

# Managing Capacity Issues in Personal Injury Proceedings - A Practical Guide

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## The Mental Capacity Act 2005

The governing statute. In a nutshell, it provides that:

- There is a presumption that a person has capacity (section 1(2))
- A lack of capacity has to be proven on the balance of probabilities (section 2(4))
- All practicable steps to enable a person to make a decision must first be taken (section 1(3))
- Capacity is decision-specific (section 2(1))
- A person is not to be treated as unable to make a decision simply because he/she makes an unwise decision (section 1(4))

## Section 3 of the MCA: the critical test

### *Inability to make decisions*

*(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).*

*(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).*

*(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*

*(4) 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.*

## CPR rule 21: capacity in civil proceedings

- “lacks capacity” has the same meaning as in the MCA (CPR 21.1(2)(c))
- A litigant is a protected party (“PP”) and/or a protected beneficiary depending on whether they lack capacity to conduct proceedings and/or to manage and control money recovered in the proceedings (CPR 21.1(2))
- Proceedings must be conducted on behalf of a PP by a litigation friend (CPR 21.2(1)). Any step taken in proceedings before a PP has a litigation friend has no effect unless the Court so orders (CPR 21.3(4))
- A settlement by a PP must be approved by the Court (CPR 21.10(1)).
- A Court will decide how money received by a PP is dealt with (CPR 21.11).

## Dunhill v Burgin [2014] UKSC 18

- A settlement was invalid in which the Claimant - unknown at the time - lacked capacity. The Defendant's appeal against this decision was dismissed.
- “13. *The general approach of the common law, now confirmed in the [Mental Capacity Act 2005](#) , is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in Masterman-Lister that capacity for this purpose meant capacity to conduct the proceedings...*”
- “18. *I would hold, therefore, that the test of capacity to conduct proceedings for the purpose of [CPR Part 21](#) is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers. Judged by that test, it is common ground that Mrs Dunhill did not have the capacity to conduct this claim.*”

## Compiling evidence of whether a litigant is a protected party

Thought should be given at the earliest possible opportunity to:

- An expert report by a Consultant Psychiatrist, Neuro-Psychologist or Consultant Neurologist
- Factual evidence, including (if appropriate) witness statements from the litigant, family members, case managers and support workers

The question of whether a litigant lacks capacity may nonetheless be fiercely contested, and require determination by a Judge...

## Ali v Caton [2014] EWCA Civ 1313

- The Defendant disputed that the Claimant lacked capacity to manage his affairs. There was disagreement between the experts and the Defendant contended that the statutory presumption had not been rebutted.
- In dismissing the Defendant's appeal, the range of evidence relevant to the determination was noted (para 59):

*“The question of mental capacity is, in the end, a matter for the court. One hears oneself directing a jury in a criminal case and telling them that expert evidence is only one aspect of a case and must be considered in the light of all the evidence. In my judgment, the same is true here. The expert evidence, in particular that of the neuropsychologists in this case, was capable of providing a psychologist's view of the question. It was an important facet in the equation, but the judge had to weigh that together with the evidence from other quarters as to how the Claimant presented and how in practice he functioned in day-to-day life. The opinion formed in the consulting room does not dictate what happens on the street or in the home.”*

## Loughlin v Singh [2013] EWHC 1641 (QB)

- The Claimant had suffered moderate brain damage in a road traffic collision. The question of whether he had capacity to manage his affairs was finely balanced.
- It was noted by the Court that (para 45), “*it was intrinsically difficult to separate conduct and patterns of behaviour, that might bear upon the relevant assessment, that were wholly or mainly attributable to psychological explanation rather than wholly or mainly attributable to the organic brain injury. In simple terms many young men, who suffer no brain injury at all, are indolent, unmotivated and prone to make financial, and other, decisions that are unwise or even calamitous.*”

*Loughlin v Singh* [2013] EWHC 1641 (QB)

- The Court ultimately accepted the evidence of one of the Claimant's experts that the Claimant did not have capacity to manage a very large fund in the future because he did not have capacity to recognise when he needed appropriate guidance and assistance.

