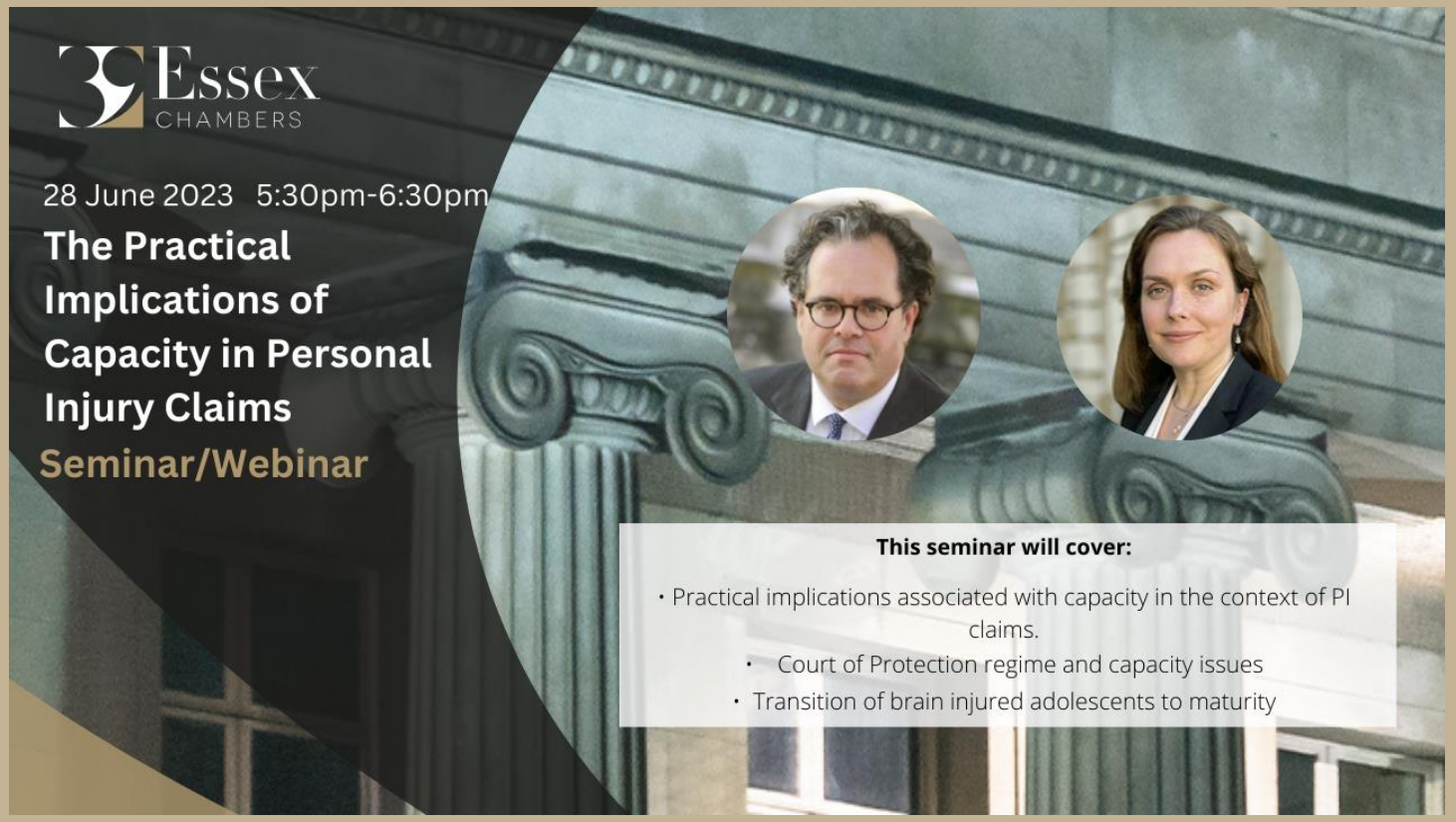


39 Essex CHAMBERS

The Seminar will begin shortly..

