Unravelling Capacity

How have things changed with the advent of the Mental Capacity Act 2005?

1. The Mental Capacity Act 2005 came fully in to force on 1st October 2007.

2. It replaces part 7 of the Mental Health Act 1983 and the Enduring Power of Attorney Act 1985. The old Court of Protection has been abolished.

3. **The New Court of Protection**:
   The Act creates a new Superior Court of Record: The Court of Protection which has its own judges and procedures (Court of Protection Rules 2007). It has wider powers than the old Court of Protection. The previous Court of Protection's jurisdiction was limited to matters concerning the property and affairs of patients. There were no powers over medical treatment, residence or contact between the patient and other people. It did not have powers to commit for contempt or to fine or summons witnesses etc. The new Court of Protection has a comprehensive jurisdiction over the health, welfare and financial affairs of people who lack capacity and the power to make declarations, decisions and orders affecting such people. It also has all the powers of the High Court to manage its own proceedings.

4. The Act also creates a new office of Public Guardian (dealing with lasting powers of attorney and supervision of deputies).

5. The functions of the Court of Protection are wide and include appointing deputies and making declarations/decisions as to:
   - Incapacity
   - Lawfulness of an act e.g. provision or withdrawal of treatment
   - Financial or welfare matters

   But do not extend to issues of consent to sexual relations/marriage/divorce/placement of children/adoption/discharge of parental responsibilities/voting.

6. The powers generally only arise when the person lacking capacity is an adult but powers re property/conduct of legal proceedings may apply to a child who is unlikely to have capacity when he reaches 18.

7. **The New Civil Procedure Rules 21**:
   The Mental Capacity Act concerns the jurisdiction of the Court of Protection. It does not confer or limit the jurisdiction of the other courts. However, issues of capacity are relevant to the conduct of litigation and the control of the proceeds of litigation. New Civil Procedure Rules were therefore required in order to bring the Act in to effect in the civil courts or at least to ensure consistency in the approach of the courts.

   The Civil Procedure Rules were consequently amended to create a new Part 21 and accompanying Practice Direction which came in to force on the same date as the Act came fully in to force – 1st October 2007.

8. Under the Rules, the terminology has been changed. The term "Patient" has been replaced by "Protected Party" or "Protected Beneficiary".

9. A "Protected Party" is someone who lacks capacity to conduct proceedings and a "Protected Beneficiary" is a protected party who lacks capacity to manage and control any money recovered in the proceedings. (CPR 21.1)

10. "Receivers" have been replaced by "Deputies" who are appointed by the Court of Protection. The Court of Protection decides the extent of the powers of the deputy (e.g. a power to conduct

proceedings on behalf of the protected party). Those who were Receivers prior to the Act coming in to force retain their powers and are treated as deputies.

11. Under the Rules a Protected Party must have a Litigation Friend to conduct proceedings (CPR 21.2(1)). The deputy can be the litigation friend. A person who is not a deputy can become a litigation friend by fulfilling requirements/obligations set out in CPR 21.4 and 21.5 (filing certificate of suitability etc) or by court order CPR 21.6. The rules provide a detailed framework for the appointment, change and removal of litigation friends.

12. **<u>The Test of Capacity to Litigate: Common Law or Statute</u>**?

    - This has been a matter of some judicial and academic discussion and may continue to be.
    - Prior to the 2005 Act, the common law test for litigation capacity was most fully set out in *Masterman Lister v Brutton & Co* [2003] 1 WLR 1511.
    - The Code of Practice issued with the 2005 Act (prior to the Rules) suggested (paragraph 4.32) that Judges in the civil jurisdictions could merely adopt the test of capacity set out in the Act where "appropriate".
    - However, as the Act itself does not legislate for the QBD/County Courts, the question arose as to whether the Court could legitimately abandon the common law approach and adopt the test of capacity as set out in the Act merely on the basis of this suggestion in the Code of Practice.
    - This was considered by Mumby J in *MM (an adult)* in August 2007 (2007 EWHC 2003) and prior to the publication of the new CPR 21.
    - At paragraph 79 -80 of that case Mumby J expressed the view that there was no relevant distinction between the test for capacity set out in section 3 of the 2005 Act and the tests being applied by the common law Judges. *"…the test set out in section 3(1) [of the 2005 Act] ….merely encapsulates in the language of parliamentary draftsmen the principles hitherto expounded by the judges …*" and, therefore, the "*invitation extended to the Judges in the Code of Practice is entirely understandable and indeed appropriate*".
    - The question was considered again soon after the new Civil Procedure Rule 21 came in to force. *Saulle v Nouvet* [2007] EWHC 2902 (QB) was heard by Andrew Edis QC sitting as deputy High Court Judge in November 2007. He considered *MM (an adult)* in the light of the new rules and concluded that, in answering the questions posed by the CPR, (i.e. whether the Claimant is a protected party and/or a protected beneficiary), the Judge is required *by the CPR* (not by the Act) to adopt the definition of mental incapacity set out in the 2005 Act.
    - A part of Andrew Edis QC's rationale for arriving at that view appears to have been an agreement with Mumby J's position that there was no substantive difference between the tests. Howard Elgot (in a talk at APIL earlier this year) suggests that this view does not take on board the extension of the principles of autonomy enshrined in the Act.
    - It is a point well made and there remains an argument that the test to be applied remains the common law test.
    - I suspect that even if this argument were successful, the general trend of the common law towards autonomy coupled with the presence of the Act, the attraction of a structured and uniformed approach and the words of both Mumby J and Andrew Edis QC would however mean that in practice the Courts would adopt the definition in the Act and incorporate it in so far as is necessary in to the common law.

