Crossover Issues for the PI & COP Practitioner: a view from the middle

Joint Meeting

APIL NORTH WEST REGIONAL GROUP
&
COURT OF PROTECTION PRACTITIONERS ASSOCIATION

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1. There are currently many unresolved conflicts in the mental capacity sphere, which have implications for both Court of Protection and Community Care practice and personal injury litigation. The purpose of this talk is to highlight some of these tensions (as time permits) and provide food for thought for both the adult welfare and personal injury professional.

2. Inevitably, as a lawyer, I must start with a few caveats. Firstly, the law in this area is in a remarkable state of flux. In many instances, I can only signpost some of the imminent judicial resolutions or flag up some of the issues which are likely to fall for consideration in due course. Secondly, I am involved in some of the cases referred to so my room for personal comment is restricted in places.

Capacity and its assessment

3. Most if not all of you will be familiar with the relevant parts of the Mental Capacity Act 2005 and the accompanying Code of Practice, so I will take these briefly.

4. What does the Act mean by 'lack of capacity'? Section 2(1) of the Act states: "For the purposes of this Act, 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*."

5. There are two stages to the assessment process (commonly referred to as the *diagnostic* and *functional* tests or components).

6. Firstly, a person asserting the incapacity of another must prove that P has an impairment of the mind or brain, or some sort of disturbance that affects the way their mind or brain works. If a person does not have such an impairment or disturbance of the mind or brain, they will not lack capacity under the Act.

7. Secondly, for a person to lack capacity to make a decision, the Act says: "*P's impairment or disturbance must affect his or her ability to make the specific decision when needed.*"

8. Before making such an assessment, P must be given *all practical and appropriate support* to help them make the decision for themselves. Stage 2 only applies if all practical and appropriate support to help the person make the decision has *failed.*

9. For the purposes of the Act (see section 3(1)), a person is unable to make a decision if they cannot:

    - Understand information about the decision to be made (the Act calls this 'relevant information');
    - Retain that information in their mind;
    - Use or weigh that information as part of the decision-making process; or
    - Communicate their decision (by talking, using sign language or any other means).

Litigation capacity

10. Although there have always been cases in which the assessment was more difficult than in others, until more recently the law in this area was relatively settled, practitioners taking **Masterman-Lister v Jewell**[1] as both their start and end point.

11. However, the Supreme Court is currently seized of the **Dunhill v Burgin** litigation[2]. In brief summary, the claimant suffered severe brain injury as the result of a road traffic accident on June 25, 1999. The nature and extent of her injuries were not fully explored or appreciated by her own advisers. Proceedings were issued, the claim having been limited to £50,000, and were the subject of a court door settlement in the sum of

[1] [2003] 1 W.L.R. 1511
[2] **Dunhill v Burgin (No 1)** [2012] P.I.Q.R. P15 and **Dunhill v Burgin (No 2)** [2012] 1 W.L.R. 3739

£12,500. Having first issued a professional negligence action against her former advisers, the claimant then sought to reopen the original litigation on the grounds that at all material times she had liked capacity conduct that litigation (so called **Masterman-Lister** proceedings).

12. The issue of the claimant's capacity to litigate was tried by Silber J who delivered judgment on March 7, 2011. The parties were at odds regarding nature of the Court's enquiry when looking retrospectively at a particular transaction and, therefore, defined the main issue as follows:

Whether in considering the issue of capacity historically rather than prospectively, should the court:

(a) Confine itself to examining the decisions in fact required of the claimant in this action; or

(b) Expand its consideration to include decisions which might have been required if the litigation had been conducted differently.

13. Giving judgment for the defendant, Silber J held that: "when the court is considering if the consent order might be set aside on grounds of lack of capacity, the fundamental question for the court when considering this issue of capacity historically, is confined to examining the decisions in fact required of the claimant in the action as drafted… It should not expand its considerations to include decisions which might have been required if the litigation had been conducted differently".

