CAPACITY IN THE CONTEXT OF LITIGATION

1. A person's capacity to litigate may arise in the context of litigation generally but, frequently, arises where a claim is brought on behalf of someone who has suffered a traumatic brain injury. In those circumstances, consideration will have to be given to the questions whether the claimant has the capacity to litigate and, separately, whether the claimant has the capacity to manage any award of damages that the court might order. In a substantial personal injury claim, the latter issue is no mere technicality as the award will make provision, if necessary, for the costs that will be incurred in dealing with the Court of Protection and the appointment of, usually, a professional deputy and those costs can well exceed over £200,000. A defendant may question whether or not a claimant lacks capacity in order to try to avoid paying the substantial sums that would otherwise be awarded.

Starting Point

2. The starting point for issues of capacity in civil litigation is CPR Part 21. CPR Part 21.2 provides that a "*protected party*" must have a litigation friend to conduct the proceedings on his behalf. A protected party means a party who lacks capacity to conduct the proceedings and lacks capacity is defined as lacking capacity within the meaning of the MCA 2005. So far as any award is concerned, where a protected party is also a protected beneficiary, namely a person who lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings (again within the meaning of the MCA 2005) then the provisions of the Practice Direction to Part 21 at section 10 apply. Those provisions require the appointment of a deputy where the sum

exceeds £50,000 unless there is already a person having authority pursuant to a registered EPA or LPA.

Problems in Practice

3. In most, although not all, cases not involving claims for damages for personal injuries, it will be a matter of indifference to an opposing party whether the claimant (or defendant as the case may be) lacks capacity. Indeed, if there is a possibility that the opposing party lacks capacity, then if nothing is done about that and it later turns out that the opposing party did lack capacity, then any settlement that is reached not having the approval of the court will not bind the party who lacked capacity but did not have a litigation friend. Thus it is very much in those circumstances in the interests of all (lawyers included) to make sure that the issue is determined so that the chance of re-litigation and, probably, negligence actions can be ruled out.

4. The rules do not contemplate that it is necessary for a deputy to be appointed when proceedings on behalf of a claimant who lacks capacity are contemplated. If those proceedings are likely to result in a substantial award of damages, then it is probably wise to seek the appointment of a deputy early because in such circumstances, commonly, there will be substantial interim payments and it will be necessary for a deputy to be appointed so as to deal with those.

5. If a deputy is appointed before proceedings are started, then that deputy pursuant to CPR 21.4(2) has the right to be the litigation friend so long as he has power to conduct proceedings on the claimant's behalf. Commonly, however, a deputy is not in place at

the time proceedings are started and, therefore, the litigation friend will, usually, be a family member. Subsequently, a deputy may well be appointed and the usual practice in the case of substantial personal injury awards is for a professional deputy to be appointed, although the practice is growing for a joint appointment of a professional deputy and a family member.

6. The litigation friend, once appointed, would act as the claimant's statutory agent in the litigation, see paragraphs 15 and 30 of *BVB* (2010) EWHC 543 (Fam). Thus the litigation friend would be entitled to take all decisions (subject where necessary to the court's approval) on behalf of the claimant that concerned the litigation process (but has no authority outside that process). Where, however, the deputy, or deputies, would have to be involved would be whenever a decision needed to be made on behalf of the claimant concerning the claimant's property or affairs, in particular, for example, the purchase of a property.

7. It is commonly the case that in substantial brain injury cases, the claimant will seek a large interim payment to fund the purchase of a suitably adapted property. In such a case, it will be necessary for the deputy or deputies to decide whether to do so on behalf of the claimant acting in the claimant's best interests and, so far as necessary, obtain the approval of the Court of Protection for the purchase. It would then be for the litigation friend to decide whether the application for an interim payment had reasonable prospects of success. It is possible, although unlikely, that there could be conflict between the views of the litigation friend (usually, as set out above, a family member) and the deputy (usually a professional although sometimes, again as set out above, acting together with a family member).

