BRIEFING

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INTRODUCTION

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An Introduction to Capacity: Part I

Welcome to another edition of the 1 Chancery Lane Clinical Negligence team briefing. In this edition Ella Davis and Susanna Bennett take a look at the procedural and legal framework relating to mental capacity. Capacity arises in a significant number of clinical negligence claims. Often there are obvious indicators that a Claimant's capacity needs to be assessed. In such cases capacity is usually well evidenced and assessed throughout the life of the claim. In other cases, however, the indications that capacity may be in issue are more subtle and capacity may not be raised as an issue until some way through the litigation process. Whenever it arises, those practicing in this area should have a handle on the procedural and legal framework, and focus the factual and expert evidence accordingly.

Also, watch this space for Part II of this briefing. In follow up, 1 Chancery Lane's Personal Injury team will be looking at capacity in the context of traumatic brain injury cases.

As always, if you have any questions about any of the issues covered, please do not hesitate to get in touch with one of us via clerks@1chancerylane.com or on 020 7092 2900.

JUDICIAL DETERMINATIONS OF CAPACITY

ELLA DAVIS

In many cases it will be clear whether a particular person has capacity either to litigate or to manage their property and affairs. However, there are cases where this is not so easy to determine, where medical experts will reasonably disagree and where the issue will be vigorously contested. Where, for example, a substantial claim is made for deputyship costs, defendants may be reluctant to concede that a person lacks capacity to manage their awards of damages, and those acting for claimants will be anxious to ensure that their client has the necessary funds to provide for such services. In such cases, if the parties are unable to compromise, the court will be required to determine the issue. It can be helpful therefore to consider the approach taken in those reported cases where the issue has been subject to judicial determination.

The role of medical evidence

The first thing a practitioner should do if they have reason to believe that a claimant lacks capacity to manage any damages is of course to seek the views of appropriate medical experts such as neurologists, neuropsychiatrists and neuropsychologists. However, what happens when, as often occurs, the experts do not speak with one voice on this issue?

The correct approach to medical evidence was considered in *Ali v Caton [2014] EWCA Civ 1313*. This was a case in which the claimant had suffered brain injury in a road traffic accident. Shortly before trial, he passed a citizenship test which the experts found surprising. The trial judge found that the claimant continued to suffer significant cognitive deficits, lacked capacity, and had no residual earning capacity. The defendant appealed, arguing that the test result led to the inevitable conclusion that the claimant had been malingering or had consciously exaggerated his condition. The appeal was dismissed.

The defendant argued that, in circumstances where all the experts had deferred to the neuropsychologists on the question of capacity, the judge had been wrong to rely on other evidence. The Court of Appeal rejected that submission, holding that the question of mental capacity is in the end a matter for the court. The opinion of the neuropsychologists was important, but it was only one aspect of the case which the judge had to weigh together with evidence from other quarters as to how the claimant presented, and how in practice he functioned in day-to-day life. It is therefore important that those acting for claimants adduce relevant factual evidence from family, support workers and case managers. Examples of the claimant struggling with finances may be useful evidence (although of course a person is not to be treated as unable to make a decision merely because he makes an unwise decision). Similarly, those acting for defendants should not be so focused on the expert evidence that they overlook such factual evidence.

Where there are conflicting medical opinions, the court will also have to subject each report to careful scrutiny to determine what weight to attach to it. This of course is an exercise that judges often undertake in clinical negligence claims. In *Ali v Caton*, the judge at first instance was very critical of the defendant's neuropsychology expert, to the extent that he largely rejected the expert's evidence. The judge criticised the expert, who had expressed a firm view that the claimant was malingering, for having lost the objectivity that is essential for an expert witness. The judge found that the expert has entered into areas where he lacked any valid expertise and had adopted a *"dogmatic and frequently unjustifiable approach."* Although the other experts had deferred to the neuropsychologists, the judge ultimately found it useful to consider evidence beyond that provided by the neuropsychologists. This was because the defendant's neuropsychologist felt unable to express a view on capacity which *"was a reflection of his ambivalent attitude to the role of clinical observation and judgment in forming an overall assessment of the case."* It is therefore imperative that practitioners carefully consider whether their expert has in mind the correct statutory tests, has had regard to all relevant factors and has not had regard to irrelevant factors.

