

APIL

Brain Injury Special Interest Group
A Talk on Capacity Issues in Personal Injury
Litigation

1

Marc Willems Q.C.

COBDEN HOUSE CHAMBERS

25th September 2020

www.cobden.co.uk

Capacity in Personal Injury Cases

2

1. Capacity to Litigate
2. Capacity to have Sexual Relations
3. Care Packages and Deprivation of Liberty
4. Welfare Deputies in Personal Injury Litigation
5. Capacity and Social Media
6. Capacity to Manage Property and Affairs
7. Financial Deputies and the extent of their Authority

Capacity to Litigate

3

Introduction

1. Statutory Background to Capacity and the Mental Capacity Act 2005

5 general principles in Section 1 of the MCA 2005:

- a) A person must be assumed to have capacity unless it is established that he lacks capacity;
- b) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;
- c) A person is not to be treated as unable to make a decision merely because he makes an unwise decision;
- d) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interest
- e) 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 effectively achieved in a way that is **less restrictive** of the person's rights and freedom of action.

Definition of Mental Capacity

4

Sections 2 and 3 of the MCA 2005 define mental capacity:

The test of capacity has two elements both of which must be present before a person can be found to lack capacity.

1. There must be an inability to make a decision; and
2. This must be **because of** an impairment of, or a disturbance in the functioning of, the mind or brain.

How the Act helps if a person lacks capacity

5

1. If the person in question has made a lasting or enduring Power of Attorney, then decisions may be taken for or on behalf of the donor of the power by their attorney
2. In relation to matters relating to care and treatment, decisions may be effectively taken on an informal basis under Section 5 MCA 2005. This is done not by conferring a substantive right but by removing civil or criminal liability arising in respect of acts done in connection with care or treatment, provided that:
 - a) The person carrying out the act reasonably believes it would be in the other person's interests; and
 - b) They are not negligent.
3. Decisions may be taken for a person who lacks capacity by the Court (Section 16(2)(a)).
4. The Court may appoint a Deputy (Section 16(2)(b)). A Deputy may only take decisions on behalf of P where he knows or reasonably believes that P lacks capacity in relation to that matter (Section 20(1) MCA 2005).

Best Interests

6

Any external decision made on behalf of a person who lacks capacity must be done in their **best interests**.

There is no definition of **best interests** within MCA 2005 but Section 4 sets out various factors.

Appointment of Deputy

7

Section 16(4) adds two principles which the Court is required to take into account and weigh when determining whether to appoint a Deputy:

- a) That a decision by the Court is to be preferred to the appointment of a Deputy; and
- a) The powers conferred on a Deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

An Individual's Capacity is Issue-Specific

8

Apparently straightforward concept but its application has caused consternation and significant litigation.

For example, issue-specific capacity was difficult to define in the context of Litigation and Sexual Relations.

Capacity to Litigate

Dunhill -v- Burgin [2014] UKSC 18

1. The Issue: Did the Claimant have capacity to litigate the **case that she presented** at Court or was the test of capacity to be considered in the light of **the claim that the Claimant in fact had?** Answer: Need to have capacity to understand the advice which the case required rather than the advice which the case in fact received?
2. The Supreme Court unanimously rejected the Defendant's argument that the Claimant's capacity would depend upon the case as presented because this would mean that the Claimant's capacity would depend upon whether she had received good advice, bad advice or no advice at all. In Paragraph 18 Baroness Hale stated:
"That the test of capacity to conduct proceedings for the purpose of CPR Part 21 is the capacity 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".

Capacity to have Sexual Relations

Two Conflicting Views

1. Baroness Hale's view at Paragraph 27 in the case of **R -v- Cooper [2009] UKHL 42** was:

*“My Lords, it is difficult to think of an activity which is more personal and situation-specific than sexual relations. One does not consent to sex in general. One consents to this act of sex **with this person** at this time and in this place”.*

2. Mumby J. in **Re: MM [2007] EWHC 2003** had this view:

*“So capacity to consent to sexual intercourse depends upon a person having sufficient knowledge and understanding of the nature and character – the sexual nature and character – of the act of sexual intercourse, and of the reasonably foreseeable consequences of sexual intercourse, to have the capacity to choose whether or not to engage in it: See **XCC -v- MB**...It does not depend upon an understanding of the consequences of sexual intercourse with a particular person. Put shortly, capacity to consent to sexual relations is **issue-specific; it is not person (partner) specific**”.*

Which view is right?

