Civil Justice Council

Procedure for Determining Mental Capacity in Civil Proceedings

A response by the Association of Personal Injury Lawyers

March 2024

Introduction

APIL welcomes the opportunity to respond to the Civil Justice Council's consultation about the Procedure for Determining Mental Capacity in Civil Proceedings.

Concerning the nature of the issue and the role of the court, APIL believes that the court should be involved in the investigation of capacity, especially if the party is unrepresented. Nevertheless, we highlight reservations with the introduction of inquisitorial approaches for the investigation and determination of litigation capacity within the adversarial system. There is a risk that this could create inefficiencies, prejudice other aspects of the claim and create satellite litigation.

APIL welcomes clearer guidance as to the duty on legal representatives to raise with the court an issue as to the litigation capacity of their client and as to the duty on legal representatives to raise with the court an issue as to the litigation capacity of another party to the proceedings who is unrepresented.

We also support an amendment to the Pre-Action Protocols to require parties to identify issues of potential lack of litigation capacity at the pre-action stage. In relation to the proposals about substantive proceedings pending the determination of capacity, APIL agrees that pending a capacity determination no steps may be taken in the proceedings without the permission of the court, as already stipulated in the CPR Part 21.

Concerning funding and costs, APIL highlighted concerns around the extension of fixed recoverable costs and the implications of the new vulnerability provisions, which may limit vulnerable parties' ability to recover additional costs necessary. The rigidity of the 20% threshold combined with the timing of the assessment of vulnerability costs may deter solicitors from taking on such cases, raising substantial access to justice concerns as vulnerable parties may need to cover shortfalls from their damages. APIL urges a re-evaluation of the new vulnerability rule to safeguard vulnerable parties' access to justice and the proper pursuit of their claims.

Consultation Questions

<u>Nature of the issue and the role of the court</u>

1) Do you agree that other parties to the litigation do not generally have any legitimate interest in the outcome of the determination of a party's current litigation capacity?

Yes, APIL agrees with this. However, we appreciate that other parties may have an interest in the outcome of the determination of a party's litigation capacity to the extent that a determination of lack of litigation capacity will have implications on the financial and welfare capacity of the party.

The other party will also be interested in the determination outcome of litigation capacity given that if a party takes action while lacking capacity without it being determined by the court, those actions will not be valid. Further, insurers will seek reassurance that the receipt of the damages is valid. For instance, if a party lacks capacity and a settlement is not approved in an approval hearing, it would be deemed invalid, allowing the claimant to reopen the case later. Thus, other parties might seek reassurance that the capacity to litigate has been properly assessed.

2) Do you agree that the approach to the issue should be inquisitorial, with the court ultimately responsible for deciding what evidence it needs to determine the issue?

APIL has reservations regarding the implementation of this inquisitorial approach within an adversarial process. However, we agree that it could prove beneficial for the court to request information on the necessary evidence, especially in cases where a solicitor believes a party lacks capacity, yet the party disputes this and instructs the solicitor not to take any action. Empowering the court to intervene in such scenarios could prevent potential conflicts arising from the party contesting the solicitor's decision to serve or file evidence indicating their potential lack of capacity.

Identification of the Issue

3) Is clearer guidance needed as to the duty on legal representatives to raise with the court an issue as to the litigation capacity of their own client?

APIL believes that clearer guidance is welcomed about the duty on legal representatives and the threshold for triggering that duty to draw to the court's attention a potential lack of capacity in a client. As recognised in the consultation paper, the exact threshold for triggering the duty is described in various ways, therefore we believe it would be helpful to clarify the trigger for the duty to raise a litigation capacity issue to the court.

We recommend the introduction of a declaration confirming either the absence of capacity issues requiring investigation or the presence of a potential lack of capacity. If an investigation is necessary, the declaration should include an outline of the steps taken to address this matter.

4) What level of belief or evidence should trigger such a duty?

