BRIEFING

PERSONAL INJURY MEDICAL LAW

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INTRODUCTION

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Capacity is an important issue that can arise in cases of all values and complexities. Sometimes the case is straightforward and low value but the injured party has pre-existing vulnerabilities affecting their ability to give instructions and make decisions. In other cases the claimant has suffered an acquired brain injury causing capacity issues to be of central importance in the claim. It is important that lawyers of all levels of experience have an understanding of capacity issues and what to do when they arise. The law is not perhaps as straightforward and accessible as it might be, considering the sensitivities and importance of the area.

Recently, Ella Davis and Susanna Bennett prepared a briefing introducing capacity issues and how they should be managed. In this second briefing in the series John Ross QC, David Thomson and Sarah Prager provide a more in depth analysis to assist you when navigating the law and practice in this area.

SOME ABCS IN TBI CASES - SOLICITORS' DUTIES IN RELATION TO THE ISSUE OF CAPACITY

This is the initial article in a series of 1 Chancery Lane Clinical Negligence Practice Articles.

The question of "capacity" arises in two contexts: capacity to litigate and capacity to manage one's financial affairs. This Article is concerned with capacity to litigate, in particular, on what measures ought to be taken when representing a client, often a potential claimant or party who will proceed by a litigation friend, who has suffered a brain injury.

This Article sets out the legal test to be applied to determine the question of capacity, and then what steps solicitors need to take to properly address this issue. Acting for a brain damaged client is challenging but also rewarding. A solicitor has to fulfil their client obligations in order to avoid subsequent claims. Such claims often arise when a settlement has been reached with a Defendant, but the client, now a claimant in potential proceedings against his/her former solicitor, subsequently asserts that he/she lacked capacity to consent to the settlement agreement. Perhaps inevitably such disputes arise long after the events in question, especially if the Claimant asserts that he/she continues to lack capacity – in which case no limitation defence will be available to the solicitor.

When and if the effectiveness of a settlement agreement is challenged in subsequent proceedings the Court is required to decide whether the Claimant had the capacity to conduct the original proceedings in question (or to litigate) – Court of Appeal as upheld by the Supreme Court in Dunhill v. Burgin [2014] UKSC 18. A claimant has to understand all aspects of the proceedings and be able to take an informed decision - Court of Appeal Bailey v. Warren [2006] EWCA Civ 51, again per Dunhill v Burgin.

The compromise/settlement agreement will not be treated as a separate, discrete matter. Rather the question is not whether the claimant had capacity to enter into the compromise agreement, but a broad one of whether he/she had capacity to conduct all of the proceedings "*down to the administration of any award of damages (which) was to be treated as a single transaction and not a series of individual steps*" – Bailey v Warren – and "*capacity to litigate involves the capacity to understand a large variety of issues that arise between deciding to issue the claim up to the point of judgment*" – Dunhill v Burgin.

This consideration of the whole is apparent in CPR Rules 21.2(1) and 21.4(3). The Rules focus on proceedings in general rather than on the proceedings as framed. The test is a *capacity to conduct the claim which the claimant in fact has*, rather than to conduct the claim as formulated by lawyers. This inevitably leads onto the question of whether a litigation friend ought to have been appointed.

The CPR

The starting point for a determination of what the Court is required to decide is: Is he/she a "**protected party**"? (formerly termed a "patient"). This is because a protected party must have a litigation friend to conduct proceedings on his/her behalf – CPR 21.2(1). Thereafter, Rule 21.1(2)(d) defines a "protected party" as a party, or an intended party, who lacks capacity to conduct the proceedings.
A person may have capacity in relation to some matters but not others. In the context of CPR 21 the question is whether the person lacks capacity to conduct proceedings or to litigate. If such capacity is lacking, the person is a protected party.