The Practical Implications of Capacity in Personal Injury Claims: a brief guide

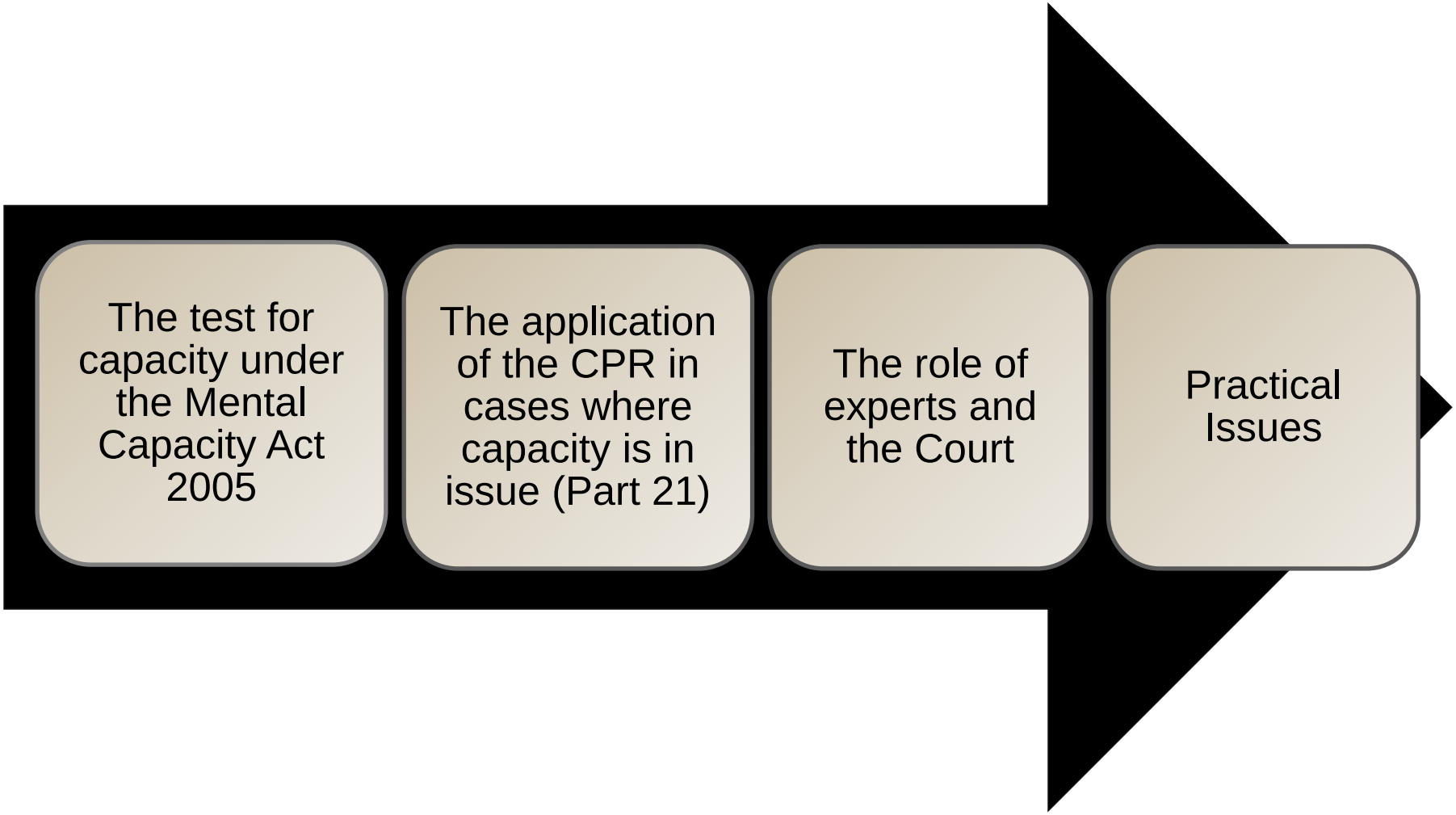
Derek O'Sullivan KC

28th June 2023

Capacity

- Capacity claims can add very considerably to the quantum of catastrophic injury claims; with current discount rate it is now routine in cases involving younger claimants to see claims over £1m in relation to the costs of managing an award.
- Two elements in this discussion: litigation capacity and financial capacity.

Considerations



The Test

The relevant principles are set out in ss.1-3 of the Mental Capacity Act 2005 ('MCA').

In summary:

- A person must be **assumed to have capacity** unless it is established that he lacks capacity - s.1(2) MCA;
- 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 – s.1(3) MCA;
- A person is not to be treated as unable to make a decision merely because he makes an **unwise decision** – s.1(4) MCA.