14. On appeal, the Court of Appeal (Lord Justice Ward giving the only judgment) disagreed:

> "In my judgment Silber J fell into error, perhaps misled by the narrow focus of the issues as they had been defined, in treating the relevant transaction as the actual compromise negotiated outside court leading to the consent order made on January 7, 2003. The proper question as settled by Masterman-Lister and Bailey, was whether the claimant had the necessary capacity to conduct the proceedings or, to put it another way, the capacity to litigate…Since the compromise is not a self-contained transaction but inseparably part of the proceedings, the question is not the narrow one of whether she had capacity to enter into that compromise but the broad one of whether she had the capacity to conduct those proceedings" (at [24]) and hypothetical issues (if the proceedings had been conducted differently) were to be taken into account (at [27])"

15. In light of the Court of Appeal's decision, a second question fell for consideration (as mooted by Chadwick LJ in **Masterman-Lister** supra at 1537 A-B [68]):

The Court having declared that the Claimant lacked capacity to enter into the compromise agreement of 7 January 2003 and the Defendant declining to ask this Court to approve the compromise retrospectively, does CPR Part 21.10 have any application where the Claimant brought a claim in contravention of CPR Part 21.2 so that in the eyes of the Defendant and the Court she appeared to be asserting that she was not under a disability?

16. This issue was tried before Mr Justice Bean on 3-4 October 2012. Prior to handing down his decision, the Supreme Court granted permission to appeal the Court of Appeal's judgment. Accordingly, by consent the Court issued a leapfrog certificate and both appeals will be heard together on 3-5 February 2014.

17. Whatever the outcome, the Supreme Court's ruling is likely to have significant implications on practice in both the civil courts and Court of Protection.

Deprivation of liberty, safety and best interests

18. On 21-23 October 2013, the Supreme Court heard consolidated appeals in **P v Cheshire West & Chester Council**[3] and **P & Q v Surrey County Council**[4] concerning the Deprivation of Liberty Safeguards. Similarly, the Supreme Court's decision here is likely to have significant implications for both mental capacity and personal injury practitioners alike. It is not possible here to provide a rehearsal of (or mini lecture on) the issues in these appeals, suffice to record that irrespective of whether or not somebody is cared for at public or private expense (or perhaps a combination of both) a balance must be struck between flexibility and certainty, so that the legality of any restrictions are appropriately scrutinised whilst promoting the best interests of disabled people.

19. I can, however, give two examples of cases in which both the Court of Protection and the civil courts have been seized of the same subject matter – with drastically different results.

[3] [2012] P.T.S.R. 1447
[4] [2012] P.T.S.R. 727

20. In **Sedge v Prime**[5], Court of Protection proceedings has preceded an application for an interim payment to establish an accommodation and care package within a personal injury claim. As part of a multidisciplinary assessment, it had been concluded that it was in P (or C)'s best interests for him to live in the community. Giving judgment in favour of the claimant, the Deputy Judge commented upon the earlier determination as follows[6]:

> "I do not regard myself as in any way bound by that decision. At the same time I do not regard it as irrelevant. The fact that those experienced in caring for others and/or arranging such care unanimously concluded that it would be in the claimant's best interests for him to be cared for in the community suggests that a considerable body of experienced opinion did not reject community care as a potential realistic option for the claimant. But the decision offers limited support for the claimant's case since the test the court has to apply is different."

21. Clearly an earlier *best interests* decision is relevant information as part of a subsequent decision in connection with a compensation claim, but is the latter assessment entirely unfettered? Are the injured party's rights (and Court's obligations) arising under Articles 5 and 8 not potentially engaged in each case? Equally, would respect for dignity in those who lack capacity to make decision regarding their own personal care arrangements not inform the assessment of what was reasonable by way of private expenditure?[7]

22. In **Roult v North West SHA**[8], partial approval of settlement was made in a liability admitted birth injury claim on the basis that the claimant would be accommodated by his local authority in a 'group home'.