Further a protected party may be a "**protected beneficiary**", so a protected party who lacks capacity to manage and control any money recovered by or on their behalf or for their benefit in proceedings – Rule 21.1(2)(e).
The "protected beneficiary" is subject to Rule 21.11 which deals with the control of money recovered on behalf of such a protected party and beneficiary.

Rule 21.1(2)(c) adopts the meaning of "lacks capacity" in the Mental Capacity Act 2005. Section 2(1) of the Act

states that a person lacks capacity in relation to a matter if at the material time they are "*unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain*". It does not matter whether the disturbance is permanent or temporary - section 2(2).

Note Section 1 of the Act stipulates that an act done or a decision made under the Act on behalf of a person who lacks capacity must be done or made in their best interests. More about this often difficult issue is addressed below.

Coming back to "inability", such inability to make a decision about the conduct of proceedings must be caused by an impairment of, or a disturbance in the functioning of the mind or brain, is the "*diagnostic test*". It can cover a range of problems such as psychiatric illness, learning disability, dementia and brain damage. Obviously, if a party is already challenged by reason of, for example, a personality disorder, the degree to which his impairment of and/or disturbance in the functioning of the mind or brain is added to, by even a modest impairment, may qualify him as a person who lacks capacity to litigate/conduct the proceedings attendant on his injury. He/she is not required, as a party in need of assistance and protection by the Court, to prove that the tortious impairment of, or disturbance in, the functioning of his/her mind or brain was the sole and exclusive cause of his lack of capacity. Prior or subsequent hindrances to full functioning capabilities should be considered. There is *no causation requirement* in the statutory/CPR test. The loss of capacity could (and often does) arise from entirely extraneous circumstances, e.g. a subsequent stroke which is not causatively related to the index accident.

Section 3 adds to Section 2 and sets out four matters: "*(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable – (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision; or (d) to communicate his decision (whether by talking, using sign language or any other means)*". Accordingly, a person will be held to be unable to make a decision for him or herself if he/she cannot manage any one of these 4 listed activities. So, these are the factors which must be addressed by the medical expert in his/her instructions and Report on Capacity.

Section 3(4) of the 2005 Act continues: "*The information relevant to a decision includes information about the reasonably foreseeable consequences of – (a) deciding one way or another; or (b) failing to make the decision*". This has an obvious connection with the activity requirement of being able to use or weigh such information as part of the process of making the necessary decision/s. In Masterman-Lister [2002] EWCA Civ 1889 the Court of Appeal explained that capacity must be approached in a common sense way and not by reference to each separate step in the process of litigation. The test to be applied was "***whether the party to the legal proceedings is capable of understanding***, *with the assistance of such proper explanation from his legal advisers and experts in other disciplines as the case may require*, ***the issues on which his consent or decision is likely to be necessary in the course of those proceedings***".

The test is *NOT* confined to discrete issues, such as the capacity to agree an apportionment of liability on the day of a settlement agreement. Instead, it is much wider and covers whether or not the person had capacity to conduct the entirety of the claim/proceedings he/she was advancing against the Defendant. It is litigation capacity, not, for example, simply settlement capacity.

When to assess Capacity?

As to the person's "best interests" as referred to in Section 1 of the Act, in Masterman v. Lister the Court also said that, as a matter of practice, the court should, *at the first convenient opportunity*, investigate the question of capacity whenever there is any reason to suspect that it may be absent. This is often a feature of traumatic brain injury (TBI). The big question for the solicitor is when should capacity of the client be considered and assessed?

Even when the issue does not seem to be contentious, a Master or district judge who is responsible for case management will almost certainly require the assistance of a medical report before being able to be satisfied that capacity/incapacity exists. The same obligation

rests on the person's solicitor. Instances arise where the court has to decide the question of the person's capacity even when neither party has positively asserted that capacity was lacking. The policy underlying the CPR is clear: children and protected parties require and deserve protection, not only from themselves but also from the legal advisers. The Supreme Court in Dunhill confirmed the approach to a retrospective assessment of capacity is appropriate under the 2005 Act.