The underlying philosophy of the MCA is to assist those who suffer from disability to live normal lives and to make normal choices about those lives to the greatest extent possible (Masterman-Lister v Brutton & Co [2003] 1 WLR 1511).

MCA 2005

The functional test: S. 3 MCA

1) …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).

(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.

The assumption of capacity

Personal autonomy is a key element of the MCA; see

- Kerr J in **King v The Wright Roofing Company** [2020] EWHC 2129 [11] *"It is agreed that I cannot twist the meaning of the statutory provisions to protect the claimant from himself and the risk that he will make unwise decisions. The Act prizes personal autonomy highly"".* **King** is a very interesting decision which repays study- the claimant believed that he had capacity and was very suspicious of the motives of his legal team.
- The useful summary of the law of McDonald J in **NHS Foundation Trust v AB** [2019] EWCOP 45 at [26].
- McFarlen LJ in **PC v City of York** [2013] EWCA Civ 278 at [54]: "*there is a space between an unwise decision and one which an individual does not have the mental capacity to take and … it is important to respect that space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates"*

Wisdom is not required for capacity

Most people are unwise or act irrationally. Both the Act (s.1(4)) the Guidance and the authorities make it clear that a lack of wisdom is not the touchstone of lack of capacity, see:

- The MCA Code of Practice states in relation to s. 1(4): "*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".*
- Stanley Burton J in **Lindsay v Wood** [2006] EWHC 2895 QB: "*A finding that a person lacks capacity is a serious matter since it deprives a person of basic human rights namely the power to make decisions as to his own affairs and assets. Many people of full capacity make rash decisions or cannot be trusted to manage their money sensibly. Thus these qualities do not necessarily lead to a finding of incapacity"*
- Similarly, Davis LJ described the general position of capable adults in **DL** [2012] EWCA Civ 253 at 76: "*It is of course, of the essence of humanity that adults are entitled to be eccentric, entitled to be unorthodox, entitled to be obstinate, entitled to be irrational. Many are. But the decided authorities show that there can be no power of public intervention simply because an adult proposes to make a decision or to tolerate a state of affairs, which most would consider neither wise nor sensible*."

Vulnerability / Risk of Exploitation Not Determinative

Vulnerability and the risk of exploitation are **not** by themselves determinative in relation to financial capacity; see (e.g.) para 18 in **Lindsay v Wood**:

- Having referred to paragraph 78 of the judgment in **Masterman-Lister** (which included: "*It is not the task of the courts to prevent those who have the mental capacity to make rational decisions from making decisions which others may regard as rash or irresponsible*"), Stanley-Burnton J stated:

> *"…When considering the question of capacity, psychiatrists and psychologists will normally wish to take into account all aspects of the personality and behaviour of the person in question, including vulnerability to exploitation. However, vulnerability to exploitation does not of itself lead to the conclusion that there is lack of capacity. Many people who have full capacity are vulnerable to exploitation, or more so than most other people. Many people make rash and irresponsible decisions, but are of full capacity. The issue is, as Chadwick LJ himself indicated in the above passage, whether the person concerned has the mental capacity to make a rational decision".*

What must the claimant be able to understand?

Important to bear in mind that many people with full capacity would struggle with the terminology and nomenclature of legal proceedings. It is not necessary that the claimant must understand every element of what is being explained to him. What is important is that he has the capacity to conduct proceedings generally, not specific aspects of them (**Dunhill v Burgin** [2014] 1 WLR 933 at [15]); can understand the 'salient factors' (the information relevant to the decision): **LBJ v RYJ** [2010] EWHC 2664 (Fam) and the level of understanding required must not be set too high. **PH and A Local Authority v Z Limited & R** [2011] EWHC 1704 (Fam).

Some elements of the Code of Practice

The Application of the CPR

CPR Part 21 applies to all PI cases in which capacity is in issue (*Saulle v Nouvet [2007] EWHC 2902 (QB)*).

Two distinct questions must be addressed in accordance with CPR Part 21:

1) Whether the claimant has capacity to conduct the proceedings (**litigation capacity**)

Under CPR 21.1 (2)(d):

A '<u>protected party</u>' means a party, or an intended party, who lacks capacity to conduct the proceedings;

2) Whether the claimant has capacity to manage his/her finances (**financial capacity**);

Under CPR 21.1 (2) (e):

A '<u>protected beneficiary</u>' means a protected party who lacks capacity to manage and control any money recovered by him or on his behalf or for his benefit in the proceedings.

