Mentally incapacitated claimants and the Court of Protection

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Personal Injury analysis: What is best practice for PI and clinical negligence lawyers when dealing with a mentally incapacitated claimant? Edward Lamb, barrister at 9 Gough Square specialising in clinical negligence, discusses different areas of consideration for practitioners and touches on the impact of the Court of Protection Rules 2017.

What are the main issues relating to capacity that PI and clinical negligence lawyers should consider?

The question of a litigant's capacity is unproblematic in the vast majority of claims. There is, of course, a presumption of capacity. Any modern civil negligence lawyer dealing with PI and/or clinical negligence should be aware of the basic principles of not only how the civil courts deal with issues of capacity but also the Court of Protection's jurisdiction when compromising cases.

Cases in which difficulties can often arise in cases where the capacity of a litigant fluctuates. This is specifically envisaged in CPR 21.9 that provides that when a party ceases to be a patient or a protected person the litigation friend's appointment continues until it is ended by a court order.

What is capacity?

First one looks at the Mental Capacity Act 2005 (MCA 2005). This has to be the starting point as CPR 21.1(2)(c) defines 'lacks capacity' to mean 'lacks capacity within the meaning of MCA 2005'.

Five essential principles are identified in MCA 2005, s 1 that apply for the purposes of the Act:

• a person must be assumed to have capacity unless it is established that they lack capacity

• a person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success

• a person is not to be treated as unable to make a decision merely because they make an unwise decision

• an act done, or decision made, under the MCA 2005 for or on behalf of a person who lacks capacity must be done, or made, in their best interests

• before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action

Capacity is defined at MCA 2005, s 2. A person lacks capacity in relation to a matter if:

> 'at the material time he is 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'

The inability to 'make decisions' is expanded at MCA 2005, s 3:

‘For the purpose of section 2, a person is unable to make a decision for himself if he is unable:

• to understand the information relevant to the decision

• to retain that information

• to use or weigh that information as part of the process of making the decision, or

• to communicate his decision (whether by talking, using sign language or any other means)’

What are the risks of failing to recognise a lack of capacity at an early stage?

Lawyers must always be live to capacity. Any concern over capacity should be investigated. Lack of litigation capacity is defined, using the guidance above from MCA 2005, as whether the litigant is unable to make such decisions necessary ‘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’ *Dunhill v Burgin* [2014] UKSC 18, Lady Hale, at para [18].

This distinction is important. Capacity is decision specific. In *Dunhill* if the court had found that the claimant’s capacity was to be judged in relation a specific decision, ie whether or not to accept a ‘doors of court’ offer of £12,500 and not her capacity to comprehend and understand her ‘actual case’ (valued at £1m+), then she would have had capacity. In the context of her capacity to make decisions in relation to her actual claim, she fell well short.

What issues arise from failing to spot capacity issues in relation to compromise?

First, if the litigant lacks capacity at the relevant time of compromise it will almost certainly render any final compromise of the proceedings invalid and capable of being set aside. This much was confirmed in *Dunhill v Burgin* [2014] UKSC 18 at para [20]. Note the important and plain provisions of CPR 21.10(1):

> ‘Where a claim is made—
>
> (a) by or on behalf of a child or patient [now protected party], or
>
> (b) against a child or … patient [now protected party]
>
> no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim, by, on behalf of or against the child or patient [now protected party], without the approval of the court.’

Taking the *Dunhill* litigation as a practical exemplar—it was painful for all those involved (including the claimant herself). From an accident in 1999, Mrs Dunhill was still in the court system as recently as March 2018. Moreover, her lawyers were faced with negligence claims on the basis of their advice.

Second, caution must be exercised by both claimants and defendants if there is even anecdotal evidence of a lack of capacity. Despite warranties often being given by claimant solicitors as to their client’s capacity, it is sensible to obtain evidence on capacity if there is any doubt at the point of compromise or preceding it.

Third, some parties continue to rely on the rather creative approach taken in *Coles v Perfect* [2013] EWHC 1955 (QB) where Teare J approved a compromise in circumstances where the capacity of the claimant was unclear by using the court’s inherent jurisdiction. In light of Dunhill this course of action must now be treated with extreme caution and is most probably inconsistent with the ratio of Dunhill. It poses an unacceptable risk of a retrospective claim that the claimant lacked capacity at the relevant time—either in negligence against the claimant’s own lawyers or setting

aside of the compromise. Further it does not fit well with the purpose and scope of CPR 21 generally or for that matter, the associated and exponential growth of the jurisdiction of the Court of Protection.

Can a party withdraw from a settlement before it is approved by the court?

In circumstances where protected parties are procedurally protected in the CPR, does this affect the ability of a party to withdraw from a compromise before approval? Is the delay necessitated by the need for approval, discriminatory against those that lack capacity?

Revill (a protected party proceeding by his litigation friend) v Damiani [2017] EWHC 2630 (QB), [2017] All ER (D) 26 (Nov) gives the answer to both questions.

In *Revill* the defendant sought to withdraw from a compromise contained in a memorandum before the claimant had obtained approval under CPR 21.10. The claimant sought a declaration that such a withdrawal was contrary to his Article 14 and 6 rights. Dingemans J rejected the application for a declaration and found the provisions of CPR 21.10 a proportionate means of achieving a legitimate aim. Therefore, the answers are—yes, a party can withdraw between conclusion of agreement and prior to approval and no, it is not discriminatory.

What are the main changes introduced by the Court of Protection Rules 2017?

The Court of Protection Rules 2017, SI 2017/1035 that came into force on 1 December 2017 will probably have very little effect on PI lawyers' lives. However, it is useful to examine the changes in brief. The fundamental change is presentational—the new rules are arranged like the CPR.

The other more substantive changes can be summarised as follows:

• the overriding objective of the rules is set out in Part 1—this is to enable the court to deal with a case 'justly and at proportionate cost' having regard to the principles contained in MCA 2005. Under Rule 1.2 the court can on its own initiative, or on application, make directions to ensure P's participation and representation. The court is required to actively manage cases under Rule 1.3 which includes identifying at an early stage the issues and the parties, deciding promptly which issues need a full investigation (and which do not), fixing timetables and a cost/benefit analysis of taking steps. The parties, the legal representatives and unrepresented litigants are required (in Rules 1.4 to 1.6 respectively) to help the court to further the overriding objective. All of this is very familiar to the civil lawyer

• cases are now divided and allocated into three pathways—the Personal Welfare Pathway; the Property and Affairs Pathway and the Mixed Welfare and Property Pathway

• Part 15 contains amending provisions in relation to expert evidence now so restricted to that necessary to assist the court

• finally, Part 21 includes new provisions for orders for committal modelled on provisions in the Civil Procedure and Family Procedure rules

Interviewed by Samantha Gilbert.

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