The timing of assessment of capacity can be challenging. Consider the chronology of events that arose in Bailey. In that case a liability apportionment was purportedly agreed *prior* to the commencement of proceedings. Judgment had also been entered for the claimant at 50% at a time when he was not suing as a patient. A full year after judgment had been entered, a medical report was obtained suggesting that the claimant lacked capacity and only after a further 10 months had elapsed was a litigation friend appointed. The Court of Appeal identified the issue before the court in the following terms: "*This appeal centres on whether the judge was correct to hold that Mr Bailey was not a patient in November 2000 [the date of the purported settlement agreement]*". The Court of Appeal overturned that finding on the ground that the first instance judge had confined his assessment of the claimant's capacity to the question alone of whether he had capacity to address the issues inherent in settling the liability/contributory negligence issue - instead of by reference to the whole basket of issues that would arise in the course of litigating the entirety of his claim. The Court of Appeal stated the logical time for a solicitor to consider the capacity of their client to litigate is **before** the letter of claim is sent! So, when a compromise is made in the course of litigation, the test is whether the individual has *capacity to conduct those proceedings*. It stated that it would be undesirable to have a different test for capacity dependent on whether the offer happened to be made while proceedings were in contemplation or after the proceedings had been commenced.

Therefore, the **Relevant Test** to apply is *whether the client has capacity to start proceedings* and that would include the question of whether he or she would have capacity for the purposes of an offer of compromise.

Accordingly, in a claim where a person seeks damages for personal injury because he has suffered a TBI, we consider capacity is a question that ought in general be considered early. In cases of doubt, "this will usually mean that the solicitor has to arrange for a medical opinion to be obtained" [per Arden LJ in Bailey].

In Bailey and Dunhill, the Courts detailed some factors to be considered when capacity to litigate is being reviewed. The list is not complete, but it includes the following: funding; the risk of an adverse costs order; approval of the Particulars of Claim; prospective compromise; insight into the compromise; ability to instruct his or her solicitor to advise him on it; understanding of the advice given and ability to weigh the advice, contributary negligence. Further, as to settlement, where the receipt of damages could have a substantial impact on him - an understanding of the amount that he could recover on his claim (the global value of the claim); and, therefore, of what he was being required to "give up" were he to accept the terms on offer from the defendant; and what would happen if he refused to accept the offer of settlement. Other factors pertaining to damages include matters such as the question of periodical payments, interim payment(s), the overall effect of compromise including the finality of settlement, terms of the agreement and evidence thereof.

To these factors there can be added the following: The 2005 Act Code of Practice gives guidance in relation to s.1(4) of the Act and, at part 2.11, states that there may be cause for concern if the person repeatedly makes unwise decisions that put him or her at risk of harm or exploitation or makes a particular unwise decision that is obviously irrational or out of character.

A particular challenge is where a person has a fairly significant short term memory impairment or a slowing of comprehension capability following a TBI and detailed explanation is given to him in relation to litigation decisions he will have to make. He can be given an opportunity to consider the matter overnight, but by the following morning it is not uncommon for the person to ask what it is that he or she was supposed to have been making a decision on. By s.3(4) of the Act the "information" relevant to the decision to be made must include information about the

reasonably foreseeable consequences of deciding one way or another or failing to make the decision. The person must be able to reach an informed decision and to be able to make such a decision for him or herself. Abdication of responsibility for making the decisions necessary to the conduct of the litigation, often to other family or friends or the solicitor, is not acceptable. It should be taken to indicate a lack of capacity and also real consent.

In Dunhill the Court set the bar high - when considering the issue of capacity, the court should address the question of whether the claimant had capacity at the relevant time to determine **all** those issues that he/she should have been asked to address with proper legal advice. So, clearly much is expected of the client's solicitor.