Unintended consequence of CPR 21 is that a person who has capacity to litigate but not to manage his financial affairs is not a protected beneficiary

Two Capacity Issues in Litigation: (a) Litigation Capacity and (b) Financial Capacity

The Role of Experts

Who decides Capacity?

*"The question of mental capacity is, in the end, a **matter for the court**… 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." (**Ali v Caton** [2014] EWCA Civ 1313 at para 59).*

In practice the Court will take into account the views of family and friends as well as the experts (who tend to come from the fields of neurology, neuropsychology and neuropsychiatry): see **Lindsay v Wood** for a case where an experienced judge relied heavily on the factual evidence.

Practical Issues:
Ensure capacity is properly dealt with

The Act (s. 1 (4)), the Code of Practice and the authorities are all clear that overturning the presumption of capacity is an important decision which requires proper consideration of the statute. And yet:

- Many experts frequently do not apply the MCA or its COP properly. Still the case that many reports contain no detail or analysis justifying a statement that the "claimant lacks capacity". Also often the case that the wrong test is applied (e.g. C cannot make a decision in his best interests). There must always be a focus on the functional test posed by S. 3 MCA
- Moreover there is often a lack of focus on the issue of the steps that could be taken to assist a claimant to make a decision and/or that this process has not been tested..
- Parties therefore must be very astute to ensure that capacity is considered properly.
- Developing a pro-forma set of instructions for experts in relation to capacity is a sensible step.
- Similarly, part 35 questions are a useful interlocutory step when capacity has not been properly considered (by reference to the MCA and its COP).
- Expert shopping or selective disclosure is absolutely impermissible – See **Loughlin v Singh** EWHC 1641 (QB), [2013] MHLO 71.

Practical Issues:
What is the basis for the lack of capacity?

Important for all experts to remember that "*writing off*" a person's financial capacity is a blunt instrument with a profound impact; it effectively infantilises an adult (who lose their economic freedom). The basis for such opinions need to be very considered very carefully. Particular care must be taken with neuropsychological test results; decision making is heavily dependent on working memory skills and the neuropsychological profile should be carefully considered to see if P has the intellectual capacity to understand relevant information and retain it for the purposes of making a decision. A claimant with a frontal injury may (e.g.) have a weakness in working memory relative to his other abilities; however he may still function in this domain sufficient to manipulate information and allow decisions to be made (so long as all practicable steps are taken to assist him or her in this process).

It also often the case that surrounding evidence (such as Support Worker notes or medical records) will give an indication of functioning in the "real world" and consideration of such evidence has to be part of the process involved in determining capacity.

Practical Issues:
When should capacity be determined?

- It is entirely open to a Defendant to plead in a Defence either a dispute as to an alleged lack of litigation capacity or financial capacity or the very least the identification of capacity as an issue.
- The threshold for the appointment or need for a litigation friend is sufficiently low that the fact of a claimant proceeding via a litigation friend is not in any way determinative that the claimant lacks capacity. It merely means that the solicitors acting for the claimant have some grounds for believing that the claimant lacks litigation capacity; see para 80 of **Masterman-Lister**: "*Normally no problem arises as to when the issue of capacity should be raised. It raises itself. A responsible solicitor acting for a claimant or defendant has doubts about the capacity of his client, and seeks a medical opinion. If the opinion suggests that the client lacks the necessary capacity then the solicitor arranges for the appointment of a litigation friend.*"
- Also see **Folks v Fazey** [2006] EWCA Civ 381 – Provided that there is some supportive evidence C's sols can apply for a litigation friend to be appointed even without a determination on capacity. This application can be made without notice.
- It was suggested in **Masterman-Lister** that capacity should be tried as a preliminary issue and there some instances of that in the years that followed the judgment it is now relatively rare (if capacity is in issue) for a court to order that it be tried as a preliminary issue (albeit see **King**). The majority of recent cases involve capacity being determined along with the all of the other issues at a quantum trial: see e.g. **Loughlin v Singh** and **Martin v Salford Royal NHS Trust** [2021] EWHC 3058.
- Note a defendant has no locus in any application by the claimant to the Court of Protection during the course of personal injury litigation.

