www.doughtystreet.co.uk

Capacity and Civil Proceedings – Part 1

doughty street chambers

Chair – Oliver Lewis

Speakers -

Beth Chalcraft

Dominic Preston

Jordan Briggs

When does someone lack capacity?

Beth Chalcraft, Barrister, Doughty Street Chambers

MENTAL CAPACITY ACT 2005

- The principles (section 1):
  - Assumption of capacity.
  - Take all practicable steps to help P make a decision.
  - An unwise decision is not in itself evidence of incapacity.
  - An act or decision made must be in P's best interests.
  - Least restrictive option.

MENTAL CAPACITY ACT 2005

- Functional test (section 3(1)):
  - Understand the relevant information.
  - Retain the relevant information.
  - Use or weigh the relevant information.
  - Communicate their decision.

- Diagnostic test (section 2(1)):
  - An impairment of, or a disturbance in the functioning of, the mind or brain.
  - Permanent or temporary.
  - No requirement for a specific diagnostic label.

MENTAL CAPACITY ACT 2005

- The ‘relevant information’ for conducting litigation:
  - Nature and purpose of proceedings.
  - The main issues.
  - The risks.
  - Settlement.

Capacity - Navigating CPR 21

Dominic Preston, Barrister, Doughty Street Chambers

CPR 21

What it tells us:

- A protected party (person lacking capacity to litigate) requires a litigation friend (r. 21.2(1))
- Absent litigation friend – no steps in proceedings other than issue and service of claim and applying for appointment of litigation friend (21.3(2))
- If found to be protected party during proceedings, no further steps (21.3(3))
- Any step taken whilst a protected party of 'no effect' unless otherwise ordered (21.3(4))
- Who can be a litigation friend and how they are appointed (21.4; 21.5; 21.6)

What it does not tell us:

- The procedure (as distinct from the test) for deciding *whether* a person lacks capacity to litigate
- The court's powers and duties (if any) in relation to that procedure (e.g. disclosure/expert evidence)
- The rights and duties of P, the other parties and P's representatives.

PROCEDURE – DUTY OF INQUIRY

- Court's duty:
  - If issue is raised, to *inquire* - *Masterman-Lister v Brutton* [2003] 1 WLR 1511 at 17:

    'courts should always, as a matter of practice, at the first convenient opportunity, investigate the question of capacity whenever there is any reason to suspect that it may be absent.'
  - Necessarily inquisitorial process – cannot rely on P to advocate on capacity!
- Duty of P's legal reps –
  - Professional duty to resolve doubt by investigating: *RP v Nottingham CC* [2008] EWCA Civ 462, [2008] 2 FLR 1516 per Wall LJ at para 47
  - If necessary, must notify the court (*McFaddens (A Firm) v Platford* [2009] PNLR 26
  - Presumption of capacity does not obviate need to investigate where there is good reason for concern and legitimate doubt (*Royal Bank of Scotland PLC v ABI* UKEAT/0266/18 per Swift J at para 26)

PROCEDURE – RIGHTS AND DUTIES OF OTHERS

- P's rights:
  - P has right to object to his autonomy being removed: *Folks v Faizey* [2006] CP Rep 30 at [25]
  - Court may need to hold a hearing to decide issue: *Folks v Faizey*
  - At hearing, P's representatives should be neutral – assisting court with law and evidence but not advocating a particular outcome.
- Rights of opponent
  - Not an inter-partes issue – not generally permitted to challenge appointment: *Folks v Faizey*
  - Other party may have right to object only if '*plausible reason to protect their own position*' – does not include inconvenience of appointment and delay: indeed appointment *protects* the other party (e.g. avoids unravelling; ensures settlement binding).

PROCEDURE – RIGHTS AND DUTIES OF OTHERS (2)

- Duty on opponent to raise issue where opponent is litigant in person?
  - *Masterman-Lister at [30]: **May** have duty to raise it with court.*
  - See also:
    - » CPR r.1.1(2)(a) – overriding objective: ensuring parties can participate fully in proceedings –
    - » PD 1A – court 'with assistance of parties' duty to identify vulnerability of parties

- If court needs to investigate – what are its powers?
  - to order third party disclosure?
  - to order party to obtain an expert's report?

MAKING APPLICATIONS TO THE COURT

- What of duty of confidentiality? Duty to the court? Duty to your client?
  - Can application include confidential material or material protected by legal professional privilege?
  - Bar Council view:
    - duty to act in client's best interests (*CD2*) and duty to the court (*CD1*) override duty of confidentiality
    - When applying to the court may be necessary to give evidence on *why* you are concerned about capacity – must be disclosed.
    - SRA may disagree! If unsure, take advice from relevant body - refer to bar council guidance

- Should application be on notice to other side? Should evidence be marked for judge only?
  - Will depend on circumstances of the case
    - e.g. information relating to capacity could be relevant to case generally – may need to prevent other side having that evidence in absence of valid consent from a capacitous client?

OTHER ISSUES:

- Costs: Who will pay for any report, court application or costs of attending any hearing:
  - No legal retainer – can you charge client?
  - Legal aid – not everything (or much!) in scope?
  - CFA – is it a valid CFA?
  - Insurer – is insurer liable if client could not contract?

