EXCHANGE
CHAMBERS

Capacity in personal injury claims

The introduction

Most of the time, in personal injury claims, you are dealing with clients who are perfectly able to understand what is going on. They may struggle to understand more complex topics, and so they may need things explained to them simply and carefully. That is one of the important skills of the barrister. However, they will still be able to make decisions about the case in a way which gives you confidence that they understand what needs to be done.

Sometimes, the person bringing the claim is under the age of 18. That is a situation which barristers and solicitors will encounter from the very start of their careers. The child will have a Litigation Friend appointed to represent their interests, the instructions come from the Litigation Friend, and if the claim settles, there is an approval hearing to make sure that the settlement is appropriate. This is all very straightforward.

However, things can be more complicated where the client (assuming they are over the age of 18) is struggling to conduct proceedings because of an illness or disability:

- Sometimes, the person will obviously lack capacity, and there is no question of them giving you instructions (e.g. someone with a catastrophic brain injury);
- Other times, the question of capacity may be more complex. There might be doubts about whether the client has capacity, or they might only have capacity to do certain things, or their capacity may fluctuate over time.

This article is intended as a helpful toolkit for anyone who is wondering how to approach a case where a client may lack capacity.

Disclaimer

This article is meant to be a helpful introduction to the subject and is not advice to be relied upon. The law changes all the time and the facts of every case are different.

If any solicitors reading this would like some advice, please feel free to contact my clerks.

Why does capacity matter?

There are four key reasons why capacity matters for personal injury practitioners.

<u>The need to protect the client</u>

People who lack capacity are often very vulnerable, and if they are suddenly given large amounts of personal injury compensation, there is a real danger that they will either waste the money or be exploited. We will look shortly at the Mental Capacity Act 2005

and how it works, but the main thing to remember is that there are systems which are set up to protect people who lack capacity. If a client is treated as having capacity when they do not, there is a real danger that they lose this protection and end up being harmed as a result.

The need to make sure the right person is making the decisions

We need to try and work out whether the client can make decisions. If we blindly assume that the client can make decisions, and it turns out that they cannot, they are not going to provide effective instructions. They are either going to blindly agree with whatever is suggested to them, or they are not going to provide any meaningful instructions at all. But on the other hand, if they do have capacity, and there is a lazy assumption that they do not, they are robbed of their right to exercise personal agency, and they have to rely on a third party to make decisions which they are probably better placed to make.

The need to ensure that settlements are binding

If the client does not have capacity, and this is ignored, and a settlement is entered into (without the appointment of a Litigation Friend, and approval by the court), the settlement may be overturned, which can lead at best to further expense and delay, and at worst to professional negligence proceedings (see *Dunhill v Burgin* [2012] EWCA Civ 397).

The possibility of gaining additional damages

There may be additional damages which are recoverable where a Claimant does not have capacity, and so establishing a lack of capacity can unlock further claims. These can be very significant – for example, the costs of deputyship can be enormous.

When will you have a concern about capacity?

When speaking to the client for the first time, it is sensible to have the question of capacity in the back of your mind. There are some things which should always trigger further action:

- Is the client known to suffer from a mental impairment (e.g. a brain injury) which could affect their ability to understand the case, make decisions, or give instructions?
- Does the client exhibit any other behaviours (e.g. disordered thoughts, delusions of grandeur) which suggest that they might be suffering from a mental impairment?
- Are there any entries in the client's medical records which point towards the client potentially suffering from a mental impairment?
- Does the client otherwise give the impression, when speaking to you, that they may not be understanding what you are saying to them?
- Do you struggle to understand what the client is saying to you?

- Have other people raised concerns about whether the client has capacity (e.g. a treating doctor, a family member, or a case manager?)

The starting point – the Mental Capacity Act 2005

The Mental Capacity Act 2005 is the crucial piece of legislation to consider. The Act sets out the approach that should be taken when working with people who may lack capacity.