Practical Issues: Settlement where capacity in issue

- Cases frequently settle where capacity is firmly in issue; such a dispute is not a bar to settlement and parties frequently compromise such claims (and then ask the Court to approve such the settlement with it being agreed that the costs of an approval hearing shall be part of the costs of the litigation).
- There is nothing illogical or incoherent about a defendant adopting such an approach; following **Dunhil v Bergin** [2014] UKSC *18* it is entirely sensible. In **Dunhill**, Settlement agreed in 2003 at £12,500 when the claim was worth £800,000 - £2million, subject to CN deduction. Settlement agreement declared void by SC on the basis that C lacked the capacity to enter into the agreement; an agreement involving a party who lacks capacity to enter into such an agreement is therefore not binding on either party until it has been approved. Both claimants and defendants therefore need the protection of an approval where capacity is in issue.
- Also see the decision of Teare J. in **Coles v Perfect** [2013] EWHC 1955 (QB). In **Coles** neither party asserted that the claimant lacked capacity (and the claimant did not proceed by a litigation friend) but it was probably marginal; the claimant applied for an approval so as to ensure finality. Teare J found that the court had inherent power to approve any settlement and approved the settlement without any determination on capacity; he stated if it were later alleged that the claimant lacked capacity the effect of the approval would be that the settlement was valid and could not be declared void (even if it was found that the claimant lacked capacity).

Other Issues

- Claims for Welfare Deputyship are another subject- for another talk.

- The annual cost of administering a personal injury trust is not generally recoverable by a claimant with capacity: **Owen v Brown** [2002] EWHC 1135 and **A v Powys Local Health Board** [2007] EWHC 2996. In **Martin v Salford Royal NHS Trust** [2022] EWHC 532, the claimant sought such damages for a PIT on the basis that the claimant (who did not lack financial capacity) was a vulnerable individual and the High Court should exercise its protective jurisdiction to award damages for a PIT. The claim was dismissed (notwithstanding the experts for both sides agreeing that her funds should be administered by a trust. The judge made clear the decision as for him- not the experts).

Other Issues

- Extreme situation considered in **EXB v FZZ** [2018] EWHC 3456 (QB) and **DXW v PXL** [2019] EWHC 2579 (QB): Court ordered that C (who lacked both litigation and financial capacity not to be informed of the terms of the settlement.

Illegality and Capacity

Note the decision of Irwin J in **AB v Royal Devon & Exeter Hospital** [2016] EWHC 1024 QB: claimant suffered a severe spinal injury but his lack of capacity was due to heroin use. On grounds of public policy the claimant was denied any damages in relation to his capacity claim.

What if the Claimant does not serve a witness statement?

- This could be the subject of an entire talk.
- The Courts frequently face the situation where the claimant (alleging a lack of capacity) has not provided a witness statement but has been interviewed by the experts in the case (and whose evidence is provided in hearsay form by others- such as case managers).
- See the (potentially conflicting) decisions in *Brown v Mujibal* [2017] 4 WLUK 42 (available on Westlaw) and *G (A protected party) v Hassan* [2019] EWHC 3879.
- These decisions were both made prior to the new provisions of CPR 1.1 (2) (a)- these “vulnerable witness” provisions no doubt complicate this issue considerably.

Resources

39 Essex Chambers is the leading set in relation to Court of Protection and Mental Capacity issues.

The Mental Capacity team deal mainly with public law issues and maintain a database of case law, see:

https://www.39essex.com/information-hub/mental-capacity-resource-centre/mental-capacity-cases

Transitions to adulthood

Arianna Kelly

June 2023

Issues

- Changing role of parents
  - Best interests decision-making
  - 'I am the decision-maker'
  - Health and welfare deputyships
- Deprivations of liberty
  - When is an authorisation needed
  - Court's consideration and scrutiny around young people
- Statutory care services
  - Care Act
  - Roles of carers
  - Health
  - CHC
  - Leaving education
- Promoting independence
  - Independent living
  - Positive risk-taking
  - Sex

Case of ‘G’

- G was in his late 20s; suffered a brain injury in an RTA 14 years ago
- PI case had settled and deputy was appointed 9 years ago. £1m lump sum payments and £83,000 annual periodical payment
- Deputy was national, well-regarded, corporate deputy
- G’s deputy approached the local authority to fund his care package, which provided 22 hours/day of care
- G’s lump sum award was almost entirely gone, and care package could not be sustained on the periodical payments
- Local authority assessed several times over four years as request was put repeatedly; multiple social workers considered the case
- Consistent assessment was that G needed 5 hours/day of care and some assistive technology so G could access support at night if necessary
- G’s capacity to make decisions as to his residence and care had never been considered by deputy or case manager

