131) the issue continues to be clothed with uncertainty.[[132]](#footnote-132) In the Supreme Court decision in *Dunhill*, Lady Hale made the obiter comment that the authorities in this area of law are ‘in a state of some confusion’, before voicing relief that ‘fortunately, the issue does not arise’, making it unnecessary for the court ‘to express any opinion, one way or another, as to the present state of the law’ (in particular whether the *Imperial Loan* rule applies to the relation between principal and agent).[[133]](#footnote-133) While the High Court in *Blankley* indicated preference for the application of the *Imperial Loan* rule in an agency context,[[134]](#footnote-134) the Court of Appeal was less forthright in confirming this, recognising instead the need for a ‘fresh examination or reconsideration’ of *Yonge* and ‘related authorities’ and indicating preference for an approach where B’s knowledge of A’s condition has relevance in determining the contractual relation between A and B.[[135]](#footnote-135) According to Richards LJ, A’s supervening mental incapacity should not terminate automatically the contractual relation between A and B (which, in *Blankley*, involved a client and a solicitor), B should continue to have authority to act on A’s behalf while B has no knowledge of A’s mental incapacity and should continue to have authority ‘to take necessary steps’ to protect A’s position upon becoming aware of A’s mental incapacity.[[136]](#footnote-136) However, these remarks were made obiter and the Court of Appeal expressed relief that the case did not require the court ‘to re-examine the principle’ in *Yonge* or ‘to grasp the ‘hot potato’ left on one side by the Supreme Court’ in *Dunhill*.[[137]](#footnote-137) A choice between confirming the principle in *Yonge* or recognising the application of the *Imperial Loan* rule to agency contracts may appear, in the first instance, as a choice between two unattractive alternatives. However, as we have seen, while both options are open to criticism, the challenges associated with the *Imperial Loan* rule can be addressed by adopting a wide interpretation of the knowledge requirement to include constructive knowledge based on the circumstances of the transaction. This provides a more balanced framework for protecting the interests of the contracting parties, an approach that considers not only economic values (such as the security of transactions), but also social values (such as the protection of human dignity) and, consequently, a way out of this dilemma of conflicting authorities.

***Quo Vadis*? Finding the Way Forward through the Lens of the CRPD**

This section aims to add weight to the argument that the *Imperial Loan* rule (interpreted widely to include the circumstances of the transaction) should apply also to the agency context, by arguing that the proposed way forward is closer to the vision pursued by the UN *Convention on the Rights of Persons with Disabilities*. The CRPD was ratified by the United Kingdom in 2009 and whilst it has not been incorporated into domestic law and, consequently has ‘no direct effect in English law’,[[138]](#footnote-138) its ratification requires that domestic law conforms ‘wherever possible’ with the ‘norms and values’ enshrined in the Convention.[[139]](#footnote-139) The discussion is divided in two parts: it starts by looking at some of the CRPD principles which have relevance to the issue of contractual capacity, before moving on to consider how the concept of contractual capacity can be aligned to the values pursued by the Convention.

The CRPD is the first international human rights instrument focused specifically on the rights of persons with disabilities.[[140]](#footnote-140) The Convention reframes the interests of persons with disabilities in terms of human rights, stresses that persons with disabilities are human rights subjects with full entitlements in society, rather than disempowered victims, and perceives disability as an aspect of human diversity.[[141]](#footnote-141) Article 12 CRPD, which embodies the Convention’s ethos for ensuring the full and equal enjoyment of human rights and fundamental freedoms by persons with disabilities, puts forward a vision of universal legal capacity closely linked with the concept of universal human dignity.[[142]](#footnote-142)