11

The Court of Appeal decided on 11th June 2020 in **A Local Authority -v- JB (2020) EWCA Civ. 735** that both were right and agreed with Sir Brian Levison P. in **IM -v- LM and others (2014) EWCA Civ. 37** when he said at Paragraph 75 that:

“In our view, each of the Judges, including Baroness Hale, was correctly stating the law. The reason why the words used are diametrically opposed to each other arises, in our view, from the due distinct and differing context in which the respective judgments were given”.

In short, general capacity to give or withhold consent to sexual relations as per Mumby J. is the necessary **forward-looking** focus of the Court of Protection and the person-specific, time and place specific occasion when that capacity is actually deployed and consent is either given or withheld (per Baroness Hale) is the **backward-looking** focus of the criminal law.

The 2020 Court of Appeal case took the matter further by identifying that capacity in a Court of Protection sense, had to involve the capacity to consider whether the person with whom the potentially incapacitous person was having sex, themselves had capacity to consent.

Therefore the issue-specific nature of capacity to consent to sexual relations is not a “one size fits all” and depends upon the characteristics of the protagonists but also upon the legal context in which it is to be considered.

This explains the unpopular decision in the case of **Regina (Monica) -v- Director of Public Prosecutions** [2019] QB 1019 of the Divisional Court which rejected an appeal made by the victim of the Metropolitan Police’s undercover police officer scandal against the refusal to judicially review the Crown Prosecution Service’s decision not to prosecute the Police Officers for rape. This is because the concept of deception vitiating consent for the purposes of the offence of rape did not apply to deceptions which were not closely connected with the performance of the sexual act, or intrinsically so fundamental owing to that connection that they could be treated as cases of impersonation. The decision might well be different in a civil context.

Care Packages and Deprivation of Liberty

At Paragraph 46 Baroness Hale in the case of **Cheshire West -v- P [2014] AC** at Paragraph 46 said the following:

“If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage”.

The acid test is said to be:

1. Is the person subject to constant supervision and control; and
2. Is the person free to leave, with the focus being not on whether a person seems to want to leave, but on how those who support them would react if they did want to leave.

The issue is relevant because some care packages will involve a Deprivation of Liberty which will require a Deprivation of Liberty Safeguards (DoLS).

Following the case of **Staffordshire County Council -v- K (Court of Protection)** [2016] 3 WLR and Charles J's judgment, the following can be said to apply:

1. When a Court awards damages and the Court of Protection when appointing a Deputy to hold and manage those damages and the Deputy to whom damages are paid must then make decisions on its application in P's best interest all should be aware that the regime of care and treatment of persons can create a "private" deprivation of liberty within Article 5 (Right to Liberty).
2. The same facts do not make the State responsible for a Claimant's deprivation of liberty and therefore this does not trigger direct State involvement.
3. However, the knowledge of the Courts of the private deprivation of liberty triggers an obligation on the Local Authority with its adult safeguarding role to investigate, to support and sometimes to make an Application to the Court of Protection.

What should a Welfare Deputy do if a package of care does or could amount to a Deprivation of Liberty?

15

The answer is to be found in Paragraphs 56-59 of the **Staffordshire County Council** case in Charles J's Judgment.

1. Applying the best interests test and the authority conferred by a Financial Deputyship Order, a Deputy who agrees to pay for the care and treatment of P or for a property for P could not properly ignore the issues
 - a) Whether P was being deprived of his liberty or restrained; and
 - b) Whether that was lawful or needed authorisation under the DoLS or by the making of a Welfare Order of the Court of Protection.

2. The need for a Financial Deputy to consider and apply the best interests test is based on the principle in Section 1(6) of taking the least restrictive option and the general point that decisions made on behalf of P should result in a lawful situation on the ground.

What should a Welfare Deputy do if a package of care does or could amount to a Deprivation of Liberty?

3. A Financial Deputy should raise these issues with the relevant providers and the relevant Local Authority with statutory duties to safeguard adults. The Local Authority could then put in place arrangements that meant that P was not objectively deprived of his liberty or that would make the care arrangements less restrictive and/or remove any restraint.
4. Unless the situation on the ground could be altered in a way that mean that P was not being deprived of his liberty, then, the Deputy would either have to take steps
 - (i) to ensure the situation on the ground was authorised under the DoLS or by the making of a Welfare Order; or
 - (ii) To ensure that the situation was kept under review by the relevant decision makers on the ground, the Local Authority and P's family and that they all remained of the view, and he agreed, that the care and treatment being provided was the least restrictive option to best promote P's best interests.