There is also a Code of Practice, which adds more detail about how the Mental Capacity Act 2005 should be implemented. The Code of Practice can be accessed here:

https://assets.publishing.service.gov.uk/media/5f6cc6138fa8f541f6763295/Mental-capacity-act-code-of-practice.pdf

The foreword to the Code of Practice makes clear that the Act is intended to protect and empower people who may lack capacity. This is the central ethos of the Act:

"The Mental Capacity Act 2005 is a vitally important piece of legislation, and one that will make a real difference to the lives of people who may lack mental capacity. It will empower people to make decisions for themselves wherever possible, and protect people who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process. It will ensure that they participate as much as possible in any decisions made on their behalf, and that these are made in their best interests. It also allows people to plan ahead for a time in the future when they might lack the capacity, for any number of reasons, to make decisions for themselves." [per Lord Falconer]

Section 1 of the Mental Capacity Act 2005 (the general principles which apply)

Section 1 of the Mental Capacity Act 2005 sets out the general principles which underpin how the Act operates. The principles are set out below, with some commentary:

(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.

The Act includes a rebuttable presumption that a person has capacity. The Act makes clear that practitioners should not assume, without more, that someone lacks capacity. You start with the assumption that the person has capacity, and then look for things which overturn that assumption.

(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.

The Act makes clear that where a person is struggling to make a decision on their own, everything possible should be done to help them, before any view is taken that they cannot in fact make a decision.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

The Act makes clear that a person making an unwise decision does not necessarily mean that the person lacks capacity. There are plenty of people who have capacity and who make bad decisions. The emphasis of the Act is on preserving personal autonomy.

See the Code of Practice at paragraph 2.10:

"Everybody has their own values, beliefs, preferences and attitudes. A person should not be assumed to lack the capacity to make a decision just because other people think their decision is unwise. This applies even if family members, friends or healthcare or social care staff are unhappy with a decision."

Practitioners should be wary of erring on the side of caution, and assuming that a person does not have capacity with a view to 'protecting them' (see *CC v KK* [2012] EWHC 2136). There should be an objective assessment of capacity in each case.

(5) 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 interests.

The crucial requirement again is that where decisions are made on behalf of a person who lacks capacity, they should be made in their best interests.

(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.

This is slightly clumsily worded, but the idea is that where things are being done on behalf of someone who lacks capacity, there should be an attempt to find some way of doing these things in a way which preserves the person's rights and freedom of action.

Section 2 of the Mental Capacity Act 2005 (the test for capacity)

Section 2 of the Mental Capacity Act 2005 then sets out the crucial test for 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.

There is effectively a two-stage test for capacity:

1. Is the person unable to make a particular decision for themselves (sometimes called the 'functional test')?
2. If so, is this because of an impairment or disturbance in the functioning of their mind or brain (sometimes called the 'diagnostic test')?

The authority of *A Local Authority v JB* [2021] UKSC 52 makes clear that the 'functional test' should come before the 'diagnostic test' (see paragraph 67), but the order of the two stages should not in my view make any difference to the eventual outcome.

We will see shortly how the Act defines the idea of a person being able to make a particular decision for themselves, and the specific things that the person needs to be able to do.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

The Act reminds us here that if a person may only temporarily lack capacity, that is still important, and action still needs to be taken.

(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.

The Act reminds us that there should not be any lazy assumptions about capacity based on a person's age, appearance, or behaviour. We should not assume that just because a person has a condition like autism, or even dementia, or that they attend a special school, or that they live in a care home, they automatically lack capacity.

There are some other provisions which will be presented without further comment:

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person ("D") may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity,

is exercisable in relation to a person under 16.

Section 3 of the Mental Capacity Act 2005 (the test for inability to make a decision)

Section 3 of the Mental Capacity Act 2005 then sets out what it means for a person to be unable to make a decision:

(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).

We see here that there are four key requirements for someone to be able to make a decision for themselves, and all four must be satisfied.

(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).

The Act reminds us that the information which is relevant to a particular decision must be presented in a way which is as accessible as possible.

The Code of Practice includes some useful questions to ask, where thought is being given to the question of how a client can be helped to make a decision:

- *Does the person have all the relevant information they need to make a particular decision?*
- *If they have a choice, have they been given information on all the alternatives?*
- *Could information be explained or presented in a way that is easier for the person to understand (for example, by using simple language or visual aids)?*
- *Have different methods of communication been explored if required, including non-verbal communication?*
- *Could anyone else help with communication (for example, a family member, support worker, interpreter, speech and language therapist or advocate)?*
- *Are there particular times of day when the person's understanding is better?*
- *Are there particular locations where they may feel more at ease?*
- *Could the decision be put off to see whether the person can make the decision at a later time when circumstances are right for them?*
- *Can anyone else help or support the person to make choices or express a view?*

There is again some further guidance in Section 3 about the elements of the test:

(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.