The Convention stresses that persons with disabilities are persons before the law, with the right to enjoy legal capacity in all aspects of life (which implies the equal rights to enter into legally binding agreements), whilst acknowledging that some persons with disabilities may require support in exercising legal capacity.[[143]](#footnote-143) This provision aims to tackle the participation barriers faced by persons with disabilities (in particular persons with cognitive disabilities),[[144]](#footnote-144) including legal barriers when disability is equated with mental incapacity, resulting in denial of legal capacity and the adoption of substituted decision-making.[[145]](#footnote-145) The denial of legal capacity removes the opportunity for people to make their own choices, resulting in dependency on others and in the deprivation of individual autonomy and human dignity.[[146]](#footnote-146) The Convention is, however, unclear about the link between the concepts of legal capacity and mental capacity[[147]](#footnote-147) and provides no guidance on the impact of the concept of universal legal capacity on the mental incapacity defence in contract law.[[148]](#footnote-148)

The mental incapacity defence in contract law can be compatible with the CRPD if it can be invoked by anyone and the mental incapacity and disability concepts are not equated.[[149]](#footnote-149) However, even a disability-neutral concept of mental incapacity may be incompatible with the Convention if the differential treatment on the basis of mental capacity has a disproportionate impact on persons with disabilities,[[150]](#footnote-150) resulting in indirect discrimination and a breach of Article 12(2) (equal enjoyment of legal capacity) and Article 5(2) CRPD (no ‘discrimination on the basis of disability’), and this cannot be objectively justified.[[151]](#footnote-151) Such objective justification may be provided by a mental incapacity defence that meets a three-part test, showing that it pursues a legitimate aim under the CRPD, which is assessed objectively, and constitutes a reasonable means to achieve a relevant aim.[[152]](#footnote-152) In the context of a grossly imbalanced transaction entered into by a party who lacked the mental capacity to understand its nature and who received no support in making the decision (such as independent legal advice), intervention based on the mental incapacity defence may be supported by a broad reading of Article 3(a) (safeguarding human dignity), Article 11 (protecting individuals in situations of risk, including serious financial risk) and Article 16 CRPD (protecting individuals from exploitation, including passive exploitation by the other contracting parties).[[153]](#footnote-153) Such a defence must move beyond a party’s medical condition (and whether this was known by or apparent to the other party) to also assess environmental factors such as the circumstances of the transaction. It must also reflect a concern not only for economic values (including the security of transactions) but also social values (including individual autonomy and human dignity). Furthermore, in the absence of guidance provided by the CRPD on how to balance the protection of individual autonomy with potential interventions to safeguard human dignity,[[154]](#footnote-154) the mental incapacity defence in contract law could provide a safety net in situations where a party who did not understand the implications of a transaction entered into a grossly imbalanced contract to his detriment.[[155]](#footnote-155)

Legal frameworks should always start from a presumption of contractual capacity, recognising that some parties may require support in exercising capacity, subject to safeguards that ensure respect for their will and preferences.[[156]](#footnote-156) Such frameworks also need to address the ‘troubling situations’ where a party’s decisions place him at a ‘serious risk’ that he did not understand,[[157]](#footnote-157) including grossly imbalanced transactions that a party entered into, outside a framework of support, which place him at a serious financial risk. The need to respond to such concerns would justify, in exceptional circumstances, a departure from the absolute stance adopted by the Committee on the Rights of Persons with Disabilities (ComRPD) in their interpretation of Article 12 of the CRPD.[[158]](#footnote-158) Going beyond the CRPD text, ComRPD perceives all mental capacity assessments based on functional tests as being incompatible with the Convention and rejects any separation between legal standing (to hold rights) and legal agency (to exercise rights).[[159]](#footnote-159) However, it fails to consider the situations where a party who lacked the mental capacity to understand the nature of a transaction acted outside a framework of support and entered unto a grossly imbalanced contact to his detriment. Abandoning the mental incapacity defence because of potential implications for a party’s legal agency would risk leaving such parties unprotected, creating a legal vacuum that could not be filled by other doctrines (e.g. there are questions over the extent to which doctrines such as undue influence and unconscionability could cover situations where the other party’s unacceptable conduct was passive).[[160]](#footnote-160) In fact, parties can exercise their universal legal capacity more effectively in a legal framework that includes, as a safety net, a mental incapacity defence in contract law focused on economic and social values, such as the protection of individual autonomy and human dignity.

