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# Children, Capacity and the Court of Protection in Injury Litigation: common misconceptions and traps

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# This Dekinar

*Protected parties and the CPR: reaching parts the White Book cannot.*

- *The new CPR Part 21 a missed opportunity?*
- *White Book guidance on capacity to be treated with caution*
- *Practical solutions to low value, high dependency cases: arguments for claimants and defendants*
- *Recent practice in the Masters Corridor relating to investment of funds and child trusts*

- *Disclosure to and from the COP in catastrophic injury cases.*
- *Highlighting the importance of coordination between the civil and COP jurisdictions in catastrophic cases*
- *A worked example and practical solutions to a perennial problem*

# What is the COP?

Take the example of Mr B; he was in direct contact with the angels and the Virgin Mary. His leg had ulcerated and was putrefying with bone infection. He declined an amputation which would then lead to his death.

"I don't want an operation.

I'm not afraid of dying, I know where I'm going. The angels have told me I am going to heaven. I have no regrets. It would be a better life than this

I don't want to go into a nursing home, [my partner] died there.

I don't want my leg tampered with. I know the seriousness, I just want them to continue what they're doing.

I don't want it. I'm not afraid of death. I don't want interference. Even if I'm going to die, I don't want the operation."

Best interests for those that lack capacity (defined by § 2 Mental Capacity Act), determined on principles set out in §4 Mental Capacity Act 2005:

*It is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.*

*a conclusion that a person lacks decision-making capacity is not an ‘off-switch’ for his rights and freedoms.*

Wye Valley NHS Trust v Mr B [2015] EWCOP 60 (Peter Jackson J)

# Why relevant in injury litigation?

In practice the interface of the MCA and PI practitioners is most commonly felt in the requirement to (a) conduct litigation through a litigation friend and (b) the requirement that any settlement concluded on behalf of a protected party, must be approved by the Court.

With effect from 6 April 2023, Practice Direction 21 was revoked and Part 21 was amended to incorporate some of the provisions previously in PD21 (as well as some other changes).

Practitioners will be familiar with this section of the Civil Procedure Rules, which concern children (persons under 18) and protected parties (persons who lack capacity to conduct litigation).

# Capacity

Section 1-3 Mental Capacity Act 2005 govern this.

MCA 2005 s2(1): "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.

MCA 2005 s 3(1) a person is "unable to make a decision for himself" if he is unable (a) to understand the information relevant to 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 (the 'functional test').

# Litigation Capacity

***Masterman-Lister v Brutton & Co***

*capable of understanding, with the assistance of such proper explanation from legal advisors 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*

*In broad terms and simple language*

*Able to recognise a problem, receive, understand and retain relevant information including advice, weigh the information and communicate a decision*

***Bailey v Warren***

*How will proceedings be funded/costs risk?*

*Give instructions/approve PoC/approve compromise*

*Insight into the compromise, ability to understand and weigh advice*

# Other key principles

MacDonald J in TB v KB and LH [2019] EWCOP 14.

Some key points summarised:

a. A person is presumed to have capacity unless otherwise established.

b. A person shall not be treated as lacking capacity unless “all practical steps to help” them have been taken without success.

c. Capacitous people may make unwise decisions.

d. Decisions on capacity are to be made by the court.

e. The burden of proof lies on the person asserting lack of capacity. The civil standard of proof applies. However, the court may itself seek to investigate the issue of capacity of its own initiative in which case the presumption of capacity applies, and the party is presumed to have capacity unless otherwise established on the balance of probabilities.

# The New CPR Part 21

**Litigation Friends**

Every protected party must have a litigation friend to conduct proceedings on her behalf: r.21.2(1). Every child must have a litigation friend unless the court permits her to conduct proceedings without one: r.21.2(2), (3) and (4). Where a litigation friend is required, no person may take a step in proceedings (save for issuing, serving or applying for a litigation friend) until there is one: r.21.3(2). A person may become a litigation friend by way of certificate of suitability or court appointment: r.21.5 and r.21.6.

