

INCAPACITY – THE NEW LAW

The Effect of the Mental Capacity Act 2005 and the
New Part 21 CPR

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- The Mental Capacity Act 2005 and the new Part 21 CPR came into force on 1st October 2007.

- As personal injury lawyers, why are we interested in mental capacity?
- 1. Litigation Capacity.
- 2. Quantum. Damages awarded to those incapable of managing and controlling award will exceed damages awarded to those who are sui juris because of the costs of administering the award to a protected beneficiary (but see later).

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- Explanation of the interaction between the Rules and the Act given by Andrew Edis QC sitting as a judge of the High Court in Saulle v. Nouvet 2007 EWHC 2902
- [Also important to consider the interesting and helpful [Mental Capacity Act 2005 Code of Practice](#) issued by the Lord Chancellor in accordance with sections 42 and 43 of the Act]
- [Prima facie the Act does not affect the definition of litigation capacity at all. However....](#)

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- The new Part 21.1 states
21.1 (1) This Part –
 - (a) contains special provisions which apply in proceedings involving children and **protected parties**.....
- So no more “patients” – only “protected parties” and “protected beneficiaries”
- (Also no more “receivers” – only “deputies” – s.16 Act)
- And.....

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- (2) In this Part –
- ‘the 2005 Act’ means the Mental Capacity Act 2005;
- ‘lacks capacity’ means lacks capacity within the meaning of the 2005 Act;
- ‘protected party’ means a party, or an intended party, who lacks capacity to conduct the proceedings
- A protected party can only conduct proceedings by a litigation friend (Rule 21.2(1))

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- Has the statutory definition of mental incapacity changed the substantive law?
- Both Andrew Edis QC and Mumby J in MM (an adult) 2007 EWHC 2003 agree that the test set out in section 3 of the new Act merely encapsulates “the principles hitherto expounded by the judges”.

No more Masterman- Lister? Up to a point.

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- Human Rights context
- Minimum of state or other interference with the rights of the individual
- Loosening of paternalistic approach (compare evolution of approach to consent claims in clinical negligence)
- Loss of right to settle one's own litigation is a profound loss of autonomy
- Capacity is “issue-specific”
- Section 1(6) “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 as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.”

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- **S.2 People who lack capacity**
- (1) 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**.
- (2) *It does not matter whether the impairment or disturbance is permanent or temporary.*
- (3) *A lack of capacity cannot be established merely by reference to—*
 - (a) *a person's age or appearance, or*
 - (b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*

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- **S.3 Inability to make decisions**
- (1) For the purposes of section 2, a person is **unable to make a decision** for himself if he is unable—
- (a) to **understand** the information relevant to the decision,
- (b) to **retain** that information,
- (c) to use or weigh that information as part of the process of making the decision, **or**
- (d) to **communicate** his decision (whether by talking, using sign language or any other means).

INCAPACITY – THE NEW LAW

- S.3 (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to **understand an explanation of it given to him in a way that is appropriate to his circumstances** (using simple language, visual aids or any other means).
- (3) The fact that a person is able to **retain the information relevant to a decision for a short period** only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about **the reasonably foreseeable consequences of—**
 - (a) **deciding one way or another, or**
 - (b) **failing to make the decision.**

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- S.1(1) The following **principles** apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) 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**. *[compare s.3 (2)]*
- (4) A person is not to be treated as unable to make a decision **merely because he makes an unwise decision**.

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- Vulnerability to exploitation?
- This is insufficient to prove incapacity to litigate.
- British Psychological Society/ R C Psychiatrists Guidance 2006
- *“The law recognises the right of individuals to make unwise decisions. Such decisions might alert to the possibility of incapacity but they are NOT sufficient to determine a person’s lack of capacity to make that specific decision”.*
- See also Code of Practice

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- Even if claimant is not a protected party, vulnerability to exploitation may be relevant to
- General damages
- Special damages re trust?
- *No sums awarded for investment advice (Page v. Plymouth Hospitals NHS Trust; Eagle v Chambers (no. 2)), but it **may** be that a vulnerable claimant would be awarded damages “for the cost of a trustee performing a protective role similar to that of a court appointed deputy in the case of a patient” – see Lloyd Jones J in A v. Powys Local Health Board 2007 EWHC 2996 (QB), para. 158*

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- Evidence of Incapacity – Not just a medical issue
- Lay evidence is just as important as medical evidence. Neurologists are probably the least important of this cohort. Treating doctors??

| Masterman-Lister | Bailey v Warren | Saulle v Nouvet |
|---------------------------------------|------------------------------|--------------------------------|
| Neuropsychiatry | Neuropsychiatry | Neuropsychiatry |
| Neuropsychology | Neuropsychology | Neuropsychology |
| Neurology | Neurology (Claimant only) | Neurology |
| Lay Witnesses (family and friends) | Lay Witnesses (family) | Lay Witnesses (family and DVD) |
| Medical records | Medical records | Medical records |

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- Approval of settlements. Rule 21.10
- The approval of the court in which the claim proceeding is necessary.
- No longer necessary to obtain the approval of the Court of Protection.
Is this a good thing?

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- Who hears the approval application?
- Paragraph 5.6(2) 21PD
- “Applications for the approval of a settlement or compromise will **normally** be heard by –
-(2) a Master, designated civil judge or his nominee in proceedings involving a protected party.”
- But surely not in a low value claim? There are a substantial number of litigants with an incapacity to litigate who have not been brain-damaged by a tortfeasor.

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- What if no-one realises that the claimant is a patient?
- See Rule 21.3(4) “Any step taken before a child or protected party has a litigation friend has no effect unless the court orders otherwise”.
- Bailey v Warren 2006 EWCA Civ 51
- The court gave ex post facto approval to a consent order (on liability only) reached many years earlier, notwithstanding the objection of the claimant’s litigation friend and new counsel. Hallett LJ and Ward LJ (but not Arden LJ) suggested that the judge had a relatively unfettered discretion. Arden LJ gave primacy to the interests of the claimant.

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- Kennedy LJ in Masterman-Lister” para. 30
- “So_a court can regularise the position retrospectively, and that was also possible under the RSC (see Leather v Kirby [\[1965\] 2 All ER 441](#), [\[1965\] 2 QB 367](#)). Provided everyone has acted **in good faith** and there has been **no manifest disadvantage** to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position. To do otherwise would be unjust and contrary to the overriding objective of the CPR, but in any given case the ultimate decision must depend on the particular facts.....(see next slide)

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-In the context of litigation rules as to capacity are designed to ensure that claimants and defendants who would otherwise be at a disadvantage are properly protected, and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained. However, finality in litigation is also important, and the rules as to capacity are not designed to provide a vehicle for reopening litigation which having apparently been properly conducted (whatever the wisdom of the individual decisions in relation to it) has for long been understood to be at an end.”

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- Once the settlement is approved/ judgment given.....
- Rule 21.11(3)
- “Where money is recovered by or on behalf of a protected party or money paid into court is accepted by or on behalf of a protected party, before giving directions in accordance with this rule, **the court will first consider whether the protected party is a protected beneficiary.**”
- Is this the wrong way round?

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- Kennedy LJ in Masterman-Lister, para. 27
- “It is not difficult to envisage claimants in personal injury actions with capacity to deal with all matters and take all 'lay client' decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award.”
- D J Ashton, Nominated Court of Protection Judge, dealt with a case last year where he found that the protected party was only a protected party for the purposes of the litigation.

INCAPACITY – THE NEW LAW

• **THE END**