Time and Decision Specific

Capacity is of course time and decision specific. Thus, a person may be able to manage small amounts of money, but not be able to make decisions about investment of a substantial settlement sum.

Evidence of a claimant managing small amounts of money should be treated with caution. In *Verlander v Rahman [2012] EWHC 1026 (QB)* the claimant was at the time of trial managing her own money, but only with the assistance of her mother and fiancé. The claimant's mother assumed control of the claimant's finances after the claimant spent £2,000 on online gambling. She had also spent a significant part of a £15,000 interim payment and could not account for what she had spent it on. A substantial sum was probably spent on an online game. The claimant was trusted to collect her income and did appear to understand the need to pay her bills first, but the claimant's mother's evidence was that she did not know if the claimant would do so without her mother's oversight. The claimant's mother gave the claimant just £5 a day to prevent overspending. The claimant was an impulsive buyer and had recently gone to buy a hamburger and come back with five. This impulsivity was, in the view of some of the medical experts, the cause of the claimant's inability to weigh properly the necessary information in order to make a decision.

On that evidence the judge held that the claimant could not properly be said to be managing her own money. She was only doing so with the substantial assistance of her mother. She was unable to weigh the necessary information as part of the process of making a decision and, were she to have access to substantial funds through an award of the court there was a serious risk that she would spend large amounts of it inappropriately without others necessarily knowing what she had in fact done. A trust would not provide adequate protection for the claimant, and if its only purpose was to stop inappropriate spending, then it suggested financial incapacity.

Nevertheless, the judge recognised, however, that the claimant may regain financial capacity in the years to come. The judge was not willing to rule, even if he were able to do so, that the claimant was permanently incapable of managing her property or affairs. In his judgment it would be perfectly reasonable for the Court of Protection itself to reconsider her situation some time after two years following the conclusion of the litigation. If the decision were that at that time she had financial capacity, consideration could then be given as to whether a Trust ought to be set up to provide guidance and assistance in the management of her money.

AB v Royal Devon & Exeter NHS Foundation Trust [2016] EWHC 1024 (QB) is an example of a careful consideration of the specific decisions to be taken at a particular time. In that case there was evidence of the claimant having had a longstanding history of personality disorder and sustained drug abuse. His lack of capacity up to trial was substantially due to illegal drug use and the judge therefore excluded from the award any costs associated with a lack of capacity before the trial.

By trial, the claimant had ceased using drugs and the psychiatric experts agreed that the claimant therefore had the capacity to conduct litigation and manage his financial affairs. However, the judge had to consider the claimant's capacity at the moment when a very large sum of money was due to be paid over. The judge concluded that, even if he remained abstinent of drugs, the claimant would probably not achieve and sustain the capacity to make the relevant decisions about the organisation and disposition of his life, and about spending which would arise following the award in this case.

The parties were agreed that were the claimant to resume his drug use, he would lose the degree of capacity he had at trial and the judge found it probably that the claimant would revert to abuse of drugs, although he could not say when or for how long. The judge noted that the complex implementation of a large award would take time. It was anticipated that it would take around a year to obtain and refit a property for the claimant's long-term use, to institute a care regime which represented the best compromise between the claimant's needs and the available funds, and to reach and implement similar decisions on the purchase of

equipment and transport. For that period the claimant would be under a disability, irrespective of drug use. After that time, the decisions facing the claimant would be less complex and he would probably have capacity, if he did not revert to illegal drug use. Any lack of capacity after the initial one year period would derive from reversion to illegal drug use. The judge consequently declined to make any award in respect of the costs attendant on a lack of capacity after one calendar year from the satisfaction of the award in the case.

The claimant's own views and insight

The mere fact that a claimant might prefer to have advice or assistance in managing a substantial award is not, of itself, probative of a lack of capacity. The following guidance, given in *White v Fell*, was approved by Kennedy LJ in *Masterman-Lister v Brutton & Co [2003] 1 W.L.R. 1511*[1].

"Few people have the capacity to manage all their affairs unaided … It may be that she would have chosen, and would choose now, not to take advice, but that is not the question. The question is: is she capable of doing so? To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice … Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and to advise her appropriately … Finally, she needs sufficient mental capacity to understand and to make decisions based upon, or otherwise give effect to, such advice as she may receive."

However, the claimant's own views and level of insight may be relevant evidence when determining the question of capacity. In *Verlander* the judge took account of the claimant's own fears that she would probably "blow" the cash were she to have access to it by herself, and considered this evidence to be telling.