23. This was news to the local authority. In ignorance of the proposals for the claimant's care, the local authority (with the support of the Official Solicitor, who was in a similar state of darkness) pursued a welfare application in the Court of Protection owing to safeguarding concerns.

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[5] (2013) 129 B.M.L.R. 37

[6] At [40]

[7] **R. (on the application of A) v East Sussex CC (No.2)** [2003] EWHC 167 (Admin); (2003) 6 C.C.L. Rep. 194 – This is an unusual case in which Munby J considered the interrelationship between a local authority's responsibility as an employer under the Manual Handling Operations Regulations 1992 and the interests of disabled people to be lifted safely and with dignity.

[8] [2009] P.I.Q.R. P18

24. Ultimately, the Court of Protection concluded that it was in the claimant's best interests (with the agreement of his new advisers in the clinical negligence proceedings) for him to live in his own property as part of a proposed supported living arrangement. As the terms of the partial settlement excluded any liability on the part of the defendant to meet such costs, the interested parties remain at loggerheads as to how the claimant's future care needs should be met.

25. The weighing of risk versus personal autonomy is a common feature of Court of Protection and personal injury claims, particularly in borderline capacity cases. Although the aims are often very similar, practitioners in the latter discipline typically have little if any familiarity of representing clients in a welfare jurisdiction and vice versa. Having the benefit of some experience in both, I am firmly of the view that there is much gained by at least a rudimentary knowledge of the judicial approach in each jurisdiction.

26. **Re MM** [2009] FLR 443, Munby J (as he then was) observed as follows at [120]:

> "A great judge once said, 'all life is an experiment', adding that 'every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge' (see Holmes J in *Abrams v United States* (1919) 250 US 616, at 624, 630). The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be bought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good – in particular to achieve the vital good of the elderly or vulnerable person's *happiness*. What good is it making someone safer if it merely makes them miserable?"

27. Reading this passage in abstract, one might as readily assume the learned Judge to be talking about sexual relations and contact decisions in connection with a vulnerable adult (the actual subject matter the proceedings) as a decision whether or not to order the trial of a home or supported living placement (say, for example, where there is uncertainty as to how well the risks to the claimant, family members or professional carers might be managed in that environment).

28. Concerns expressed in the context of adult welfare proceedings are occasionally echoed by rehabilitation professionals working in the NHS and private sphere[9]:

> "There are unfortunately too many brain-injured people who having been awarded generous personal injury settlements continue to lead impoverished lives with little self-determination or independence. They are not living their lives the way they wish to, but the way well-intentioned health professionals have determined they should live it. They may be "safe" but unfulfilled. They may be "stable" but their life has little meaningful activity."

29. Using the example of a residence issue, in personal injury proceedings the tension is typically a financial one: the cost of success or failure will be borne (at least in part) by the tortfeasor. In Court of Protection proceedings, the focus will normally be on expressed wishes and respect for autonomy. For example, in **P v M (Vulnerable Adult)**[10] and **Re M (Best Interests - Deprivation of Liberty)**[11] the learned Judge in each case held that the risks (of potentially life-threatening consequences in each case) did not outweigh the benefit in each case of ordering P's return home with a package of support, at least on a trial basis, thereby giving respect for family life and autonomy.

30. There are some capacity issues which throw up similar difficulties, irrespective of whether or not the vulnerable adult has a personal injury claim. Last summer, BABICM's summer conference focused on all aspects of relationship following head injury[12]. In the recent case of **AB v LM & Others**[13], the Court of Appeal has finally had an opportunity to grapple head on with issue of capacity to engage in sexual relations. Hopefully, the case will provide clarification, as the issue of capacity in this context is of practical significance and acute sensitivity for injured people and those fulfilling a supporting role (family, case managers, carers etc).

31. It is also a sphere of human activity where, as observed in the authorities, the State should tread carefully (safeguarding authorities and the Courts etc).