The difficulty of providing general guidance that will be apposite to different types of civil proceedings needs to be acknowledged. To avoid any wrong assumptions one way or the other, we suggest that there be an expectation that capacity to litigate is considered in every case (please see question 3), although the scope of enquiry may well be limited in most cases.

We also suggest that the Directions Questionnaire should include inquiries concerning litigation capacity and identify concerns/doubts about a party's litigation capacity. We believe this would ensure that any doubts about a party's capacity are promptly identified and addressed at the earliest opportunity.

5) Is clearer guidance needed as to the duty on legal representatives to raise with the court an issue as to the litigation capacity of another party to the proceedings who is unrepresented?

APIL supports clearer guidance on the duty on legal representatives to raise with the court an issue as to the litigation capacity of another party to the proceedings who is unrepresented. However, caution is needed to prevent situations of oppressive behaviour or tactical strategies from the represented party towards the litigant in person. This duty should not be used in a way to deter the litigant in person from taking any further steps in the claim, and the court should intervene promptly to assist the unrepresented parties with the next steps (e.g. the appointment of a litigation friend) and then make a ruling to determine whether the party lacks capacity.

7) Should other parties to proceedings have a general duty to raise with the court an issue as to the litigation capacity of a party to the proceedings who is unrepresented:

a. In all cases?

b. In some cases (e.g. where the other party is a public body, insurer etc.)?

APIL believes that if there is a general duty, it should apply to all cases.

9) Should the Pre-Action Protocols be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage?

APIL agrees that Pre-Action Protocols should be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage. This requirement must be carefully worded and applied equally to claimants and defendants, particularly during pre-action stages where medical evidence is limited. Both parties should make their best efforts to identify and address any capacity-related issues that may affect the proceedings at the earliest stage. This change to the Protocols is welcomed to avoid situations where the opposing party argues that there was not enough disclosure as to the party's litigation capacity. If issues of potential lack of litigation capacity are identified at the pre-action stage both parties will be aware of the position from the outset of a claim.

10) Should key court forms (claim forms, acknowledgments of service and defence forms) be amended to include questions about whether another party may lack litigation capacity?

Yes, APIL agrees with this.

11) Should there be any particular sanction(s) for a clear failure by another party to raise the issue?

No, the identification of capacity-related issues is an individualised assessment, and as recognised by the consultation document, it can be difficult to distinguish between a party merely giving unwise instructions and a party being unable to understand, retain and weigh the relevant information because of an impairment. We believe a general sanction for a failure by another party to raise the issue would be unfair.

Investigation of the issue

13) Do you think any of the following should be involved in the investigation of an unrepresented party's litigation capacity:

a. The court?

b. Other parties and/or their legal representatives?

c. The Official Solicitor (Harbin v Masterman enquiry)?

d. Litigation friend (interim declaration of incapacity)?

e. Other (please specify)?

APIL believes that the court should be involved in the investigation of an unrepresented party's litigation capacity and, in some cases, the official solicitor and the litigation friend.

14) Do you have any comments to make in relation to your answers to the previous question?

As stated previously, doubts about the litigation capacity of a party should be first identified in the Directions Questionnaire. Regarding the court, we believe the court should be involved in the investigation. In particular, if the party is unrepresented, the court should case manage the issue and assist the unrepresented party with all the steps needed to determine litigation capacity and then make a ruling on whether the party lacks capacity or not.

We believe that the official solicitor could be beneficial in certain cases. For instance, when there are issues with the appointment of a litigation friend or when there is not an obvious person to be appointed as a litigation friend, the official solicitor could be appointed just to investigate capacity and to obtain a capacity report.

The litigation friend should also be involved in the investigation of an unrepresented party's litigation capacity. We believe that the involvement of the litigation friend in the investigation is important when a party refuses to accept they might lack capacity. There have been cases where a litigation friend has been appointed to instruct a solicitor to investigate capacity and/or obtain a medical report. The involvement of the litigation friend in the investigation can help resolve the question of whether someone has litigation capacity in situations where the unrepresented party refuses to address the issue.

15) Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity?

No, we believe that the court does not need more powers to determine litigation capacity.

17) Should the civil courts have powers to call for reports, similar to those of the Court of Protection, for purpose of investigating and determining issues of litigation capacity?

APIL agrees that the civil courts should have powers to call for reports for the purpose of investigating and determining issues of litigation capacity if the party is unrepresented.

However, we do not agree that this should be the case for represented parties given the adversarial system. The responsibility for presenting evidence lies with the parties involved in the dispute rather than with the court itself and we are concerned that the introduction of an inquisitorial approach within the adversarial system could create inefficiencies. There is a risk that this could prejudice other aspects of the claim and create satellite litigation.

Determination of the issue

18) Should there be a rule or presumption that other parties to the proceedings (and/or non-parties) cannot attend a hearing to determine a party's litigation capacity?

19) Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing?

Yes, APIL agrees with both proposals. It is sensible that reporting restrictions are in place so that the default position is similar to the one in the Court of Protection hearings. There should be a presumption of granting anonymity to the party regardless of the determination outcome.

20) What form should a party's right to challenge a determination that they lack capacity take, to ensure they are able to exercise that right effectively?

We believe the right to challenge a capacity determination should be through the appeal mechanism already in place. There is an existing framework in the Civil Procedure Rules (CPR) Part 52 that gives parties the right to appeal an order whether they were present at or absent from the hearing at which the order was made. The CPR also provides parties the right to set aside an order.

21) Should a party's legal representatives be able to refer for review a determination on capacity which they consider to be obviously and seriously flawed?

As mentioned in response to question 20, the CPR already provide a framework so that parties can either set aside an order made or appeal it.

Substantive proceedings pending determination

22) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that no steps may be taken in the proceedings without the permission of the court?

23) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that any existing orders in the proceedings should be stayed?

Yes, APIL agrees that pending a capacity determination no steps may be taken in the proceedings without the permission of the court. This is already stipulated in the CPR Part 21. We also agree that any existing orders in the proceedings should be stayed. All this is subject to the power of the court under Part 21.3 (3) and (4) to validate steps taken or to be taken.

24) If so, do you think those starting points should be subject to a 'balance of harm' test?

25) What factors should be included in such a test?

No. We believe that the current process is effective, and the introduction of a new 'balance of harm' test might unnecessarily complicate the process. We appreciate that this question aims to address tactical strategies where an issue about litigation is raised inappropriately. However, we believe there are other ways to ensure that parties are not abusing the process. If the issue of capacity is raised inappropriately, the court has the authority to subsequently validate the steps taken while pending determination.

Funding and Costs

29) Do you have any experience of issues arising in relation to payment of costs of investigating and determining litigation capacity by the party's insurers or other third-party funding?

Our members' feedback is that they have had positive experiences with insurers regarding the payment of costs of investigating and determining litigation capacity. But that relates to cases where costs are not fixed, and the prospect of issues needs to be considered in the context of cases, where fixed recoverable costs may apply, especially if that turns upon the question of capacity. The CPR does allow for the possibility of recovering additional costs where the vulnerability of a party has made additional work necessary, but with the extension of Fixed Recoverable Costs and the provisions on vulnerability, this is by no means guaranteed.

31) Should a central fund of last resort be created, to fund the investigation and determination of litigation capacity issues where there is no other feasible source of funding?

Yes, we agree with this.

32) On what principles should the costs of a determination be decided?

We believe this should be based on the principles set in CPR Part 44.

Other questions

33) Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above?