The solicitor will have much to consider - the key witnesses are likely to be the medical experts, such as neurologists, neuropsychiatrists and neuropsychologists. Witness evidence covering the claimant's difficulties in managing his life in practice can be of assistance, albeit this will often be provided in the GP notes and other care records. Difficulties in managing his or her existing and prospective funds will be highly relevant, but evidence of other difficulties such as managing day-to-day activities, managing travelling arrangements and his ability to interact socially will also be pertinent.

Decided cases on necessary factors

There are a number of decided cases on the matters that a person's solicitor should consider. Here are but a few important cases.

Lindsay v Wood [2006] EWHC 2895: The claimant was left with the range of difficulties including lack of motivation, distractibility, irascibility, lack of judgement, disinhibition, poor recall, lack of concentration and an obsession with his mobile phone. The judge found that "*the advice he may receive for the purposes of this litigation may be considerably more complex than the relatively straightforward advice that, in the view of his condition, it would be prudent to place the monies in trust. In addition, it cannot be excluded that he will receive conflicting advice from other persons with whom he may be in contact, advice that would not necessarily be disinterested. He would be unable to weigh the merits of such advice as against that of his professional advisers*". The court made clear that the issue of the Claimant's vulnerability to exploitation is important and often takes centre stage in an analysis of the capacity question. This is because, in those who are heavily vulnerable to abuse by unscrupulous people, the risk is that they lack the ability to weigh information as part of the process of making a decision. A highly vulnerable individual may attach grossly insufficient weight to the need to provide for his own future when succumbing to inappropriate requests for money. A Periodical Payments Order may be advisable.

The court's approach to the issue of capacity to manage litigation monies was considered in Verlander v Rahman [2012] EWHC 1026 (QB). The claimant had sustained a moderately severe head injury with frontal lobe damage resulting in behavioural symptoms. There was evidence of significant sums being spent on online gambling and other examples of inappropriate expenditure of funds on smaller items. This enabled the judge to conclude that the claimant was unable to weigh the necessary information as part of the process of making a decision.

Loughlin v Singh [2013] EWHC 1641 (QB): The brain injured claimant was found to have lacked capacity to manage his financial affairs, albeit he had undergone intensive rehabilitation and was in receipt of support worker assistance which amounted to little short of a 24/7 input. The claimant had poor organisational skills and difficulty with motivation and initiation. There were consistent reports of fatigue and poor sleep. Given the strictness of the regime of support and control of his finances, there had been few opportunities for the claimant to display obvious financial imprudence. There had been no "trial of access" to larger sums of money, as recommended by one of the psychologists. The decision to hold that the claimant lacked capacity was based upon his inability to recognise when he needed advice, because he was not aware that he had a problem that needed to be solved and there was no certainty he would seek advice in the first place.

In King v. Wright Roofing Co Ltd [2020] EWHC 2129

(QB) the claimant suffered a severe head injury. Ahead of the hearing of his claim (in which an issue was his own contributory negligence), the Court was required to determine as a preliminary issue K's capacity to litigate and manage his own finances. He received an interim payment which he promptly spent on an expensive holiday. His friends and family were concerned about his capacity and a litigation friend was appointed. Later the Court of Protection appointed 2 deputies to manage his finances. The claimant became exasperated with the litigation and stated that his solicitors and deputies were dragging things out to make money for themselves. He believed he should be conducting the litigation and at one point approached the defendant's insurers directly. His solicitor and his litigation friend were concerned that he would under-settle his claim, squander any sums received and so be unable to pay for the care he required for the rest of his life.

The Court concluded that the issue before it was the third aspect of the requirements laid down in s.2(1) of the 2005 Act, namely whether the claimant was unable to use or weigh the information as part of the process of making a decision concerned. Relevant information included information about the reasonably foreseeable consequences of deciding one way or another or failing to make the decision. The weighing of the information included whether to solicit or accept a settlement offer and what evidence was needed.