What standard actually needs to be met (for inability to make a decision)?

We have seen above the things which the client needs to be able to do, in order to be treated as being able to make a decision for themselves. The four requirements have been set out above. The question which might be posed is what standard actually needs to be met. Does the client (as an example) need to have a complete understanding of the information relevant to the decision, or remember every single detail?

The answer is that the person must at least be able to understand the 'salient features' of the decision. See *LBJ v RYJ* [2010] EWHC 2664, at paragraph 58:

"In Dr Rickard's view it is unnecessary for his determination of RYJ's capacity that she should understand all the details within the Statement of Special Educational Needs. It is unnecessary that she should be able to give weight to every consideration that would otherwise be utilised in formulating a decision objectively in her 'best interests'. I agree his interpretation of the test in section 3 which is to the effect that the person under review must comprehend and weigh the salient details relevant to the decision to be made."

Who should initially decide whether the client has capacity?

The initial assessment by those representing the client

I think sometimes there is a feeling that where there is any concern whatsoever about whether a client has capacity, the barristers and solicitors representing a client should rush off and instruct a professional to comment. This then leads to further expense and delay.

My view, which is supported by the Code of Practice, is that it is perfectly legitimate for barristers and solicitors to make an initial attempt, with a view to the principles in the Act, to assess the capacity of the client. See the Code of Practice:

"For a legal transaction (for example, making a will), a solicitor or legal practitioner must assess the client's capacity to instruct them. They must assess whether the client has the capacity to satisfy any relevant legal test. In cases of doubt, they should get an opinion from a doctor or other professional expert."

Those representing a client, as part of their initial assessment, should gather supporting evidence where possible. Can the client's treating doctors provide any assistance? Can there be any assistance from friends and family?

Where an assessment is made by those representing a client, there should be written evidence of (1) the test which was considered (with reference to the relevant provisions within the Mental Capacity Act 2005), and (2) how the evidence was applied to that test. There should likely be a file note or similar setting out how the assessment was performed, so that the reasoning can be understood if there is any challenge in the future.

The subsequent assessment by a professional

If there is still genuine doubt after this initial assessment has been made, then it is clearly appropriate to then seek an opinion from an expert. The usual disciplines who provide opinions on capacity include the following:

- Neuropsychiatrists;
- Neuropsychologists;
- Psychiatrists;
- Neurologists;
- Social workers (although it is better in my view to get a medical opinion);

Any experts who are instructed must be familiar with the Mental Capacity Act 2005 and the various tests contained within. The experts must be able not only to interview the client but also consider supporting material as well (e.g. medical records).

One interesting point is what those representing a client should do if the expert returns an opinion which seems to be wrong on its face (either being far too generous, or pessimistic, about capacity). Should those representing a client blindly prefer what the expert says, even if it is totally unconvincing? My view is that the court can reject expert evidence which is unconvincing, and so those representing a client must be able to as well.

The need to act quickly

Where concerns about capacity are raised, action needs to be taken as soon as possible. See *RP v Nottingham City Council* [2008] EWCA Civ 462, at paragraph 47:

"There is, however, a further point which needs to be understood and emphasised. Both the relevant rules of court and the leading case of Masterman-Lister make it clear that once either counsel or SC had formed the view that RP might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible. This point will become more apparent when I consider the case of Masterman-Lister later in this judgment (see in particular paragraphs 111 to 127 below). For present purposes, it is sufficient to state that in my judgment it would have been a serious breach of her professional and ethical code were SC to have continued to take instructions from a person whom she had reason to

believe did not have the capacity to instruct her. She was, accordingly, duty bound to seek a professional opinion on RP's capacity to do so."

What happens once the claim is litigated?

The need to raise concerns with the court

It may be the case that there is initially no concern about capacity, the claim ends up being litigated, and at some point thereafter, concerns arise about whether the client has capacity. It may be necessary to formally raise these concerns with the court.