Louglin v Singh [2013] EWHC 1641 (QB) was a case which all the experts and the judge considered to be finely balanced.[2]

One difficulty was that it was intrinsically difficult to separate conduct and patterns on behaviour that were wholly or mainly attributable to psychological explanation rather than wholly or mainly attributable to the organic brain injury. The judge recognised that *"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."* The judge was particularly impressed by the evidence of the claimant's neuropsychiatrist who accepted, in line with the defendant's expert evidence, that so long as the claimant had the capacity to recognise that he needed appropriate guidance and assistance, and the capacity to take and act upon such advice and assistance, the claimant could be treated as having capacity in the legal sense. That expert, however, did not believe that the claimant had the capacity to respond in the appropriate manner and gave evidence that the claimant may not know that he needed advice because he would need insight to know that. The judge therefore concluded that the claimant did not have capacity to manage his financial affairs.

Conclusion

It will be seen, therefore, that the court will have regard to a wide variety of factual and expert evidence. The claimant's own views and insight as well as the observations of family members may be important, and the courts will of course give due weight to the opinions of suitable experts. However, the question of capacity is ultimately one for the court and judges are not bound to accept or reject the views of any witness. Practitioners should obtain and consider a broad range of evidence and ensure that all relevant factors have been considered by their experts. Further, one should never lose sight of the fact that capacity is time and decision specific, and so it is important to be critical of general assertions that a person has or lacks capacity.

[1]A decision which pre-dates the Mental Capacity Act 2005

[2] In light of this it was also a case where the judge considered it appropriate to take account not just of the views of the experts, but also of those professionals who had close and frequent contact with the claimant.

MENTAL CAPACITY IN CIVIL PROCEEDINGS: A PRACTICAL INTRODUCTION

SUSANNA BENNETT

Problems touching upon the mental capacity of parties crop up with reliable regularity for litigators. The topic has spawned a web of legislation, CPR rules and, inevitably, judicial findings. Whilst the guiding legal principles in the area are now well established, practical capacity-related problems which may arise during litigation are tricky, various and have the potential greatly to disrupt proceedings. A careful, evidence-based, and cooperative approach is called for by the legal representatives on both sides. Such an approach will best serve the lay client and will limit costs.

In this article I summarise the legal framework and CPR provisions relating to mental capacity. I then give examples of scenarios which are commonly encountered in civil proceedings and give my view on how they can best be managed.

The law: the Mental Capacity Act 2005

The governing legislation is the Mental Capacity Act 2005 (the "MCA"). For present purposes, its key principles are, in a nutshell:

- It is assumed that a person has capacity subject to evidence that he/she does not (section 1(2));
- A decision as to whether a person has capacity must be made on the balance of probabilities (section 2(4));
- All practicable steps to enable a person to make a decision must be exhausted before the conclusion is reached that he/she lacks capacity (section 1(3));
- Capacity is decision-specific. A person lacks capacity if he/she is unable to make a particular decision because of an impairment of, or a disturbance in the functioning of, the mind or brain. This impairment or disturbance might be permanent or temporary (section 2(1)-(2));
- A person must not be treated as unable to make a decision simply because he/she makes an unwise decision (section 1(4));
- Section 3 contains the test as to when a person is unable to make a decision:
  "(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."
  An act taken or a decision made on behalf of a person who lacks capacity must be done or made in his/her best interests (section 1(5)).

Civil procedure: CPR rule 21

CPR rule 21 incorporates the principles of the MCA into civil procedure as follows:

- The words "lack capacity" have the same meaning as in the MCA (CPR rule 21.1(2)(c));
- A party who lacks capacity to conduct proceedings is known as a "protected party". A protected party who also lacks capacity to manage and control money recovered by him/her in the proceedings is known as a "protected beneficiary" (CPR rule 21.1(2)(d)-(e));
- Proceedings must be conducted on behalf of a protected party by a litigation friend (CPR rule 21.2(1)). Any step taken in proceedings before a protected party has a litigation friend has no effect

unless the Court orders otherwise (CPR rule 21.3(4));
- A settlement, compromise or payment which relates to a claim by, on behalf of, or against a protected party, will be invalid unless approved by the Court (CPR rule 21.10(1));
- The Court will direct how money which is received by or on behalf of a protected party is dealt with. It will first consider whether the protected party is a protected beneficiary (CPR rule 21.11).

