

## ***THE MENTAL CAPACITY ACT 2005***

### ***A Short Introduction for PI Practitioners***

1. The Mental Capacity Act 2005 (“the Act”) aims to create a new statutory framework designed to protect and empower vulnerable people. Its key provisions came into force on 1 October 2007 along with a raft of new procedural rules.
2. This paper aims to give a brief introduction to parts of the new statutory code most directly affecting PI practitioners. Other major changes effected by the Act e.g. the new law as to Lasting Powers of Attorney and advance decisions to refuse medical treatment, are not considered.

#### Overview

3. The key basic points to note:
  - 3.1 The Act introduces a new test for mental capacity: sections 2 and 3.
  - 3.2 It replaces Part 7 of the Mental Health Act 1983 and the whole of the Enduring Power of Attorney Act 1985.
  - 3.3 It creates a new superior court of record known as the Court of Protection. This replaces the old office of the Supreme Court of the same name.
  - 3.4 The new Court of Protection has a comprehensive jurisdiction over the health, welfare and financial affairs of people lacking capacity.
  - 3.5 It has its own judges and its own new set of procedural rules and Practice Directions: the Court of Protection Rules 2007 SI 2007/1744(L12)
  - 3.6 The Act is backed by a highly detailed Code of Practice. This runs to some 308 pages and gives practical guidance as to many aspects of application of the Act.

- 3.7 The Code has statutory force. Persons acting in a professional capacity (which obviously include solicitors and counsel) have a duty to have regard to the Code: s.42(4) of the Act.
- 3.8 With effect from 1 October 2007 a new CPR Part 21 was introduced to reflect the provisions of the Act.

#### The test of capacity

4. Sections 1-4 of Act are fundamental to its operation and are attached for detailed consideration.
5. Some points to note:
  - 5.1 The Act essentially applies to persons over 16.
  - 5.2 The Court of Protection can make decisions about the property or finances of a person under 16 (or appoint a deputy to make these decisions) if that person lacks capacity to make the relevant decisions and is still likely to lack such capacity when they reach the age of 18: see s.18(3) of the Act.
  - 5.3 For the purpose of the new CPR Part 21 a child can also be a protected party.
  - 5.4 Capacity is to be assessed on a decision and time-specific basis.
6. Paragraphs 4.32 and 4.33 of the Code of Practice provide as follows:
  - 4.32. There are several tests of capacity that have been produced following judgments in court cases (known as common law tests) these cover: ... capacity to enter into a contract, capacity to litigate (take part in legal cases ...)
  - 4.33 The Act's new definition of capacity is in line with the existing common law tests, and the Act does not replace them. When cases come before the court on the above issues, judges can adopt the new definition if they think it is appropriate. The Act will apply to all other cases relating to financial, healthcare or welfare decisions.

7. This guidance is potentially puzzling insofar as it relates to capacity to litigate:
  - 7.1 CPR r.21.1 defines a protected party as a person who lacks capacity to conduct the proceedings within the meaning of the Act.
  - 7.2 For the purposes of CPR Part 21 the statutory definition must be applied: see *Saule v Nouvet* [2007] EWHC 2902 (para. 19).
  - 7.3 The Code seems to make it clear that guidance contained within the previous case law may remain relevant to determinations of capacity on the specific facts.
  - 7.4 One broad distinction enshrined in pre-Act case law clearly survives (and remains relevant for the purpose of putting detailed questions to medical experts): the distinction between whether the client has capacity to (1) provide instructions in relation to conduct of the claim and (2) decide, even with advice, how to administer a large award (see further *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511).
  - 7.5 In this regard it is to be noted that the new CPR Part 21 distinguishes between “protected party” and “protected beneficiary”.
  - 7.6 Note *Bailey v Warren* [2006] EWCA Civ 51, however. In relation to capacity to litigate it may be an error to judge matters on too piecemeal a basis. There a litigant who had ability to understand what was meant by a 50/50 liability split, but lacked ability to understand the concept of damages that resulted from the split, lacked true capacity to conduct the proceedings.
8. Who is to assess capacity?
  - 8.1 For a legal transaction a solicitor or legal practitioner must assess the client’s capacity to instruct them: paragraph 4.41 of the Code.

- 8.2 In cases of doubt an opinion from a doctor or other professional expert should be obtained.
- 8.3 Paragraph 4.54 of the Code emphasises the need for a formal assessment if there is doubt as to (1) capacity to sign a legal document (2) whether a litigation friend is required.