For barristers, the suggested course of action is set out in a guidance note from the Bar Council ('Client Incapacity'), which can be accessed below:

https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Client-incapacity-June-2021.pdf

The possibility of the court having to determine capacity

There are circumstances where the question of whether the client has capacity may need to be formally determined by the court:

- There may have been concerns raised openly about capacity, and the court is obliged therefore to make a decision (see *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889);
- The concerns referred to above may include an open dispute between the client and their representatives about whether the client has capacity;
- There may be heads of loss which are only recoverable if the client is deemed to not be capacitous (and so the Defendant has an interest in establishing capacity).

The Court of Appeal made clear in the authority of *Ali v Caton* [2014] EWCA Civ 1313 that even though experts may provide a view about mental capacity, mental capacity (at least in litigated claims) is a matter for the court to decide upon:

"[...] The question of mental capacity is, in the end, a matter for the court. One hears oneself directing a jury in a criminal case and telling them that expert evidence is only one aspect of a case and must be considered in the light of all the evidence. In my judgment, the same is true here. The expert evidence, in particular that of the neuropsychologists in this case, was capable of providing a psychologist's view of the question. It was an important facet in the equation, but the judge had to weigh that together with the evidence from other quarters as to how the Claimant presented and how in practice he functioned in day-to-day life. The opinion formed in the consulting room does not dictate what happens on the street or in the home." [paragraph 59]

Section 4 of the Mental Capacity Act 2005 (the need to act in the person's best interests)

Section 4 of the Mental Capacity Act 2005 then sets out the need to act in the best interests of the person who lacks capacity.

Section 4(1) again makes clear that there should not be any lazy assumptions about what is in the best interests of the person on account of their appearance, behaviour and so on:

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the 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 what might be in his best interests.

Section 4(2) then sets out how anyone taking steps on behalf of a person who lacks capacity should work out what is in the person's best interests:

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

[...]

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

The procedural rules relevant to capacity (CPR 21)

The procedural rules relevant to capacity are contained within CPR 21, which we will examine shortly.

The unsatisfactory situation with PD 21

CPR 21 used to have PD 21 alongside it, and PD 21 is still live on the justice.gov.uk website (https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part21/pd_part21). However, PD 21 (according to the White Book) has been revoked from 6 April 2023. I emailed the relevant government department on 6 March 2025 asking if PD 21 needed to be removed from the website, but received no reply. It is quite common, in my experience, for lawyers and laypeople to refer to the CPR as they appear on the government website. If it is right that PD 21, though still live, has actually been revoked, I cannot imagine how many Judges and barristers have been misled.

The four key types of people within CPR 21

CPR 21 includes rules which apply to four different types of people:

1. Children, who are people under the age of 18 (CPR 21.1(2)(b))

Note that a child can also be a protected party. The general assumption is that a child will gain capacity at the age of 18, but for some children (e.g. those who have suffered a debilitating brain injury) this may not happen.

2. Protected parties, who are a party, or an intended party, who lacks capacity to conduct the proceedings (CPR 21.1(2)(d))

We have dealt above with the idea that capacity may be present for particular issues but not for others. Here, if there is any part of the proceedings which a person cannot conduct, they will be a protected party (see *Bailey v Warren* [2006] EWCA Civ 51, paragraph 178).

3. Protected beneficiaries, who are protected parties who also lack capacity to manage and control any money recovered for them in the proceedings (CPR 21.1(2)(e))

The idea here is that there is a difference between (1) capacity to litigate, and (2) capacity to
manage and control any money recovered for them.

If the client does not have capacity to litigate, and also does not have capacity to manage and control any money recovered for them, they will be a protected beneficiary.

If the client does have capacity to litigate, but does not have capacity to manage and control any money recovered for them, the White Book commentary suggests that they should be encouraged to make an application to the Court of Protection for the appointment of a Deputy before any damages are paid out [WB 21.0.2].

4. Litigation Friends, who conduct proceedings on behalf of a protected party.

The Litigation Friend effectively steps into the shoes of the client and makes decisions on their behalf. The Litigation Friend is usually a family member or friend, or, in cases where no-one suitable is available, the Official Solicitor can be appointed.