Case of ‘G’

- Social workers felt G had good self-care skills and good insight into potential risks. Had friends and family locally, and a good social network through local football team’s disabled supporters group. Social workers did not consider he would need carer support to interact with friends
- No deprivation of liberty authorisation was in place, and care arrangements had never been considered by the Court of Protection
- When speaking to his social worker and advocate, G was clear that he was unhappy with the care arrangements, he found them oppressive and wanted to have a care package in line with what was proposed by the local authority so that he could have more freedom
- Wanted a girlfriend, but not allowed to see friends on his own
- Social workers raised this issue repeatedly with the case manager and deputy, who stated that they were acting in line with the recommendation of the claimant’s expert in the PI proceedings.
- Refused to make changes to the care package until there was no money left to fund the care

Case of ‘G’

- Was this arrangement in G’s best interests? Strong view from social workers was that it was not, to the point of being a safeguarding issue
- Care package implemented in line with claimant expert reports did not seek to promote G’s independence, which social workers considered was an important and feasible goal for him
- Care plan had ‘locked in’ on the basis of the claimant evidence from the PI proceedings
- Care manager and deputy refused to consider had not changed to reflect G’s recovery and increased ability to care for himself as he matured

Case of ‘G’

- COP approach: always specific to the case, but always a central consideration of what the person wants
- High levels of care can be supportive and enabling, but can also be restrictive and oppressive, particularly if contrary to P’s wishes
- People’s needs and preferences change, particularly with recovery and maturity
- For many people, transition to adulthood (particularly post-recovery and rehabilitation) will bring an increasing wish for independence
- For some, this may mean less care and support

Role of parents and families

- Mental Capacity Act:
  - Best interests framework
  - S.4 MCA focuses on the need to hear from a range of people with an interest in the person's welfare
  - Highlights the person's past or present wishes and feelings, and beliefs and values s.4(6)
  - Parental voice may be included under s.4(7)
    - Named by the person as someone to be consulted
    - Caring for the person
    - Interested in the person's welfare
  - However, no specific legal authority which is greater or lesser than anyone else's as a result of being the adult's parent

‘I am the decision-maker’

- 16- and 17-year-olds are covered by the Mental Capacity Act – presumption of capacity applies unless displaced by evidence of incapacity
- If parents are stepping back, other voices may become more prominent and take on greater weight
- Beware anyone without a deputyship or LPA who declares ‘I am the decision-maker’
- Health and welfare deputyships are increasingly applied for, but still relatively rarely granted
- Arguments are often more compelling where there are frequent decisions which are called for, or series of decisions (in line with MCA Code of Practice)

Role of parents and families

- What are the person's care arrangements likely to be
- Will family be playing a prominent role or stepping back
- 'Mutual dependence'
  - *David Ross v A* [2015] EWCOP 46: Deputy sought and was granted retrospective authority to pay the school fees of A's brother from personal injury award, which allowed him to attend a well-regarded school close to the family rather than take a place he had been assigned which would have obliged A's parents to spend much of their time transporting him to school
  - Court considered that it was 'impossible to consider A's interests in isolation from those of her family as a whole'

End of Parental Responsibility

David Ross v A [2015] EWCOP 46:

Many, indeed most, families are as dependent upon a damages award for personal injury or clinical negligence as the recipient of the award is dependent upon their family. Parents in this situation are all too aware of their reliance on their child's award, and it is both insensitive and demeaning to stigmatise them for deciding to sacrifice their own careers and earning potential by staying at home and caring for their profoundly disabled child on a full-time basis…

[A's] wellbeing is dependent upon their wellbeing and this involves being together, meeting each other's needs, helping each other to pursue their dreams, and enjoying as satisfactory a quality of life as they can in what are, by any standards, extremely exacting circumstances. Their wellbeing also involves foreseeing and avoiding setbacks and negative experiences, wherever possible, and it is clearly advantageous to A to reduce the levels of burden and anxiety within the family in a manner that is likely to have a positive outcome for everyone.

In considering A's best interests at a particular time, the decision-maker must take a holistic approach and consider her welfare in the widest sense, not just financial, but social and emotional.