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[9] *Personal Injury Law and Severe Head Injury: Helping Millionaires to Lead Impoverished Lives?* Bruce Scheepers, Mark Thorneycroft and Allan Perry-Small [2009] J.P.I.L. ISSUE 4/09 at Page 272

[10] [2011] 2 FLR 1375

[11] [2013] EWHC 3456 (COP)

[12] A report of this and some of the talks, including my own paper on some of the legal issues, are included within the BABICM Newsletter, n53 (2012).

[13] Appeal heard before the PQBD, Tomlinson & McFarlane LLJ on 13-14 November 2013 with judgment reserved.

32. In conclusion, whilst there is some tension between *best interests* and *reasonableness*, the respective tests in each jurisdiction, it would surely be illogical and inconsistent if the reasoned approach of one judge dealing with a COP case (if not exactly the same subject matter, as in the case of **Sedge**) does not inform the approach of another judge dealing with similar issues in a private claim (and vice versa).

Loughlin v Singh and Others[14]

33. This case throws up a number of important issues and practice points for both the COP and PI practitioner:

34. Firstly, an important if subtle point is the judicial evaluation of expert evidence[15]. On a number of occasions the Judge emphasises the extent to which the experts have[16] (or have not[17]) made a detailed and careful review of the relevant material. Moreover, the Judge expressly attaches particular weight to one expert's practical experience in cases of a similar nature[18]:

> "Dr O'Driscoll is a consultant neuropsychiatrist with considerable experience, both in community based rehabilitation and in the clinical tertiary setting. He emphasised that neuropsychiatrists focussed mainly on the behavioural and emotional aspects of frontal lobe injury... Not only did he have expertise that comprehensively embraced all the issues as regards capacity, he had also considerable practical experience in working with cases, such as the present one, which were at the margin between capacity and incapacity. He had before him all the information, gathered over many years, about the claimant's behaviour, and the assessments made by others."

35. Secondly, the Judge - albeit with some reticence - took into account the views of other professionals who have been in close and frequent contact with the claimant. Such reserve is surprising. The importance of such evidence has been emphasised in a number of cases[19]. Moreover, it would fly in the face of the Mental Capacity Act 2005 not to take into account such evidence, as reflected in the Code[20]:

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[14] [2013] COPLR 371

[15] Rather than overburden this document, please see the talk I gave at the APIL Brain Injury Conference 2012 - *Understanding mild to moderate brain injury & choosing the right expert* for further guidance.

[16] Of Dr Schady at [22], of Dr Moss at [26] and of Dr O'Driscoll at [51]

[17] See Appendix in connection with the evidence of Professor Barnes

[18] [2013] COPLR 371 at [36] and [51] – Likewise PI practitioners can draw on the experience and guidance of those who deal with capacity issues on a more regular basis – see ***Compensating elderly clients*** [2012] Eld LJ 278

[19] See **Saulle v Nouvet** [2008] M.H.L.R. 59 at [53], **Bailey v Warren** [2006] C.P. Rep. 26 at [87]-[90] and generally **Lindsay v Wood** [2006] M.H.L.R. 341

[20] At Paragraph 5.49

"The Act places a duty on the decision-maker to consult other people close to a person who lacks capacity, where practical and appropriate, on decisions affecting the person and what might be in the person's best interests. This also applies to those involved in caring for the person and interested in the person's welfare. Under section 4(7), the decision-maker has a duty to take into account the views of the following people, where it is practical and appropriate to do so:

- Anyone the person has previously named as someone they want to be consulted,
- Anyone involved in caring for the person,
- Anyone interested in their welfare (for example, family carers, other close relatives, or an advocate already working with the person),
- An attorney appointed by the person under a Lasting Power of Attorney, and
- A deputy appointed for that person by the Court of Protection."

36. Thirdly, the Judge discounted past professional care and case management services by 20% on a *broad brush* basis. The precise jurisprudential basis is unclear[21], but this is a cause of significant concern for both the lawyer and professional deputy assisting a claimant with acquired brain injury. It is imperative that all professionals supporting an injured person understand and, if appropriate, scrutinise paid care and case management roles[22] and that all services are appropriately estimated[23].