The solicitors acting for a client can request that a Litigation Friend be appointed even where there has not been a formal assessment of capacity, as long as there has been some evidence that the client may not have capacity (see *Folks v Fazey* [2006] EWCA Civ 381).

The rules in CPR 21 discussing Litigation Friends

CPR 21 includes a number of rules which govern the use of Litigation Friends:

- CPR 21.2(1): a protected party must have a Litigation Friend to conduct proceedings on their behalf.

- CPR 21.2(2) and (3): a child must have a Litigation Friend to conduct proceedings on their behalf, but this requirement can be waived by the court.

- CPR 21.3(2): there are stringent limits on what can be done with a claim where a Litigation Friend has not yet been appointed.

- CPR 21.3(3): where a party becomes a protected party during the course of proceedings, there are again limits on what further steps can be done without a Litigation Friend being appointed.

- CPR 21.3(4): any steps taken before a child or protected party has a Litigation Friend have no effect unless the court orders otherwise.

The need for approval of settlements

CPR 21.10 sets out the familiar requirement for protected parties (and children) to have any settlements entered into on their behalf approved by the court:

(1) Where a claim is made –
(a) by or on behalf of a child or protected party; or
(b) against a child or protected party,
no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

Where a Claimant has been determined to have capacity but where there are some residual doubts, those representing the Claimant can apply for a protective approval of a settlement. The court has the power under its inherent jurisdiction to approve a settlement even without formally determining capacity. However, this will mean that even if the Claimant is proved subsequently to not have capacity, the settlement would still be valid and would not be overturned (see *Coles v Perfect* [2013] EWHC 1955).

The interplay between the civil courts and the Court of Protection

CPR 21.11(9) sets out the procedure where money is recovered for a protected beneficiary:

(9) Where money is recovered for the benefit of a protected beneficiary—
(a) if the amount is £100,000 or more, subject to (b) below, the court shall direct the litigation friend to apply to the Court of Protection for the appointment of a deputy, after which the fund shall be dealt with as directed by the Court of Protection;
(b) the procedure in sub-paragraph (a) will not apply where a person with authority to administer the protected beneficiary's financial affairs has been appointed as attorney under a registered enduring power of attorney, or as donee of a registered lasting power of attorney, or as the deputy appointed by the Court of Protection;
(c) any payment out of money must be in accordance with any decision or order of the Court of Protection;
(d) if an application to the Court of Protection is required, that application must be made;
(e) if the Court of Protection so decides, on its own initiative or at the request of the judge hearing the application for investment, an amount exceeding £100,000 may be retained in court and invested in the same way as the fund of a child.

It can be seen that where more than £100,000 is recovered for a protected beneficiary, a Deputy will usually need to be appointed by the Court of Protection.

Where a Deputy is appointed, they will assume responsibility for making decisions in respect of the client's finances. The Deputy must report to the Court of Protection on a regular basis, and set out the money which is being spent over time. The Deputy may spend money on things like daily expenses, rehabilitation, and so on. The Deputy will need to act in the best interests of their client, and protect them from exploitation.

The Deputy will typically remain involved with the client until such time as their involvement is no longer required (for example, because of the death of the client, or because the client regains capacity).

How does capacity affect limitation?

Section 28 of the Limitation Act 1980 states that limitation periods will be extended where the Claimant is under a disability at the time the cause of action accrues (for personal injury, for three years after the disability ends, or the Claimant dies):

(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired.

[...]

(6)If the action is one to which section 11 or 12(2) of this Act applies, subsection (1) above shall have effect as if for the words "six years" there were substituted the words "three years".

For people who are under a disability when the cause of action accrues, and where they continue to be under a disability, the limitation period for them may effectively be suspended indefinitely (or more precisely, until six years after their death).

Note that Section 28 only has effect if the disability was present when the cause of action accrued. If the limitation period started to run, and the Claimant only later on ended up subject to a disability, the limitation period continues to run and there is no extension (see *Purnell v Roche* [1927] 2 Ch 142).

Section 38(2) of the Limitation Act 1980 makes clear that 'disability' not only includes those who lack capacity under the Mental Capacity Act 2005, but also children:

For the purposes of this Act a person shall be treated as under a disability while he is an infant, or lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings.

Conclusions

I hope this article has been helpful.

Chris Richards

December 2025