8. The chance of such conflict is by no means merely theoretical. It was illustrated vividly in the case of *Re SK* (2012) EWHC 1990 (Cop). The case did not concern the purchase of a property for a claimant in a personal injury claim but the type of rehabilitation regime that was appropriate for the claimant. The claimant's brother was the claimant's litigation friend in the personal injury action and he, supported by experts who had been instructed by the solicitors in the personal injury action, wanted his brother to have an intensive two year-long rehabilitation programme. Those actually treated the claimant, however, considered that he would not benefit from that and it was not in his best interests and the issue of what rehabilitation programme came before the Court of Protection. The claimant was made a party to the Court of Protection proceedings and the Official Solicitor acted for him as his litigation friend in those proceedings. Thus, in two separate proceedings, the claimant had two different litigation friends. The Official Solicitor submitted to the Court of Protection that the claimant's best interests were served by a less intensive regime of rehabilitation.

9. The reported decision concerns the issue of who was entitled to be heard in the Court of Protection (an issue to which I shall return later). The result of the reported decision is that the claimant's brother was entitled to be joined in the Court of Protection proceedings simply as his brother and therefore someone interested in his welfare but the defendant in the personal injury proceedings, who also applied to be joined, was not entitled to be a party to the Court of Protection proceedings. In his judgment, Bodey J. at paragraph 48 remarked that the fact that the claimant had different litigation friends holding different views as to what was best for the claimant in different sets of proceedings had led to legal and practical difficulties and suggested that where there were such parallel

proceedings, it would be better, unless otherwise contraindicated, to have the same litigation friend in both such proceedings. He did remark, however, that the claimant's brother could not, for reasons unrelated to the decision about rehabilitation, have been the claimant's litigation friend in the Court of Protection and that the Official Solicitor would be unlikely to accept such an appointment in the personal injury proceedings.

10. Often the professional deputy in such cases is a member of the firm of solicitors acting for the claimant. It would, to my mind, be unsatisfactory if such a person were also the claimant's litigation friend. There would be no outside scrutiny of the firm's actions within the litigation. It would be as if the claimant's firm of solicitors was instructing itself. That is not to take anything away from the independence of professional deputies in firms of solicitors even where the same firm acts for the patient in that patient's personal injury claim. It is simply to accept the reality of matters.

Determination of Capacity in Practice

11. The issue of a party's capacity, if it is raised in proceedings, should be dealt with at as soon as possible. The Court of Appeal so held in the case of *Masterman-Lister v Brutton* (2002) EWCA Civ 1889 (2003) 1 WLR 1511 (and in the context of care proceedings in *Re D (Children)* [2015] EWCA 749). In the former case, there was no Court of Protection involvement and the issue was, in fact, whether or not the claimant was entitled to reopen litigation that had been settled on the basis that he had capacity and, therefore, had not had the approval of the court and whether parallel proceedings against the firm of solicitors that acted for him were not barred on the grounds of limitation because of the extension of limitation periods where a claimant lacks capacity.

12. Sometimes, but not always, however, in cases where capacity is in dispute, a deputy will have been appointed. In those circumstances, the Court of Protection will already have adjudicated upon the issue of the claimant's capacity pursuant to its powers under section 15 MCA 2005 to make declarations as to a person's lack of capacity to make specified or described decisions. A typical Court of Protection order appointing a deputy in relation to a patient's property and affairs will recite that the court has been satisfied that the patient is unable to make various decisions for himself in relation to matters concerning his property and affairs because of an impairment of or disturbance in the functioning of his mind or brain.

13. Such a dispute, in such circumstances, came before Kenneth Parker J. in ***Loughlin v Singh*** (2013) EWHC 1641 (QB). In that case the issue of capacity was dealt with at trial and, in the end, after hearing extensive evidence, the judge decided that the claimant lacked capacity both to conduct litigation and manage his property and affairs.

14. It is of note, however, that little, if any, attention was paid to the fact that the Court of Protection had already determined that issue and, although the court plainly had before it documents from the Court of Protection, it is not clear from the judgment whether or not the parties had sought permission from the Court of Protection pursuant to Court of Protection Rules 2007, rule 91 to use information relating to Court of Protection proceedings in the Queen's Bench proceedings.