The way forward proposed in this article (that the *Imperial Loan* rule, based on a wide interpretation of constructive knowledge to include the circumstances of the transaction, should also cover agency agreements in English law), is closer to the CRPD vision than the alternative of confirming the principle in *Yonge*. The CRPD rejects a perception of people as objects of care, rather than as subjects of rights.[[161]](#footnote-161) The approach reflected in *Yonge*, to render the contract automatically void upon A’s mental incapacity, could be equated with the perception rejected by the CRPD, as it views A as someone who, due to lack of mental capacity, cannot adopt acts that have legal consequences. Whilst this may appear, in the first instance, to protect A, it can amount to a paternalistic measure that infantilises A and denies him the respect of the law.[[162]](#footnote-162) On the other hand, the *Imperial Loan* rule, by rendering the contract voidable rather than void, considers A’s will and preferences regarding the transaction.

The CRPD reflects a move away from the medical model of disability in favour of a predominantly social model focused on environmental factors.[[163]](#footnote-163) A wide interpretation of the *Imperial Loan* rule to include the circumstances of the transaction, moves the focus away from A’s medical condition and whether this was known by or apparent to the other party, to assess environmental factors. Under this framework, a grossly imbalanced transaction could provide an indication of a substantively unfair contract, which could trigger the need to question the procedural fairness of the transaction (e.g. issues of disparity in the parties’ capacities to understand the transaction and the absence of independent legal advice). This would be assessed objectively and would include fairness-based consideration,[[164]](#footnote-164) but within a clearly defined framework where substantive fairness alone could not, in itself, invalidate a contract, but could be a trigger for investigating the procedural fairness of the transaction. It would also represent a move away from a focus solely on A’s absent consent or the other party’s wrongful conduct, to determine the circumstances where intervention is justified based on substantive and procedural factors.[[165]](#footnote-165)

The CRPD demands equal respect for persons with disabilities and a perception of disability as an aspect of human diversity.[[166]](#footnote-166) Whilst more recent cases in English contract law have moved away from the negative language employed in earlier decisions (where reference was made to ‘lunatics’),[[167]](#footnote-167) to refer instead to people as ‘persons’,[[168]](#footnote-168) it is important that this positive change in language is also matched by a focus on the circumstances of the transaction and away from A’s medical condition. The proposed way forward for a broad definition of constructive knowledge aims to achieve this aim.

Finally, the CRPD views the protection of individual autonomy and the safeguarding of human dignity as being interrelated and sees the role of social values as permeating all areas of law and, by implication, contract law.[[169]](#footnote-169) A wide interpretation of the *Imperial Loan* rule to include the circumstances of the transactions reflects a concern not only for economic values (including the security of transactions) but also for social values (including the protection of autonomy and dignity). It responds to wider social concerns (balancing the need to protect vulnerable contracting parties from exploitation, while ensuring that these parties are treated with respect), at a time when the number of people who develop mental health conditions such as dementia is on the increase.[[170]](#footnote-170) It also reflects a perception of contract law which, unconfined to the economic sector and a *laissez-faire* interpretation, plays a multi-dimensional role that includes the social sphere.[[171]](#footnote-171) This approach recognises the inter-relation between public and private law and the relevance of concepts such as autonomy and dignity in both spheres.[[172]](#footnote-172) Far from being associated with a revolution in English contract law, this continues its evolution away from a sole focus on individual values and the parties’ pursuit of self-interest, to include wider social values.[[173]](#footnote-173) Consequently, the role of contract law is not only to facilitate transactions, but also to connect people in mutual relations.[[174]](#footnote-174) Rather than focusing the intervention on A’s absent consent or on any unlawful conduct that may be attributed to the other party (B or C), such intervention would be rooted on wider norms that govern how parties should treat each other and under what circumstances the state would not support a significantly asymmetrical contract.[[175]](#footnote-175)