**Approval**

Rule 21.10 provides that no “settlement, compromise or payment” (thus including any interim payment) in a claim by/behalf or against a child or protected party is valid without approval by the court. Previously, the applicable procedure was found spread across the rules in Part 21 and PD21. The recent amendment amalgamated all of the relevant provisions into Part 21.

Proceedings brought for the sole purpose of obtaining approval must be made using the Part 8 procedure: r.21.10(2)(b). The application must be supported by a draft consent order, details of to what extent liability is admitted, the age and occupation of the child or protected party, confirmation that the litigation friend approves the settlement, a copy of any medical, financial or other expert evidence or advice, details (in a personal injury claim) of the accident and claimed loss and damage, documents relevant to liability and “a legal opinion on the merits of the settlement, except in very clear cases, together with any relevant instructions unless they are sufficiently set out in the opinion”: r.21.10(3). The draft order must be in Form N292 with appropriate amendments.

In almost all cases (even those which may be described as “very clear”), the court will be assisted by advice from a barrister who is specialist in the relevant area of practice. The advice will set out the facts and details of the agreement, analyse the claim and the range of reasonable settlements, and provide an opinion (including in light of, for example, risks on liability) on whether the settlement is reasonably capable of approval. The decision remains the court’s; but, for reasons of practicality, often connected to the weight of business before the judge in the list, the advice will form important guidance as to the likely outcome of the application.

**Investment and Management of Funds**

The default rule is that settlement monies will be paid into the court special account on an application by the litigation friend: r.21.11(7). Money in the special account will be paid out when a child turns 18: r.21.11(8)(b). The application for investment directions will be on Form CFO320 for a child or Form CFO320PB for a protected party: r.21.11(6).

Money for the benefit of a child (who is not a protected beneficiary) may be paid directly to the litigation friend to be placed into an account for the child's use, per r.21.11(8)(a), but: (i) the court will be slow to permit money intended to be retained until the child turns 18 to be used prior to that date; and (ii) the previous attraction of payments into personal accounts, namely the higher rate of interest, has been reduced by the recent recovery in the rate of interest applied to funds in the special account (4.25% at the time of writing). In a case involving a very significant sum of money, the court will expect an applicant seeking the funds to be paid into a bespoke account or trust to provide extensive detail as to the terms of investment and the use to which the money will (or may) be put. A copy of the terms of the trust will be scrutinised. In many cases, particularly given the (now better) interest rate and the facility to apply in writing for 'payments out' under r.21.11(10), the special account may well be adequate as an investment vehicle.

**Appointment of a Deputy**

A significant change in the new version of Part 21 is to the threshold above which the court must direct a protected party's litigation friend to apply to the Court of Protection for the appointment of a deputy for management of the fund. Prior to 6 April 2023, it was £50,000; that has now been raised to £100,000, with the intention of removing more cases from the (potentially lengthy and costly) Court of Protection procedure. There remain exceptions, set out in r.21.11(9), and the Court of Protection may permit the sum (even exceeding £100,000) to be retained in court and invested in the same way as a child's fund can be: r.21.11(9)(e).

**Recovery of the Litigation Friend's Costs and Expenses**

The old rules about what costs and expenses a litigation friend may recover from the child or protected party's settlement have been moved from PD21 into r.21.12.

Such expenses, according to r.21.12(1)(a) and (b), must have been reasonably incurred and reasonable in amount; and in assessing such reasonableness the court will consider all the circumstances of the case, including the usual factors in r.44.4(3), premised on the facts and circumstances as they reasonably appeared to the litigation friend: r.21.12(5) and (6). Any costs must be in line with the provisions in Part 46 and PD46 which would otherwise apply to the action.