The relevance of this in PI Litigation

17

The need to consider DoLS, an Application to the Court of Protection for a Welfare Order or other welfare considerations should, according to Charles J. at Paragraph 10(6) of his Judgment “*be factored into the calculation of damages awards in the future*”.

Welfare Deputies need to be costed into Personal Injury claims for damages.

Welfare Deputies

18

In the case of **Lawson, Mottram & Hopton** before **Hayden J. (Vice President of the Court of Protection)** [2019] EWCA P22 the Court was asked to consider the preliminary issue of:

“What is the correct approach to determining whether a welfare deputy should be appointed?”

Section 16 MCA 2005 provides for the appointment of Deputies and no distinction is made between Financial and Welfare Deputies.

Quoting Baker J. in **G -v- E [2010] 2512 (COP)** Hayden J. stated:

“The words of Section 16(4) are clear. They do not permit the Court to appoint deputies simply because “it feels confident it can” but only when satisfied that the circumstances and the decisions which will fall to be taken will be more appropriately taken by a Deputy or Deputies rather than by a Court, bearing in mind the principle that decisions by the Court are to be preferred to decisions by Deputies. Even then, the appointment must be as limited in scope and duration as is reasonably practicable in the circumstances”.

Is there a presumption or bias against the appointment of a Welfare Deputy in the Code and Statutory Scheme?

20

Answer: Emphatically no

However Hayden J. accepted that a decision against appointment was the likely consequence of the application of the relevant factors to the individual circumstances of the case.

Examples of Cases which might require Welfare Deputies

21

1. Significant care packages which affect the Claimant's Article 5 right to liberty.
2. Cases where future treatment decisions will be required which are complex and carry significant risk.
3. Cases where family members present a risk to the health and wellbeing of the Claimant through their conduct.
4. Cases where the potential involvement of Mental Health Services and/or the Mental Health Act 1983 powers of compulsory hospitalisation may arise.
5. Cases where self-harm is a risk to life.

The type of Claim that can/should be made for a Welfare Deputy

22

1. A similar multiplicand x multiplier approach as with a Financial Deputy; or
2. A contingencies claim

Capacity and Social Media

23

Cobb J. in **Re: A (Court of Protection)** [2019] 3 WLR 59 gave guidance in relation to the test of capacity for use of the internet and social media.

Capacity to engage in social media for the purposes of online “contact” is distinct from general considerations of other forms of direct or indirect contact.

Wider internet use is different from general issues surrounding care.

Unique characteristics of social media networking and internet use.

24

Distinguished from other forms of contact and care

Why?

The scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation, encouragement of self-harm, access to dangerous individuals and/or information.

Section 3(1)(a) test of the MCA 2005

25

An individual would need to understand, retain and use and weigh the following:

1. Information and images (including videos) on the internet or social media can be shared more widely, including with people you don't know, without you knowing or being able to stop it.
2. It is possible to limit the sharing of personal information or images (and videos) by using "privacy and location settings" on some internet and social media sites.
3. Placing material or images (including videos) on social media sites which are rude or offensive, or share those images, might upset or offend others.
4. Some people you meet or communicate with (talk to) online, who you don't otherwise know, may not be who they say they are (they may disguise or lie about themselves), someone who calls himself a "friend" on social media may not be friendly.

5. People you meet or communicate with on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm.
6. If you look at or share extremely rude or offensive images or messages online, you may get into trouble with the Police because you may have committed a crime.

Cobb J. was assisted by medical evidence about the applicant's understanding.

The issue of social media and internet use is present in every brain injury case.

Capacity to Manage Property & Affairs

27

This issue is familiar to all who practice in serious personal injury cases.

Charles J. in the case of Watt -v- ABC (COP) [2017] 4 WLR 24 stated at Paragraph 11, having heard medical evidence, as follows:

- i) I agree and conclude that as a result of his brain injury ABC lacks the capacity to **make decisions on the management and so investment and application of his substantial damages award and assets representing it from time to time** and so the COP has jurisdiction;
- ii) In my view, the medical and lay evidence that founds that conclusion also substantiates the common ground in the QB proceedings and on this Application that with, and in some circumstances without, support ABC does have the capacity to make a number of decisions relating to his property and affairs and so, for example, his day-to-day expenditure from income.

The test to be applied to assess capacity to manage property and affairs (which again is issue-specific) is related to the future needs and size of the claim **and** form of award.

Further, **WATT** informs us that a Financial Deputy does not need to have control over the entirety of the award and a Claimant's autonomy can be maintained for certain expenditure.