Commonly occurring scenarios in civil proceedings

I turn now to situations which frequently crop up in civil proceedings, and how they should be approached:

Solicitors suspect that their client may lack capacity

A, an elderly lady, is bringing a claim for damages against the highways authority for personal injuries sustained when she tripped on a broken paving stone. Unrelated to the incident, A suffers from several physical and mental health problems, including type 2 diabetes and depression. Three weeks before the deadline for service of witness evidence, her solicitors notice that she is now reluctant to speak on the phone, and when she does, she mumbles, and her answers are very hard for them to understand. She will not attend the office and is unresponsive when asked whether anything is wrong.

It cannot be known whether A is able to make decisions necessary for conducting litigation, and/or whether this is because of an impairment or disturbance of the mind or brain. Her solicitors should advise her to instruct a Consultant Psychiatrist immediately, to provide a reasoned opinion on whether A lacks capacity for conducting litigation, bearing in mind the tests in the MCA. Meanwhile they should seek to agree an extension for service of witness statements with the Defendant. If possible, before receiving expert evidence that A lacks capacity, they should avoid informing the Defendant of their concerns.

An expert report addressing capacity is flawed

B's (the Claimant's) solicitors provide the Court and the Defendant's solicitors at a CMC with a report from a Psychiatrist which concludes that B has ceased to have capacity to conduct the proceedings. B's solicitors invite the Court to accept the report's conclusions and order that B's wife be appointed as his litigation friend. The reasoning within the report is that the question of whether B is able to make decisions in the litigation (applying the criteria at section 3 of the MCA) is finely balanced, but given B's serious mobility problems, on the balance of probabilities B lacks capacity.

The Defendant's legal representatives should explain to the Court that the psychiatric report is flawed, as B's mobility problems (an irrelevant factor) have been taken into account. As such, the assumption that B does have capacity (section 1 of the MCA) continues to apply.

In a personal injury claim in which the 3-year limitation period has expired, solicitors for the Claimant believe that their client lacked capacity for a period following the accrual of the cause of action

Solicitors are approached by C, a man who wishes to bring a personal injury claim against his former employer. He had worked as a prison officer for many years but developed clinical depression and PTSD after witnessing the aftermaths of suicides by prisoners. The events took place around 4 years ago. He had delayed contacting solicitors because he had been severely unwell, including spending periods of time in hospital.

A loss of capacity after the accrual of the cause of action does not stop time running for limitation purposes. But it is a relevant factor in an application by a Claimant to disapply the limitation period under section 33 of the Limitation Act 1980 (section 33(3)(d)). As such, C's solicitors should advise C to obtain a report from a Consultant Psychiatrist to address the period (if any) for which C lacked capacity, to support his application to disapply the 3-year limitation period at section 11 of the Limitation Act.

Following settlement of a claim, solicitors for a Defendant are informed that the Claimant lacked capacity to conduct proceedings

D suffered a brain injury in a road traffic accident

caused by the Defendant's negligence. The Defendant agreed a settlement of a modest sum with D's solicitors at the disclosure stage of proceedings. It was not informed that D might lack capacity. D subsequently instructed different solicitors, who notified the Defendant's solicitors that D had lacked capacity throughout the proceedings, and that the settlement agreement was therefore invalid.

The Defendant's solicitors should ask for expert evidence to prove that D lacked capacity to conduct proceedings at the material time. If D's solicitors can provide good evidence of this, the consent judgment is very likely to be set aside as invalid, as it was reached without a litigation friend and without the approval of the Court (cf *Dunhill v Burgin* [2014] UKSC 18; [2014] 1 W.L.R. 933). The Defendant's legal representatives should consent to an application to set the order aside if there is strong evidence of D's lack of capacity.

No suitable litigation friend can be found

E is an elderly woman wishing to defend a claim brought against her by her son and daughter-in-law relating to beneficial ownership of a family property. She suffers from Alzheimer's and accepts that she lacks capacity to conduct proceedings. Other than her son and daughter-in-law, she has no close relatives. She does not know of anyone who is suitable and willing to act as her litigation friend.

E's solicitors should apply to the Court pursuant to CPR rule 21.6 for the Official Solicitor to act as her litigation friend.

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