Expenses may include an insurance premium and interest on a loan taken out to pay a premium or another disbursement: r.21.12(3). The detailed (mandatory) requirements for evidence in support of an application are now in r.21.12(10). The litigation friend must file a witness statement setting out: the nature and amount of expenses; a copy of the CFA/DBA, supporting risk assessment and reasons for selecting that basis of funding (including advice given about it); a bill or costs breakdown from the solicitor; details of costs (agreed, recovered or fixed) recoverable by the claimant; and an explanation of the amount agreed/awarded for general damages for pain, suffering and loss of amenity and for past financial loss (accounting for sums recoverable by the Compensation Recovery Unit). The exacting detail specified in the list indicates that a court may be slow to permit recovery of expenses where there has been no or partial compliance.

# White Book Caution

See paragraph (2.1.03) of the White Book:

*In legal proceedings the burden of proof is on the person who asserts that capacity is lacking. If there is any doubt as to whether a person lacks capacity, this is to be decided on the balance of probabilities; see s.2(4) of the 2005 Act. The presumption of capacity will only be displaced on the basis of proper evidence.* ***That evidence must be current and must deal first with the "diagnostic test" of impairment or disturbance of the functioning of the mind or brain, then secondly the "functional test" of whether the impairment renders the person unable to make the relevant decisions in litigation****. It must deal with all the factors in s.3 of the Mental Capacity Act including whether there are any practical steps which could be taken to assist the claimant in making decisions in relation to the litigation. See Fox v Wiggins [2019] EWHC 2713 (QB) and King v Wright Roofing Co Ltd [2020] EWHC 2129 (QB).*

However correct test stated in the certificate of capacity at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1135274/capacity-to-conduct-proceedings-certificate.pdf

"The Supreme Court has made clear that when assessing capacity, the first question to be asked is whether the person is unable to make a decision for himself in relation to the matter. If so, the second question is whether that inability to make the decision is 'because of' an impairment of, or a disturbance in the functioning of the mind or brain. The second question looks to whether there is a clear causative nexus between [the person's] inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of that person's mind or brain. The Supreme Court was clear that the two questions 'are to be approached in that sequence' notwithstanding passages in the Code which suggest otherwise".

# The Need for Medical Evidence

The single test of capacity, namely whether any inability of [P] to make a decision in relation to the matter in issue is because of an impairment of, or a disturbance, in the functioning of the mind or brain" [see North Bristol NHS Trust v R [2023] EWCOP 5 at paragraph 48]. However, it is entirely legitimate to reach such a conclusion in the absence either of a formal diagnosis or without being able to formulate precisely the underlying condition or conditions. To this extent, therefore, the term "diagnostic" test which is often used here is misleading.

A diagnosis in its strict medical meaning is not therefore required and it follows also that medical evidence is not required in all cases

# Hinduja v. Hinduja and Ors [2020] EWHC 1533

That leads to the next point, is there always a need for medical evidence: the answer is no:

Falk J (as she then was) undertook a first principles analysis of the position, identifying that medical evidence is simply not required by the Rules.

*37. There is no requirement in the* [Civil Procedure Rules] *to provide medical evidence. The absence of any such requirement was commented on by Chadwick LJ in Masterman-Lister at [66]. There is no reference to medical evidence in CPR 21.6. The only reference to medical evidence is in paragraph 2.2 of PD 21, which applies where CPR 21.5(3) is being relied on.* ***That requires the grounds of belief of lack of capacity to be stated and, "if" that belief is based on medical opinion****, for "any relevant document" to be attached. So the Practice Direction provides that medical evidence of lack of capacity must be attached only if (a) it is the basis of the belief, and (b) exists in documentary form. It does not require a document to be created for the purpose.*

*50. In summary, medical evidence is not required under the rules* […]

This is now repeated in the new CPR r. 21.5(6) and still applies.