Financial Deputy or Trustee?

29

The case of **Watt** also considered whether a Trustee or a Financial Deputy appointed by the Court of Protection should be the outcome.

At Paragraph 32 Charles J. made it clear that deciding that the Claimant lacked capacity to manage his property and affairs merely founded the jurisdiction of the COP to make an Order that gave the management of the capital of the award to a Deputy or Trustees. It did not presume that a Deputy was the inevitable answer.

At Paragraphs 53 and 54, Charles J. concluded that a Financial Deputy was better suited to that particular case because the statutory scheme provided advantages over a Trust namely:

1. The restriction placed on the power of the Deputy by Section 20(1) and the need to apply Section 1(5) (best interests) and Section 4(4) (participation by P) promoted autonomy and flexibility and provided a statutory decision-making structure for the performance of the duty and ability of the Deputy to
 - (a) Let P make the decisions he or she can; and
 - (b) To make decisions for P when he or she lacks the capacity to do so.
2. A Financial Deputyship also gave protection to the Deputy and third parties in respect of dealing with P's property.
3. A Financial Deputyship also provided a statutory decision-making structure that was directed to persons who lack or may lack capacity to make relevant decisions with appropriate support.

The Trust contrasted

31

The authority of trustees is granted and governed by the Trust Deed and Trust Law.

It is not as easily controlled or managed and can involve significant expense when things go wrong.

Is there a presumption that a Financial Deputy will normally be appointed if the Court decides that the Claimant lacks capacity to manage property and affairs?

32

Answer No:

Charles J. gives the answer at Paragraph 78 by stating that the normality of the appointment of a Deputy does not create a presumption, a starting point or bias that needs to be displaced.

What kind of Trust?

33

1. The bare trust misconception
2. The Court would need to know precisely what type of Trust was recommended and therefore if a party proposed a Trust this would inevitably mean a Trust Deed would need to be presented with all clauses dealing with all situations.
3. The Court of Protection would by its Order create the Trust and therefore could create a bare trust or a revocable or irrevocable trust. Those who dare enter the depths of Chancery Law are welcome to explore this further.

The extent of a Financial Deputy's powers and duties

34

See ACC [2020] EWCOP 9

General Authority

A Deputy is personally at risk as to costs if he acts outside his authority.

A Deputy must satisfy himself that any particular act in respect of a P's property and affairs is either specifically authorised or falls within the "general" authority.

The safeguard for the Protected Party is that the Deputy is subject to supervision by the Office of the Public Guardian.

The authority encompasses such ordinary non-contentious legal tasks, including obtaining legal advice, as ancillary to giving effect to the general authority. This can mean:

1. Authority to purchase or sell property including conveyancing;
2. Authority to let property including dealing with leases or tenancy agreements;
3. Authority to conduct P's business including dealing with employment contracts of that business;
4. Authority to prepare an annual Tax Return and obtain advice on completion of the Return;
5. Discharging financial responsibilities under a tenancy and obtaining advice as to liabilities under the tenancy;
6. Applying the Claimant's funds so as to ensure that the costs of care arrangements are met and therefore dealing with employment contracts of directly employed carers.

Where specific authority is required

36

Specific authority is required to conduct litigation on behalf of P except where the contemplated litigation is in the Court of Protection in respect of a property and affairs issue or to seek Directions in respect of a welfare issue. For contentious litigation a general authority allows a Deputy to conduct matters up to receiving a Letter of Response but no further.

General authority does not encompass seeking advice or other steps preliminary to litigation in respect of welfare issues but it does encompass making an Application to the COP for further Directions/specific authority in respect of welfare issues.

General authority does not encompass steps in contemplation of an appeal against an EHCP.

If urgent action is required to protect P's interests by litigation the Deputy proceeds at risk as to costs but can make a retrospective application for authority to recover costs from P's funds. There is no presumption it will be successful.

Deputy wishes to instruct his own firm to carry out legal tasks

37

Here special measures are required to address the conflict of interest such as:

1. A Deputy may seek prior authority.
2. The Deputy is required to seek in a proportionate manner three quotations from appropriate providers and to determine where to give instructions in the best interests of P.
3. The Deputy must seek prior authority from the Court if anticipated costs exceed £2,000 plus VAT.
4. The Deputy must clearly set out any legal fees incurred in the account to the Public Guardian and append the notes of the decision making process to the Return.
5. Specific authority is required to use P's funds to pay a third party's legal costs even if they relate to litigation for the benefit of P.

Any Questions?

38

Many thanks for listening