#### Borderline cases

9. Many brain damaged or psychiatrically injured claimants will be so minimally or so severely injured that the existence or absence of capacity to manage their own affairs will be tolerably clear.
10. It is the borderline cases that will pose difficulty. As to these some further points:
- 10.1 Section 15(1) of the Act gives the Court of Protection power to make a declaration as to a person's capacity.
- 10.2 Paragraph 8.16 of the Code suggests that applications concerning a person's capacity are likely to be rare. It goes on to state, however, that an application may be relevant if professionals disagree about a person's capacity to make a specific (usually serious) decision and/or if there is a dispute over whether a person has capacity.
- 10.3 Pre-Act case law can still provide useful guidance as to borderline cases. See in particular *Lindsay v Wood* [2006] EWHC 2895.
- 10.4 If thinking of assessing capacity by reference to one's own impressions in conference, note paragraph 20 of the judgment. Stanley Burnton J cautioned himself against making his own assessment of capacity based upon conduct in the witness box as against the opinions of professional medical experts.
- 10.5 In *Lindsay v Wood* [2006] EWHC 2895 it was suggested that where a claimant's legal team are in a difficult position in presenting a positive case as

to capacity (e.g. because a client is adamant he or she has capacity) consideration should be given to involvement of the Official Solicitor. In such cases it appears to remain an option to contact the office of the Official Solicitor and invite involvement in seeking a declaration as to capacity from the Court of Protection.

10.6 This approach will not be required in every instance. Whether a person is a protected party can in a suitable case be determined as a preliminary issue by the ordinary civil court judge without involvement of the Official Solicitor: see *Saulle v Nouvet* [2007] EWHC 2902.

10.7 ***Saulle v Nouvet*** [2007] EWHC 2902 is the first main case dealing with determination of capacity in a borderline personal injury case since implementation of the MCA 2005. It provides invaluable guidance as to how the issues are likely to be broken down and analysed by the court.

### The Court of Protection

11. The Court of Protection is a new superior Court of record which will have its Registry in Archway Tower, Archway, North London. This will also be the hearing centre for cases heard in London and the South East.

12. The day to day running of the court will be the responsibility of the Senior Judge, Denzil Lush (formerly Master of the Court of Protection). A number of additional High Court, Circuit and District Judges will be nominated to hear Court of Protection cases. It is understood 2 District Judges will hear cases full-time at the Archway central registry.

13. The court's core powers are enshrined in sections 15-18 of the Act, attached for detailed consideration.

14. Note: receivers appointed before 1 October 2007 will now be treated as deputies: see Schedule 5 of the Act.
15. The Court of Protection has its own new set of procedural rules, the Court of Protection Rules 2007, Practice Directions and standard forms. Whilst these appear to a large extent to mirror the CPR it is outside the scope of this talk to consider the rules in any detail. The key website is [www.publicguardian.gov.uk](http://www.publicguardian.gov.uk).

### CPR Part 21

16. A completely new CPR Part 21 and Part 21 Practice Direction also came into effect on 1 October 2007.
17. Core concepts and provisions, e.g. as to the need for a litigation friend and approval of settlements, essentially follow the familiar pattern. Note: for the purposes of the litigation alone a deputy need not be appointed under the Act (see CPR r.21.4) but see further paragraph 20.3 below regarding approval of settlements.
18. For the old “patient” are substituted the terms “protected party” and “protected beneficiary”. The former means a person who lacks capacity to conduct the proceedings within the meaning of the Act; the latter is a protected party “who lacks capacity to manage and control any money recovered ... “
19. The court’s approval is required for settlement of a claim brought by a protected party (not just a protected beneficiary).
20. Key new provisions are contained within CPR r.21.11 and paragraph 10 of the Part 21 PD:

- 20.1 CPR r.21.11(3) specifies that where money is recovered on behalf of a protected party then before giving any directions as to payment into court, investment etc. under the rule “the court will first consider whether the protected party is also a protected beneficiary”.
- 20.2 If the sum recovered is under £30,000 it may be retained in court and invested in the same way as the fund of a child.
- 20.3 If it is £30,000 or more then unless someone is already appointed either as a deputy under the Act or with enduring/lasting power of attorney the order approving settlement will also contain a direction to the litigation friend to apply to the Court of Protection for the appointment of a deputy, after which the fund will be dealt with as directed by the Court of Protection.

#### Final practice points

21. For claimants incapable of managing their own affairs Court of Protection and receivership fees may constitute a significant head of damage.
22. As a matter of basic principle costs associated with having a claimant's finances managed by a deputy under the new Court of Protection will be recoverable.
23. It will be necessary to keep a close check to ensure that an appropriate breakdown of likely costs, in line with the new regime, is being put forward. It may take time for the new regime to bed in before the position can be determined with clarity.
24. In *Saulle v Nouvet* [2007] EWHC 2902 a number of related issues were mooted by the court, though not determined:

- 24.1 A person is capable of having capacity because, and only because, he is able to understand and seek suitable professional advice. The court queried whether this might open up entitlement to claim the cost of such advice in a suitable case, contrary to previous case law (para. 58).
- 24.2 In *Saullé* the claimant was ultimately held to have capacity. It was recognised that this might not persist. The judge suggested the court might award a discounted lump sum in respect of the risk of a deterioration in the claimant's condition that could require him to seek the assistance of the Court of Protection (para. 59).

9 Gough Square  
London EC4A 3DG  
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Daniel Lawson