## Hints and tips for compiling evidence re capacity

- An expert needs to have all relevant information to form the basis of their opinion
- An expert report should be focused on whether the litigant has capacity for the particular decision (e.g. decisions arising during the conduct of proceedings)
- Factual evidence is important too.
- Remember that the decision as to capacity is one for the Judge and is not delegated to the expert

## The Litigation Friend

- If in doubt about capacity - you need a LF until your enquiries are complete
- In personal injury proceedings this is often straightforward:
  - Family member is usually the first port of call
- What if there is no obvious litigation friend?
  - Can be highly problematic in lower value claims. Starting point is to search high and low for someone to take on the role
  - What about the Official Solicitor? A nice idea in theory but in lower value claims the problem is funding

## Issue specific / fluctuating capacity

Two scenarios arise:

- Expert evidence suggesting that an individual has capacity for some things but not others e.g. capacity to litigate but not to manage finances
- A medically fluctuating condition where an individual's ability to participate in and make decisions differs from day to day

## Issue specific capacity

### Masterman-Lister v Brutton & Co [2003] 1WLR 1511

- Capacity is issue specific - a person may be capable of one kind of decision but not another
- Party must be able to understand the issues on which his decision is likely to be necessary with such professional assistance as is appropriate (lawyers and experts)
- Although decisions actually made would likely be important indicators of understanding, an irrational decision in itself is not proof of lack of capacity, just as a rational decision does not prove capacity
- Advice in broad terms and simple language

## Issue specific capacity

### Masterman-Lister v Brutton & Co [2003] 1WLR 1511

- Able to recognise a problem, receive, understand and retain relevant information including advice, weigh the information and communicate a decision
- “It is not difficult to envisage plaintiffs in personal injury actions with capacity to deal with all matters and take all “lay client” decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the plaintiff is to be regarded as a patient from the commencement of proceedings.
- “capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere.”

## Issue specific capacity

Bailey v Warren [2006] CP Rep 26

- In determining whether a litigant had capacity to approve a settlement, the focus should be on capacity to conduct proceedings as a whole, not piecemeal
- If a litigant had the capacity to understand what was meant by a 50:50 split of liability but lacked the capacity to understand the concept of damages that flowed from that split, he lacked capacity
- So: question is not just whether C understands the particular issue, but also its consequences

## Fluctuating / intermittent capacity

Difficult issue and no particularly good guidance on it. But:

Cheshire West v PWK [2019] EWCOP 57

- Distinguishes between isolated decisions (making a will or power of attorney) and situations where decisions might have to be taken regularly and at short notice (managing affairs)
- With the latter, can have lack of capacity to manage affairs even though there are snapshots of time when C has capacity
- The closer the person is to capacity at the time of the actual decision, the greater the weight that his views must carry

## Uncertainties around capacity

### Coles v Perfect [2013] EWHC 1955 (QB)

- Uncertainty about capacity
- Reluctance on both sides to try the issues of capacity
- Pragmatic decision to approve settlement so that it was binding

## The Defendant and capacity

- Concerns about capacity: can raise it with the Court (*Masterman Lister*)
- Challenging the need for a LF?  
Probably won't want to do this because of the desire for finality of settlement
- Challenging the suitability of the LF?  
Problematic & could potentially end up bearing costs
- Can D get involved in the CoP proceedings?  
Re SK [2012] EWCOP 1990: No. Best interests vs reasonableness
- Arguments about deputies and their costs for talk no 2

## Other capacity issues

- For smaller awards where a Deputy is required, a family Deputy is best, or can try and seek a one off order from the CoP seeking permission for authorisation to spend money for a particular purpose - would need advice from a CoP specialist
- Take care about the recent guidance in ACC v Ors [2020] EWCOP 9: guidance about possible conflicts of interest on a number of issues, but for the purposes of this talk it addresses the need for authority to be obtained by deputies before taking steps in relation to litigation and the special measures that must be put in place if deputy wishes to instruct own firm to act in contentious litigation for C

Thank you for listening

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