Parental responsibility: 16- and 17-year olds

- Parents cannot consent to a deprivation of liberty for a child over the age of 16 (*Re D* [2019] UKSC 42)

- Deprivations of liberty are often not recognised when a person is living at home with their family

- Involvement of family and relative normality of the person's situation does not remove a person from the deprivation of liberty framework

Objective deprivations of liberty

- When is a child deprived of liberty: objective test
  - For 16- and 17-year-olds, test is essentially the same as with adults: continuous supervision and control and not free to leave
  - Less clear for children than with adults
  - Depends on the age of the child and the nature of the restrictions
  - For younger children, greater degrees of restriction may be seen without amounting to a DOL
- Under 16: *Gillick* competence applies. Decision-specific and situation specific
  - For a non-*Gillick* competent child, parental responsibility *normally* applies, but parental responsibility only applies to decisions within the scope of parental responsibility
  - Recent case of *Lincolnshire County Council v TGA & Ors* [2022] EWHC 2323 (Fam), in which court found parents could give consent to a DOL for under 16 child if no dispute as to best interests, and child was not *Gillick* competent

Courts

- Inherent jurisdiction of the High Court (Family Division)
  - Applies to any child (under 18), whether or not they have capacity
  - To be heard by High Court judge (including s.9 and DHCJs)
  - Preference for family court when DOL application is sitting alongside care proceedings
  - National Deprivation of Liberty Court
- Court of Protection
  - Jurisdiction only encompasses 16+
  - Requirement of jurisdiction that the person lacks capacity to make decisions
  - Cannot use a standard authorisation for a person under 18
  - Usually not appropriate for streamlined procedure (*Bolton v KL),* OS usually the litigation friend

Making applications

- Detailed care plans are key
  - Care plan should set out the nature of the restrictions on the child
  - Care plan or supporting evidence should set out the reasons for the restrictions on the child, why it is necessary and proportionate, and what the risks are to the child if not detained
- What are the child and parent's views on the proposed plan
- If relevant, evidence on capacity
- Why is this deprivation of liberty necessary, including:
  - What other options have been explored, and what is the outcome of those investigations
- Child's history
- The proposed duration of the DOL and provision for review

Statutory Services

- Care Act
  - Harder-edged duties than Children Act duties
  - Specific legal obligations for transitioning to adult services – s.17 Children Act support must remain in place post-18 if Care Act assessment has not been undertaken prior to the child turning 18
  - Can start Care Act support under 18 if seen as the more appropriate route
  - Significant duties to involve the person and their carers in care planning
  - Detailed regulations and statutory guidance which create a clear process and rights for the person
  - However, context of significant hardship in local authority budgets
  - No duties to meet needs which are being met by a willing and able voluntary carer; if parents or family are supporting on a gratuitous basis, the local authority is not obliged to meet those needs
  - Capital held due to PI awards is disregarded if held by a deputy or PI Trust; treatment of income is more complex

Statutory Services

- Health
  - Positives: adult Continuing Healthcare is similarly harder-edged than Children and Young People's Continuing Care
  - Commissioning gaps – there may be fundamentally different offers made for children and adult services
  - Referral gaps – time in between referral and acceptance by adult services
  - End of what have often been long-term relationships with health providers

- Education
  - Free education up to 19
  - Potential eligibility up to 25
  - Students with disabilities should be encouraged to access education

Case of J

- J was 25, had a very close relationship with her parents as child.
- With significant support from family and private rehab, J had become quite independent and moved to a supported living accommodation
- J had entered into a relationship with another person who lived in the supported living accommodation and wanted to marry
- Parents and deputy were opposed; considered J lacked capacity to make decisions regarding sex and needed to be 'protected.'
- Local authority assessed J as having capacity to make decisions regarding sex and contact with boyfriend – considered that if they lived together, would not need nighttime support and light-touch care during the day rather than 24-hour care
- COP found J had capacity to make decisions regarding sex, marriage and contact, and J went to live with boyfriend with reduced care package

Promoting independence

- Moving from recovery and rehabilitation phases
  - Risk of reports and assessments in the PI proceedings becoming 'locked in'
  - People will grow and mature – importance of seeing the person's progress and abilities in the here and now
- Hearing the person's voice and what they want
- Positive-risk taking
  - Differences between the person and their family as to risk tolerance
  - Risks of single decision-maker/deputy
  - Sex and relationships
- Differences in approach between statutory services and PI care framework – later social work evidence likely to have a different take on the situation than reports in proceedings

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Thank you for attending!

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