The approach put forward in this article would not undermine certainty (as fairness-based arguments would be considered within a clearly defined framework), nor would it undermine freedom of contract and sanctity of contract (as these principles as not absolute), and intervention may be justified in grossly imbalanced contracts involving a party who lacked the mental capacity to understand the transaction and did not operate within a framework of support, such as the provision of independent legal advice.[[176]](#footnote-176) It is an approach that is closer to the CRPD framework of values than the alternative presented in *Yonge*, or the confinement of the *Imperial Loan* rule to a narrow interpretation of the knowledge-based requirement. Such reference to the CRPD values could confirm the most appropriate way forward in cases involving a principal’s mental capacity, like Ariadne’s thread showing the way out of the labyrinth.

**Conclusion**

Cases involving agency contacts affected by a principal (A)’s mental incapacity may present courts with a dilemma: confirm the decision in *Yonge* and render the contract automatically void, or recognise the application of the *Imperial Loan* rule in an agency context, where the contract would be valid, but could be rendered voidable if A could show his incapacity at the time of the agreement and the other party’s knowledge of this condition. The Court of Appeal and the Supreme Court have recognised this as a problematic area of law, due to the lack of a clear answer.[[177]](#footnote-177) *Yonge* has been seen to require re-examination,[[178]](#footnote-178) but *Imperial Loan* may seem an unattractive alternative if it provides insufficient protection to A by setting the bar too high for this party. However, if we adopt a wide interpretation of the knowledge requirement in *Imperial Loan* to include constructive knowledge, the *Imperial Loan* rule becomes a much more attractive choice. The way forward proposed in this article is to confirm that the *Imperial Loan* rule applies to agency agreements,[[179]](#footnote-179) but to also call for a wide interpretation of this rule. Consequently, A could invalidate a contract on grounds of mental incapacity if he could show that the other party (B or C) had actual knowledge of A’s incapacity, or had constructive knowledge of A’s condition because either the incapacity was apparent, or because the circumstances of the transaction fixed the other party with notice of the incapacity that the other party could not rebut.[[180]](#footnote-180) Whilst the first two circumstances are concerned with procedural unfairness alone, the latter may also include reference to substantive unfairness (if we are faced with a grossly imbalanced contract), which would need to be supported by a procedural unfairness claim (if there is disparity in the parties’ mental capacities and the transaction has been entered into in the absence of independent legal advice).[[181]](#footnote-181)

As the application of the *Imperial Loan* rule could render the contract voidable, rather than void, A has more freedom to exercise choice regarding the outcome of the transaction, in accordance to his will and preferences. Furthermore, a wide interpretation of constructive knowledge as part of the *Imperial Loan* rule would be concerned with the context of the transaction, moving the focus away from A’s medical condition. In addition, an examination of the fairness of the transaction (either procedural fairness alone or alongside substantive fairness) reflects concern for social values (rather than a sole focus on economic interests for the security of transactions). This approach is closer to the CRPD framework of values, including its vision to perceive people as subjects of rights, to move away from a focus on the medical condition of individuals and consider the circumstances of the interactions between the parties, to ensure respect for all, and to recognise that the protection of individual autonomy and human dignity are inter-related objectives.[[182]](#footnote-182)

In *Dunhill* and *Blankley*, the Supreme Court and the Court of Appeal respectively were spared the task of committing to follow either *Yonge* or *Imperial Loan* in agency contracts involving a principal’s mental incapacity. The time has not yet arrived to grasp this ‘hot potato’ (an analogy put forward in *Blankley*).[[183]](#footnote-183) Yet, before long, that time will come. When sitting at a crossroad, in choosing which path to follow, let us hope that the courts will choose the path that recognises the role that contract law has to play in the social sphere and is closer to the CRPD vision for protecting autonomy and dignity. While in the first instance, it may appear that the courts are faced with a conundrum, if we apply the CRPD lens, the choice is no longer difficult.