15. Part of the reason why the Queen's Bench Judge paid little, if any, attention to the Court of Protection declaration of incapacity is contained in the annex to the judgment. There

the judge was critical of the conduct of the claimant's solicitors and of one of the claimant's experts in the case. The expert had changed his view about capacity without proper explanation or grounds and the claimant's solicitors had presented the Court of Protection with that evidence of incapacity without alerting the Court of Protection to the fact that that was not the original view of that expert or to the fact that other experts held opposing views. At the end of his annex to his judgment at paragraph 15, he said,

> *"All I need add is that the lamentable failures that occurred here, and the invidious position in which the judge in the Court of Protection was unwittingly placed, must never be repeated. The issue of capacity is of very great importance, and all involved must ensure that the Court of Protection has all the material with which, on proper reflection, is necessary for a just and accurate decision.*"

16. As I have said, the judgment itself does not mention the decision of the Court of Protection. That rather begs the question of the status of such a decision. Section 15 MCA 2005 gives the Court of Protection specific power to make declarations as to a person's capacity but it must be recalled that such declarations must always be decision-specific and time-specific. As regards the latter point, in respect of many patients the lapse of time will not make matters better only, possibly, worse but there are some patients who will vary in time as to their capacity to make particular decisions.

17. Some decisions by courts as to status are binding in rem, in other words, on the whole world whether parties to the action or not. Thus, for example, decisions as to the status of a person's marriage are thus binding. In one sense, a decision as to a person's mental capacity is a decision as to that person's status but that decision is, as discussed above, fact and time-specific.

18. In *Hill v Clifford* (1907) 2 Ch.237, the Court of Appeal held in relation to inquisitions under the then Lunacy Acts, that the result of such an inquisition could be read in a subsequent suit between third parties as evidence of the "*lunacy*" but not as conclusive and might be traversed (see the judgment of Cozens-Hardy MR page 244).

19. It is likely that that approach would be followed today, even though the MCA 2005 gives the Court of Protection particular power to make declarations as to capacity. That is because, if for no other reason, circumstances might have changed. In the *Loughlin* case, no doubt, if this issue had arisen, the Defendant would have said that there was material that was not put before the Court of Protection which ought to have been put before the Court of Protection which would, had it done so, have made a very material difference to its deliberations.

20. A decision of the Court of Protection to appoint a deputy, after having considered appropriate evidence, should not, however, be dismissed lightly. In my view, the appropriate approach in subsequent proceedings between the patient as claimant and a defendant would be for the civil court to ask itself the question whether or not there was material which undermined the Court of Protection's decision to a significant degree. Was there something which was wrongly withheld from the Court of Protection? Have circumstances changed? In my view, the subsequent civil court should not simply embark on its own investigation, feeling free to come to a different conclusion. That would undermine the status of the Court of Protection, lead to potentially different conclusions by courts of competent jurisdiction and possibly bring the operation of the courts into disrepute.

Can a defendant in a personal injury action intervene in capacity decisions in the Court of Protection?

21. As I said above, I will return to the case of ***Re SK*** on this issue. In that case, the defendant in the Queen's Bench proceedings sought to be joined in the Court of Protection proceedings to be heard on the issue of what decision should be taken concerning the patient's rehabilitation. The defendant was concerned that if the Court of Protection came to a decision that it was in the best interests of the Claimant to have intensive rehabilitation, then, without the opportunity of being heard, the defendant would be "*stuck*" with that decision and that was unfair. What the defendant appeared to propose (see paragraph 18) was a hearing where a single High Court Judge sitting in the Court of Protection should decide the issue "*Where should (the claimant / patient) be accommodated and cared for, and with what level of rehabilitation?*" and that the decision in relation to that would be binding both in the Court of Protection and in the Queen's Bench proceedings.

22. The judge decided that the Defendant had no right to be joined. There were two reasons.

23. The first reason was that he decided that the defendant did not have a sufficient interest in order to be joined as a party, see rule 75 of the Court of Protection Rules, and that was because the Defendant's interest was in preserving its own financial position and not in the best interests of the patient (see paragraph 41). Furthermore, he considered that it would not, in any event, be desirable to join the defendant within the meaning of rule 73. There were a number of reasons for that, the decision in the Court of Protection and the Queen's Bench Division was a different decision, the decision in the Queen's Bench Division is a "*snapshot*", whereas the decision in the Court of Protection is for that

particular time only and capable of variation. He also questioned whether, if there were multiple defendants, all defendants should be entitled to be joined and whether such would be an intolerable burden on the Court of Protection.