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[21] Arguments of a similar nature were rejected by Stuart-Smith J in the case of **Ali v Caton & Anor** [2013] EWHC 1730 (QB) at [323h]; "*The position of a significantly brain-damaged claimant who acts on the basis of apparently reasonable advice is strong, though not always impregnable, when seeking to recover the costs of so doing from a tortfeasor. On this item, the balance of the argument strongly favours the claimant. In the event, the attempt to prepare Jubair for independent living has not been successful and should now not be maintained...While I accept that it may have been possible to do some things better (for example, a more vigorous approach to the implementation of strategies for independent journeys), that does not vitiate the general purpose and reasonableness of the strategy.*" This judgment is proceeding by way of appeal and hence some clarification may be provided in due course.

How is the decision of Parker J in **Loughlin** to be reconciled with case law in this context (namely mitigation) which (1) makes clear that it is the injured party's actions which are relevant in this context ("*For a supervening cause or a failure to mitigate to relieve a defendant...there must, in my judgment, be a finding of some conduct on [the claimant's] part or on the part of someone for whom the [claimant] is in law responsible*" per Beldam LJ in **Mattocks v Mann** [1993] RTR 13) and (2) that, in any event, these actions are not to be judged harshly ("*As between a claimant and a tortfeasor the onus is on the latter to show that the former has unreasonably neglected to mitigate the damages. The standard of reasonable conduct required must take into account that a claimant in such circumstances is not to be unduly pressed at the instance of the tortfeasor...the claimant's conduct ought not to be weighed in nice scales at the instance of the party which occasioned the difficulty*" per Sachs LJ in **Melia v Key Terrain Ltd** (1969), cited with approval in **Morris v Richards** [2004] P.I.Q.R. Q3).

[22] Helpful guidance on the role of the case manager can be found in the case **Wright v Sullivan** [2006] 1 W.L.R. 172. For further detail on the clinical objectives, *Rehabilitation following ABI* (RCP & RSRM 2003) is a useful starting point. Please also see *Good Practice in Brain Injury Case Management* (2006) Jessica Kingsley Publishing (Ed. Jackie Parker).

[23] The same applies equally of deputyship costs, the Court demonstrating reluctance to assist a Protected Party in the event of an underestimate of charges; see **In the matter of GW** (decision of Master Howarth dated 19 September 2013 in the Senior Courts Cost Office).

37. Fourthly, and finally for these purposes, a number of issues are raised in relation to disclosure of documentation before (and/or prepared in connection with) the Court of Protection proceedings.

38. Given the importance of the decisions under consideration, it is undoubtedly correct that *all* material which has a bearing on P's capacity should be placed before the Court of Protection[24].

39. This gives rise to the thorny question of "what disclosure might be made of reports made available to the Court of Protection for these purposes in subsequent civil proceedings?"[25] - No doubt this issue will fall for further judicial consideration in due course.

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[24] As a specialist forum, perhaps the Court of Protection is best placed to consider contentious capacity issues and brain injury cases might be transferred, for these purposes? See Gordon Ashton OBE's article in APIL PI Focus Vol 18 Issue 5.

[25] Historically, the Court of Protection has shown great reticence receiving applications by third parties or strangers to the original application. In the context of applications by a deputy seeking authorisation to access public assistance against the background of an earlier personal injury settlement, for example, if the interested local authority has been given short thrift - **Re Reeves** (COP 2010) Senior Judge Lush. It is always been the case that, in connection disclosure documents, the Court of Protection's primary focus has been on the best interests of the protected party - **In Re Manda** [1993] Fam. 183. Whilst awaiting definitive judgment, the prudent course for any deputy would be to treat all documents filed in connection with the application, as opposed to general accounting documentation, as being subject to the Court of Protection Rules 2007, r17.