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2. *Molton v Camroux* (1848) 2 Exch 487, at 501. [↑](#footnote-ref-2)
3. *Imperial Loan v Stone* [1892] 1 QB 599. [↑](#footnote-ref-3)
4. Peter Watts, ‘Contracts made by Agents on Behalf of Principals with Latent Mental Incapacity: The Common Law Position’ (2015) 74 CLJ 140 at 142 and 154. See *Daily Telegraph v McLaughlin* [1904] AC 776 (with reference to a power of attorney). [↑](#footnote-ref-4)
5. *Yonge v Toynbee* [1910] 1 KB 215. [↑](#footnote-ref-5)
6. P Watts, *Bowstead & Reynolds on Agency,* 21st edn, Sweet and Maxwell, London, 2017, 2-009. [↑](#footnote-ref-6)
7. *Dunhill v Burgin* [2014] UKSC 18; [2014] 1 WLR 933; [2014] 2 All ER 364, at 31. [↑](#footnote-ref-7)
8. *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18; [2015] 1 WLR 4307, at 36-37. [↑](#footnote-ref-8)
9. A Hudson, ‘Mental Incapacity Revisited’ (1986) *The Conveyancer and Property Lawyer* 178. [↑](#footnote-ref-9)
10. Eliza Varney, ‘Redefining Contractual Capacity? The UN Convention on the Rights of Persons with Disabilities and the Incapacity Defence in English Contract Law’ (2017) 37 *Legal Studies* 493. [↑](#footnote-ref-10)
11. GA Res 61/611, 13 December 2006, A/61/611, 15 IHRR 255, Art 12 (UN). [↑](#footnote-ref-11)
12. Alzheimer's Society, *Dementia UK: Update*, 2014; Hudson, above, n 8 at 181. [↑](#footnote-ref-12)
13. Gunther Teubner, ‘Contracting Worlds: The Many Autonomies of Private Law’ (2000) 9 *Social and Legal Studies* 399 at 400. [↑](#footnote-ref-13)
14. S Whittaker, ‘Personal Incapacity’ in H Beale et.al, eds, *Chitty on Contracts,* 33rd edn, Sweet and Maxwell, London, 2018, para 9-001. [↑](#footnote-ref-14)
15. Mental Capacity Act2005 (UK), ss 2 and 3. This article is not concerned with contracts that are regulated under the Mental Capacity Act2005. For a discussion of these issues, see Whittaker, above, n 13, paras 9-100 and 9-097. [↑](#footnote-ref-15)
16. *Imperial Loan* [1892] 1 QB 599; E Peel, *Treitel on the Law of Contract*, 14th edn, Sweet and Maxwell, London, 2015, para 12-054. [↑](#footnote-ref-16)
17. Mental Capacity Act 2005, s 7. See Whittaker, above, n 13, para 9-097. [↑](#footnote-ref-17)
18. Peel, above, n 15, para 12-053. [↑](#footnote-ref-18)
19. *Imperial Loan* [1892] 1 QB 599, at 601; *Re Beany* [1978] 1 WLR 770. See Whittaker, above, n 13, para 9-089. [↑](#footnote-ref-19)
20. Mental Capacity Act2005, s 2(1). See also Mental Capacity Act2005, s 3(1). See Whittaker, above, n 13, para 9-092. [↑](#footnote-ref-20)
21. *Local Authority X v MM* (an adult) [2007] EWHC 2003; [2007] 11 WLUK 442; [2009] 1 FLR 487, at 79–80, per Munby J. See A Burrows, *A Restatement of the English Law of Contract*, Oxford University Press, Oxford, 2016, para 43. [↑](#footnote-ref-21)
22. *Imperial Loan* [1892] 1 QB 599, at 601, per Lord Esher. [↑](#footnote-ref-22)
23. *Molton* (1848) 2 Exch. 487. [↑](#footnote-ref-23)