13. **<u>The Common Law Test for Capacity to Litigate</u>**

    Masterman Lister v Brutton & Co (supra) at 1539D by Chadwick LJ:

    … the test to be applied … is whether the party to the legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law –

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whether substantive or procedural – should require the interposition of a …litigation friend.

The issue of capacity was also clearly stated to be time and issue specific.

14. <u>The Statutory Test:</u>

<u>Section 2(1) Mental Capacity Act 2005</u>

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 or disturbance of the mind.

<u>Section 2 (2)</u>

It does not matter if the disturbance is permanent or temporary.

15. The test is in two parts – diagnostic (impairment or disturbance of the mind) and factual (at the material time unable to make a decision for himself in relation to the matter). The diagnostic part will be a matter for expert evidence.

16. The Act offers further guidance in relation to the application of the test in two ways. It sets out guiding principles and a formula to enable the application of the definition and principles.

17. <u>Guiding Principles</u>:
It is arguably in these principles that the subtle differences lie between the common law and the statutory definition (although Mumby J and Edis QC both considered that these merely reflected the philosophy underpinning the common law approach).

<u>Section 1 MCA 2005</u>

i. a person must be assumed to have capacity unless it is established that he lacks capacity;
ii. a person must not be treated as unable to make a decision unless all practicable steps have been taken to enable him to do so without success;
iii. a person must not be treated as unable to make a decision merely because he makes an unwise decision;
iv. an act done or a decision made under the Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests;
v. before the act is done, or the decision made, regard must be had as 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 right and freedom of action.

18. <u>The Formula</u>:
<u>Section 3:</u>

(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)

(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 –

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(a) deciding one way or another,
(b) failing to make a decision.

19. **The Evidence:**
- Which expert?
- What questions should the expert address?
- Information for the experts:
  - Clinical notes
  - Witness statements of relevant facts.
  - It will be for the lawyers to set out the type of decisions which the Claimant will be required to make in the course of the litigation.
  - Sections 1, 2 and 3 of the MCA 2005.

20. **When should capacity be investigated?**
At the first reasonable opportunity. The court is required to investigate capacity whenever there is reason to suspect it is absent. There is no need for the court to rely on either party to raise/pursue it. *Mastermann Lister v Brutton & Co* (above). These observations remain good see *Saulle v Nouvet* (above).

21. **Compromise of a claim on behalf of a protected party.**
CPR 21.10 concerns the requirement for court approval. CPR 21.11 concerns control of the money of a protected party. 21PD.5 and 21PD.6 contain details of the procedural requirements which must be satisfied for approvals.

Note: approvals must normally be dealt with by a Master, a designated Civil Judge or his nominee.

The practice of informal referral by Judges to the Master of the Court of Protection has ended – i.e. the court of protection no longer approves the settlement.

22. **Capacity to litigate but not to manage funds**:
What of the person who has capacity to litigate but not capacity to administer the sum received – can s/he be a protected beneficiary and so benefit from CPR 21.11 re control of money after settlement?

This category of patient was certainly contemplated in *Masterman Lister* (paragraph 27). However, the definition of "protected beneficiary" within the CPR is "a protected party who lacks capacity to manage and control any money recovered by him …".

CPR 21.11 requires consideration to be given at settlement as to whether the protected party is in fact a protected beneficiary but does not appear to envisage consideration of this predictable situation.

Andrew Edis QC in *Saulle v Nouvet* understood the rules to mean that the Claimant could not be a protected beneficiary unless he was first a protected party. He saw an argument for a provision in the settlement for damages or a provisional damages award to allow for a later deterioration causing the Claimant to require the help of the Court of Protection or to pay for the assistance of experts in order to maintain his capacity to understand information and take decisions.

We will have to wait and see. In the meantime, it will be important to ensure that consideration is given as to capacity shortly prior to compromise of a claim even where you have previously been satisfied that the Claimant had capacity to litigate.

23. **Claiming the costs of the Court of Protection**
The deputy is entitled to remuneration from the protected party's estate for discharging his duties. The court may order a deputy to give a security for the discharge of his functions and in practice this will require the deputy taking out a bond from an authorised insurance company or deposit taker (Public Guardian Regulations 33(2)(a)). In September we were told HSBC had the monopoly on these bonds and that premiums of £10,000 per annum were not unusual.

- Practical means of reducing premiums – reduce risk – consider limiting the deputy's access to the capital
- Will a professional deputy's professional indemnity insurance cover this risk?

24. **<u>Directions at the conclusion of the case</u>**

Where the sum recovered on behalf of a protected beneficiary is more than £30,000 the order approving the settlement must provide for the Litigation Friend to apply to the Court of Protection for the appointment of a deputy (after which the fund will be dealt with as directed by the Court of Protection) unless a deputy /attorney under a registered enduring power of attorney or donee of a lasting power of attorney has already been appointed (21PD.10).

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