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

If there is even anecdotal evidence of a lack of capacity or the risk that a party may lack capacity, approval should nevertheless be sought in light of Dunhill v Burgin (Nos 1 and 2) [2014] UKSC: there must be a sufficient understanding of the '*claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers'.*

A creative approach is that contained in *Coles v Perfect* [2013] EWHC 1955 (QB). The Defendant submitted that on a proper construction of CPR r.21.10, a court's approval of a settlement agreement could only be valid and effective if it had made a prior determination that the claimant was a protected party.

Teare J approved the compromise using the High Court's inherent jurisdiction. Teare J noted, that if the court approved a settlement and it were later determined that Ms Coles lacked capacity, the effect of r.21.10 would not be that the settlement would be invalid, but rather that it was in fact valid as it had been court-approved. This mechanism of approval avoided delay and the disproportionate costs of further investigating capacity.

# Management of Awards: Children

3 options if not paid out directly to parent (in very small amounts):

1. Court funds:

4.5% in special account rate

Or Equity Tracker

2. PI trust

3. Junior ISA

# Recent Judicial Thinking

Recent Chancery Bar discussion group with Master Sullivan. She identified the following issues:

1. Equity tracker risk profile not attractive on child approvals (must be £10,000 or more).
2. Large awards likely to see Trust (bare) provision. Benefits: Investment flexibility in uncertain global markets; likely management as an adult but potentially costly.
3. Particular pitfalls in applications for approval with an management proposal under Trust will be: cost, terms of the Trust must be designed with protection of child (i.e. look at provisions on conflict; delegation of powers; liability of trustees)

# Common Problems to Watch

Confusion of child/protected party

No costs estimates of professional trustee

Trust requested, no draft trust

No proper explanation of terms of trust or court funds office process to litigation friend

In-house professional trustee, no consideration of undue influence issues: OH v. Craven [2016] EWHC 3146 (QB)

Court funds office investment requested, no birth certificate, no CFO 320, no majority direction in order

# Adult Fund Management

As noted, now £100,000 or more goes into the COP

The possible mechanisms to manage an award are broadly as follows: through the provision of a trust, through a deputy or under a lasting power of attorney (‘LPA’). It must be remembered that on transfer of a compromised award to the Court of Protection, through CPR r. 21.11(9), the Court of Protection will make any decision as to the form or mechanism of the management of award on the best interests principles referred to above.

Key case remains *Watt v ABC* [2016] EWCOP 2532 : 6 practice points to be considered in the balance.

# LPAS

An LPA should also not be overlooked. If in place before the accident, then there may be good grounds for arguing that it should continue, subject to an analysis that it remains in the party's best interests. In such a case where, for example, a brain injury leads to a lack of capacity to manage affairs, an LPA is a persuasive indicator of that party's capacitous wishes (a key consideration under s. 4 MCA). Moreover in a case of borderline capacity, whilst an injured party may not have capacity in relation to managing the award, he/she may have capacity to create an LPA (with appropriate assistance).

# A Close Sibling; the COP in Catastrophic Cases

Do not ignore the COP in cases where running concurrently

Claimants and Defendant may obtain a benefit from dual approach; when COP proceedings are ongoing (care provision/expert evidence)

Disclosure from COP:

No specific rules; discretionary; transparency order must be respected (mirrored to anonymity order in KBD); best interests decision; seek permission from COP judge.

Possible application by Defendant but unusual: case law unclear; locus of Defendant to make an application tenuous and unlikely to be seen as in P’s best interests (without consent of P’s solicitors)

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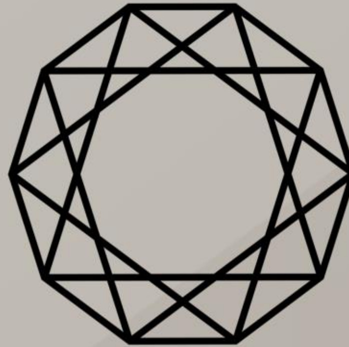

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