24. *Beverley’s Case* (1603) 4 Co Rep 123b. [↑](#footnote-ref-24)
25. *Molton* (1848) 2 Exch 487, at 503 (affirmed by the Exchequer Chamber in *Molton v Camroux* (1849) 4 Exch 17). [↑](#footnote-ref-25)
26. Watts, above, n 3 at 145. [↑](#footnote-ref-26)
27. Henry of Bracton, *De Legibus Et Consuetudinibus Angliæ* (*The Laws and Customs of England*), c. 1210-1268. [↑](#footnote-ref-27)
28. G Spark, *Vitiation of Contracts: International Contractual Principles and English Law*, Cambridge University Press, Cambridge, 2013, p 57. [↑](#footnote-ref-28)
29. Henry Goudy, ‘Contracts by Lunatics’ (1901) 17 LQR 147, 150. [↑](#footnote-ref-29)
30. *Loudon* v *Elder’s CB* (1923) SLT 226. See J Smits, *Contract Law: A Comparative Introduction*, Edward Elgar, Cheltenham, 2014, p 98. [↑](#footnote-ref-30)
31. *Proform Sports Management* v *Proactive Sports Management* [2006] EWHC 2903; [2007] 1 All ER 542. See Whittaker, above, n 13, para 9-007. [↑](#footnote-ref-31)
32. *Barclays Bank* v *Schwartz*, The Times, August 2, 1995, per Lord Millett. See Whittaker, above, n 13, para 9-007. [↑](#footnote-ref-32)
33. Goudy, above, n 28 at 150. [↑](#footnote-ref-33)
34. W Cook, ‘Mental Deficiency and the English Law of Contract’ (1921) 21 *Columbia Law Review* 424 at 438. [↑](#footnote-ref-34)
35. Watts, above, n 3 at 143. [↑](#footnote-ref-35)
36. Ibid. [↑](#footnote-ref-36)
37. Whittaker, above, n 13, para 9-081, footnote 372. [↑](#footnote-ref-37)
38. *Imperial Loan* [1892] 1 QB 599, at 602, per Lopes LJ. [↑](#footnote-ref-38)
39. See discussion in *Hart* v *O'Connor* [1985] AC 1000, at 1021. [↑](#footnote-ref-39)
40. Ibid*,* at 1027, per Lord Brightman. [↑](#footnote-ref-40)
41. *Archer* v *Cutler* [1980] 1 NZLR 386. [↑](#footnote-ref-41)
42. Ibid*,* at 401. [↑](#footnote-ref-42)
43. Ibid*,* at 402. [↑](#footnote-ref-43)
44. *Hart* [1985] AC 1000, at 1027. [↑](#footnote-ref-44)
45. David Tiplady, ‘The Judicial Control of Contractual Unfairness’ (1983) 46 MLR 601 at 618. [↑](#footnote-ref-45)
46. Hudson, above, n 8 at 178. [↑](#footnote-ref-46)
47. *Hart* [1985] AC 1000, at 1027. [↑](#footnote-ref-47)
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82. *Daily Telegraph v* *McLaughlin* (1904) 1 CLR 423. See Hudson, above, n 75, p 498. [↑](#footnote-ref-82)
83. *McLaughlin* [1904] AC 776, at 779-780, per Lord Macnaghten. See F Reynolds, ‘Agency’ in H Beale et.al, eds, *Chitty on Contracts,* 33rd edn, Sweet and Maxwell, London 2018, para 31-038. This article is not concerned with the grant of authority under a power of attorney and makes no reference to powers of attorney under the *Powers of Attorney Act* 1971 or lasting powers of attorney under the Mental Capacity Act2005. For a discussion of these issues, see Whittaker, above, n 13, paras 9-103 and 9-104. [↑](#footnote-ref-83)
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