24. A distinction can be drawn between the ***SK*** case and any case where the claimant's capacity is in issue. There the decision that the Court of Protection has to make is, essentially, exactly the same as the civil court would have to make with only one difference, namely that the latter would be making a decision on a *once-and-for-all* basis (at least at trial) and the former, of course, would not be a *once-and-for-all* decision, although in practice it might be.

25. Otherwise, the considerations would be the same and the overriding difficulty, it seems to me, would be the lack of any interest in the best interests of the claimant on the part of the applying defendant. That that is not always necessarily a bar is shown by the fact that, in statutory will cases, parties who may have no interest whatsoever in the best interests of the patient are joined if their rights under an existing will or the rules of Intestacy may be affected. That said, the Practice Direction F, at clause 9, makes separate provision requiring such people to be named as respondents.

The Role of Lasting Powers of Attorney

26. It should be noted that whilst a person may lack the capacity to manage their own property and affairs, they may still have the capacity to decide to make (and indeed revoke) a lasting power of attorney. If, in such circumstances, a claimant does so, then the claimant can choose who should look after his property and affairs, specifically his personal injury award.

27. He may choose to appoint a family member alone or a family member together with a professional. If he does the former, of course, his solicitors would have to advise him of the risks of that course of action and the reasons why the Court of Protection does not, ordinarily, appoint a family member as sole deputy in relation to the administering of large personal injury awards (conflicts of interest etc.).

28. There would be no need for a hearing to approve that course of action and, therefore, no need to persuade the court that the disadvantages of having the award in, in effect, a personal injury trust (want of supervision etc.) outweigh the advantages of such a course, reduction in costs etc. The principle of autonomy would apply, namely that if P is able to make a decision, then P has the right so to do (whether the decision is wise or not). As mentioned above, the Practice Direction to CPR 21 makes clear that where there is a lasting power of attorney, the damages award does not come under the jurisdiction of the Court of Protection.

A Cautionary Tale

29. Questions of capacity in litigation come up in a number of different ways. One such different way was in *Evesham & Pershore Housing Association v Werrett* [2015] EWHC 1060 (QB).

30. The person whose capacity was in question was the defendant in an action for possession.

31. The claimant had brought proceedings against the defendant for possession on the basis of antisocial behaviour and, upon issue, had sought and obtained an injunction. The matter came to court where by consent the court granted a final injunction and a

suspended possession order. The matter was then brought back to court on the basis that it was alleged that the defendant had broken the terms of the injunction and the suspension. The Defendant admitted some breaches and the judge found others (but not all) proved. The question of punishment for breach of the injunction was adjourned, a warrant for possession was issued but the defendant applied for that to be suspended.

32. That all took place on 2nd January 2014. At some point in March 2014, the defendant's solicitors (who had acted throughout) raised the issue of the defendant's capacity. They obtained a report from a consultant psychiatrist who considered that "*he may / will be unable to defend the proceedings, give evidence and cope with cross-examination… his fitness is impaired and he is not fit to plead*". This arose from brain injuries suffered in a serious road traffic accident.

33. The same psychiatrist provided a certificate to the Official Solicitor as to the defendant's capacity and that prompted the Official Solicitor to write to the defendant's solicitor stating that the evidence clearly established lack of capacity and agreeing to act as the defendant's litigation friend.

34. The matter then came back to court on 19th May 2014 where, on that material, the judge determined that the defendant had, at all material times, capacity.

35. Then the defendant's treating neuropsychologist provided a similar certificate to that of the psychiatrist and the defendant's solicitors made an application to vary the order made in May. The judge held that he did not have power to vary his order but, in any event, held that the new certificate did not change matters.

36. The matter went on appeal to Nicol J, where the application was heard as a rolled up application for permission to appeal and for the appeal, if permission were granted. In the end, Nicol J refused permission to appeal, holding both that the judge had been right to determine that he had no power to vary his order and to consider that the second certificate did not add any further weight to the first.

37. The moral of this story is that it is not necessarily enough to rely, in civil proceedings at least, on certificates from medical practitioners that will commonly satisfy both the Official Solicitor and the Court of Protection as to a person's capacity. A fuller report, together, if the matter is contested, with oral evidence will almost certainly be required.

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2nd November 2015