In *Loughlin*[1], the Court held that notwithstanding the legal presumption in favour of capacity, the claimant did not have capacity to conduct litigation and manage his property and affairs. Kenneth Parker J acknowledged that the question of the Claimant's capacity was finely balanced. Kenneth Parker J explained that the case was somewhat exceptional because of its marginal dimension in relation to capacity, and thus he decided to take into account the

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

views of those professionals who have had close and frequent contact with the claimant. The claimant's family also agreed he lacked capacity. Kenneth Parker J concluded that on the balance of probabilities, the claimant lacked the capacity to litigate and to manage his property and affairs, accepting the evidence of a Dr O'Driscoll who concluded that the claimant's difficulties with weighing information were due to his brain injury. In particular, Dr O'Driscoll's evidence was that the claimant could not anticipate the consequences of his actions at either a behavioural or emotional level. Thus, although he might be able to decide in a '*laboratory setting'* – with supervision as he had been and was still subject to – he would not be able to make a decision in the real world – he would be '*vulnerable in an unpredicted and unmanaged environment'* and would not seek assistance of his own initiative. This case touches on the difference between having capacity in ideal conditions – with support, not under pressure – and lacking capacity 'on the ground'.

In the case of *Damiani*[2] the court permitted the defendant to resile from a settlement agreement reached in a protected party claim. At a joint settlement meeting in February 2017, a compromise was made based on the then discount rate of 2.5%. The discount rate was due to change and would substantially affect the quantum of the claim. Therefore, the parties agreed that if the discount rate was reduced then the future losses would be recalculated. When the discount rate changed the settlement figure increased significantly. The defendant sought to resile from the agreement before the court had approved it. It was common ground that pursuant to CPR 21.10 the settlement was not valid until it had been approved by the court. The claimant sought a declaration that CPR 21.20 was incompatible with Article 6 and Article 14 of the ECHR. Mr Justice Dingemans agreed that the two articles were engaged and that the claimant was being treated differently to other litigants by virtue of his status as a protected party as he required approval of the court to secure a valid settlement. This difference in treatment was only reasonable if it pursued a legitimate aim. The dispute the court had to resolve was whether the requirement of court approval of a settlement was a proportionate means of achieving that aim. The court held that the scheme was intended to protect incapacitated parties from inadequate compromises and so it ensured that they were not bound by agreements until approved. The scheme was well established so all parties knew where they stood, and allowing both parties to withdraw from a settlement agreement prior to approval maintained a fair balance.

34) Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?

APIL has several concerns regarding the extension of fixed recoverable costs and the new vulnerability provisions. The new rules introduce two hurdles for claimants. The first is in relation to timing and the second is in relation to the costs' threshold.

In terms of timing, the new FRC rules create a situation where a legal advisor must incur the additional costs on a case of advising a vulnerable claimant before they know whether those costs will be recovered. This will not be done until the conclusion of the claim, this is at odds with non-FRC cases where the question of costs will be assessed at the point of cost budgeting.

The second issue is in relation to the costs' threshold. The scheme provided that vulnerable parties within the fixed recoverable costs scheme may not recover any additional costs ordered by the court to support their full participation unless these costs exceed the overall

[2] *Revill v Damiani* [2017] EWHC 2630 (QB)

recoverable costs by at least 20%. We find the inflexibility of this 20% threshold unreasonable due to the lack of clarity surrounding what constitutes "additional work alone" on vulnerability for a claim to meet this threshold. Should a party fail to surpass this hurdle, they are restricted to fixed costs, even if additional expenses were incurred due to their vulnerability. If these vulnerability costs prove unrecoverable, solicitors may hesitate or be unable to take on such cases, creating a significant access to justice concern. In such scenarios, solicitors might request their clients to cover any shortfall from their damages.

The combination of the 20% threshold and the timing of the assessment of vulnerability costs, which are deferred until the conclusion of the claim, extends and exacerbates the uncertainties around the litigation and the advice that is required to be given to a vulnerable party as to the cost of that litigation.

APIL believes that the new rule on vulnerability must be re-evaluated for flexibility in approach concerning costs exceeding the FRC because of the need to properly protect a vulnerable person’s right to access justice and to ensure that their claim can be properly pursued.

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