Although the claimant understood the litigation process and had rejected one offer, he was unwilling to accept advice and *unable to think through the consequences of decisions that went beyond merely disagreeing with the way the claim was being conducted.* He had particular difficulty using and weighing information about the disadvantages, from the perspective of his damages claim, of declining help with rehabilitation that would help improve his condition. He sometimes held the misconceived view that the cost of assessment or treatment would readily be funded from his compensation.

The court decided that he lacked the ability to weigh information about the state of the evidence that was relevant to how favourable an offer of settlement was, which made him at risk of under-settling his claim. It was doubtful that he could grasp that under-settling his claim could lead him to not receiving the care he needed and would need in later life. A similar finding was made in relation to his capacity to manage his financial affairs.

NHS Trust v. P [2021] EWCOP 27 concerned an older lady who had been diagnosed with diabetes, paranoid schizophrenia and HIV. An issue was whether she had litigation capacity. Since 2018 she had refused to take the anti-retroviral medication prescribed to treat her HIV. She believed that God had spoken to her and told her not to take that medication. Medical evidence suggested that there was a 50% probability that she would die within a year if she continued to refuse to take her medication. The NHS Trust sought orders and declarations that she lacked capacity to decide whether to take her HIV medication; that it was in her best interests to take such medication; and, inferentially, that she should be made to do so.
The Court concluded that conducting litigation was not simply a question of providing instructions to a solicitor and then sitting back and watching the case unfold. Conducting proceedings was a dynamic transactional exercise requiring continuous, shifting, reactive value judgements and strategic forensic decisions. That was the case even if the litigant had instructed the best solicitors and counsel in the business. A litigant had to be mentally equipped not only to be able to follow what was going on but also "to be able to figuratively tug counsel's gown." The Court stated in clear terms that **a litigant needed the same capacity to conduct litigation whether they were represented or not**.

To appoint or not to appoint a Litigation Friend

If a person lacks capacity a Litigation Friend is required and, in addition, approval by the court for an agreed settlement. Even where a settlement has been reached before proceedings have been issued, the case will fall to be considered assessed and judged on the same basis as if proceedings had been commenced. In Bailey the court explained that there were a number of reasons why the relevant transaction for the purposes of the compromise made at a time when legal proceedings are "in contemplation", should be treated in the same way as a compromise made in the course of proceedings. First, the compromise would be made

with litigation in mind. The whole context was therefore litigation. Secondly, the logical times for solicitors to consider the capacity of the client to litigate would need to be before the letter of claim was sent, not after it was sent, and immediately before proceedings were issued. If otherwise, they could find that the client had no capacity to bring the proceedings that had been threatened without the intervention of the litigation friend. Thirdly, the compromise and litigation were further connected in the sense that an individual can only properly evaluate an offer to settle a claim if he has some idea of what would follow from his rejection of any offer. So, the client would need to have some capacity to understand what might happen in the course of the contemplated litigation. Fourthly, there could be no doubting that where a contract/agreement is made in the course of litigation, the test is whether the individual has capacity to conduct those proceedings. There should be no different test of capacity dependent on whether the offer happened to be made while proceedings were in contemplation as opposed to after they had been commenced.

We emphasize that capacity for this purpose means capacity to conduct the proceedings. CPR Rule 21.4(3) requires a focus on proceedings in general rather than just on "the proceedings" as framed. It means the Claimant's capacity to conduct the claim or cause of action and which the claimant in fact actually has. The issue was not "capacity to understand and make decisions based upon the actual advice given by that lawyer".

The effect of CPR 21.10

In Bailey Ward LJ considered that once a claimant was found to be a "patient/protected party" then any prior agreement between him and the defendant was of no legal effect and was not binding on either party. An agreement required the approval of the court before it could bind the parties – and this was the effect of the wording of CPR 21.10.

If a claimant was of sound mind at the time of the agreement compromising liability the agreement would be valid. If the claimant lacked mental capacity to enter into the agreement at that time CPR 21.10(1) applied - which provided that "*no settlement or compromise shall be valid in so far as it relates to the claim by the patient without the approval of the court.*" The settlement or compromise can be a partial settlement, for example one which addresses contributory negligence alone, and include a settlement entered into before the claim issued - "*whenever entered into or made*".

Ward LJ considered that CPR 21 is to be given a wide construction. *So that when a claim is being made by a person who is **now** lacking in capacity and the settlement relates to that claim, then the compromise needs the court's approval*. The same applies in cases involving children. "*It would make no sense to restrict the ambit of the rule to post-commencement compromises. That could result in an agreement which is wholly disadvantageous to the patient being enforced against him. The overriding objective informs matters of construction and it would be manifestly unfair and unjust so restrictively to interpret it*". A defendant was entitled to withdraw any offer of settlement made. The court explained that the words "not valid" meant "*having no legal effect…. 21.10(1) the agreement is to be treated as invalid and of no legal effect unless and until the court approves it.*"

The Notes in the White Book as to the effect of the provisions of CPR 21.10 are to the same effect.

As indicated above, in Dunhill, the court was concerned with whether it sufficed that the claimant had capacity to deal with the actual compromise transaction, or whether the claimant had to have the necessary capacity to conduct the entire proceedings/the capacity to litigate. The Supreme Court explained that compromise is not a self-contained transaction, but inseparably part and parcel of the proceedings as a whole, and capacity to litigate involved capacity to understand a large variety of issues that might arise between deciding to issue the claim up to the point of judgement.

One of the purposes of CPR 21.10(1) was to impose an external check on the propriety of the settlement. Practice Direction – 21PD6 - sets out the evidence which must be placed before the court when approval is sought.

It is of note that Lady Hale in Bailey explained that

whilst a child's contract may be avoided in rather wider circumstances than may be the contracts of protected party, that "*children and protected parties require and deserve protection, not only from themselves but also from the legal advisers*".

Conclusions

These are the take-away points.

The question which the Court will be required to answer when capacity to litigate is the issue is: "*did the Claimant qualify as/fall within the definition of "a protected party" by or at the time of the purported settlement?*"

That in turn requires the Court to decide whether the Claimant had the capacity to conduct the original proceedings in question (or to litigate).

The times for solicitors to consider the capacity of the client to litigate are: (i) before the letter of claim was sent, not after it was sent, and (ii) in any event before proceedings were issued. If otherwise, they could find that the client had no capacity to bring the proceedings that had been threatened without the intervention of the litigation friend.

Although the claimant may seem to "understand" the litigation process, there are other matters that must be considered, such as:

- is he/she unwilling to accept advice and unable to think through the consequences of decisions that will go beyond merely disagreeing with the way the claim was being conducted;
- does he/she have particular difficulty using and weighing information about the disadvantages, from the perspective of his/her damages claim;
- was he/she declining help with rehabilitation that would help improved his/her condition;
- does he/she sometimes hold misconceived views that the cost of assessment or treatment would necessarily be funded from his/her compensation;
- can he/she hold and retain information and comprehension.

If so then he/she may well be found to lack the ability to weigh information about the state of the evidence that was relevant to how favourable an offer of settlement was, or the effect of the settlement, which would make him/her at risk of, for example, under-settling his/her claim.

In such circumstances a finding of lack of capacity to litigate is likely to follow.

Conducting litigation is not simply a question of providing instructions to a lawyer and then sitting back and watching the case unfold. Conducting proceedings is a demanding endeavour. It is a dynamic transactional exercise requiring continuous, shifting, reactive value judgements and strategic forensic decisions. A litigant needs clear capacity. Further he or she needs the same capacity to conduct litigation whether he or she is represented or not.

These are all matters which the instructed solicitor is definitely required to consider when representing a client who has suffered a brain injury.

The watch-word is: Make early assessments of capacity.

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