- What if client is found to *have* capacity?
  - Is there an obligation to continue to act if you remain in doubt despite court order?

PRACTICAL ADVICE WHERE CLIENT MAY LACK CAPACITY

- If doubts arise – how to proceed? Suggestions (including advice from Bar Council Ethics advice: *Client Incapacity*, June 2025):
  - Barrister/solicitor review concerns together
  - Inform client of concerns *'as tactfully as possible'* and take on board comments and response
  - Keep a careful record of action taken and advice given
  - Obtain evidence – e.g. letter/notes from treating clinician/GP – consent will be needed.
  - Those inquiries may lead to the need for further evidence. Will client consent to a report and meeting an expert?
  - May need to apply to court for permission to get report and/or to inform the court that doubts unresolved – obligation <u>even if client objects</u>
  - <u>If doubt unresolved – will need to apply to court for ruling on capacity and/or relevant orders</u>

DEALING WITH CLIENT TACTFULLY

- Don't forget the context – may have considerable trust issues:
  - Likely to have been badly failed by others from 'officialdom'
  - Asking client to give up autonomy
  - Inquiries of others may interfere with client's relationship with others he needs:
    - 'going behind client's back'
    - Clinicians may be reluctant to provide information if it may cause harm

- Process will be easier if client consents – take the time and effort to build trust:
  - Empathy and humour!
  - Engage with them as a person (likes/dislikes/concerns etc), not just a client;
  - Build rapport but must be based on honesty about problems that need to be tackled and steps you need to take on client's behalf
  - Remind them that you have a duty to consult client at all times – even if litigation friend is needed

POTENTIAL LITIGATION FRIEND

- PRE–ISSUE stage: No capacity, no retainer - How to do preparatory work for Claimant in advance of issue of proceedings?
  - Usual practice – find a willing 'potential' litigation friend
  - What is status of any CFA (or other funding arrangement) before issue and appointment?
  - Possible option (if worried): COP application – but cumbersome, slow and costly

- POST ISSUE - who can be litigation friend (CPR 21.4):
  - COP appointed deputy *with power* to do so per COP order
  - Any other person provided:
    - Can fairly and competently conduct proceedings
    - No conflict of interest
    - If acting for Claimant, undertakes to pay costs awarded against Claimant (subject to right of recoupment from Claimant's assets).
    - They consent and sign certificate of suitability confirming the above

OFFICIAL SOLICITOR – LITIGATION FRIEND OF LAST RESORT

- Currently Sarah Castle – Three principal pre-conditions:
  - Clear evidence that party/intended party lacks capacity;
  - Security for costs (legal aid/own funds/undertaking from another party to pay costs)
  - Case is one of 'last resort' – no-one else who is available to act as litigation friend

- Useful guidance:
  - *Official Solicitor's 2017 Practice Note: The Official Solicitor to the Senior Courts: Appointment in Family Proceedings and Proceedings under the Inherent Jurisdiction in relation to Adults*
  - There's a referral form to fill – it is detailed but helps identify the right information

POTENTIAL REFORM

- Recommendations of Civil Justice Council, The Procedure for Determining Mental Capacity in Civil Proceedings, Final Report, November 2024
  - Need for clarity on procedure, rights and duties of participants
  - Need to plug funding gap to ensure court has ability to assess capacity properly

- Civil Procedure Rule Committee:
  - Recommendations re 'fund of last resort' and/or 'non means tested legal aid' rejected by MOJ
  - Sub committee set up in October 2025 to consider other recommendations re procedure

Obtaining an expert report

Jordan Briggs, Barrister, Doughty Street Chambers

AVOIDING PITFALLS

1. Don't be too hasty to obtain a report!
   - Presumption is that P has capacity (s.1(2) MCA).
   - Fundamental safeguard of human autonomy.

2. Many private assessors exist.
   - Many of these are poor quality.
   - It is not clear who will pay.

3. The right assessor is important.
   - The *'diagnostic limb'* may warrant a particular type of professional.

AVOIDING PITFALLS

4. Be wary of collateral evidence.
   - Sometimes using this evidence is unavoidable.
   - But capacity is decision specific (*A Local Authority v JB* [2021] UKSC 52) and collateral evidence won't be.

5. Don't be too hasty to accept the conclusions!
   - Many reports are of poor quality.
   - Your duties are not extinguished upon receipt of a report.
   - Beware of fluctuating capacity.

CASE STUDY

MacPherson v Sunderland City Council (Rev 1) [2024] EWCA Civ 1579

- Basic facts
  - "LV" was P's mother in Court of Protection proceedings.
  - LV was held in contempt of court in those proceedings, and was committed to prison.
  - LV instructed lawyers to appeal the committal.
  - The lawyers developed concerns about LV's capacity to conduct the appeal proceedings.

- The lawyers acted *"wholly in accordance with their respective codes of professional practice"* (§24; 11-13)
  - Raised concerns with LV in conference (§11).
  - Invited LV to undergo a capacity assessment (strongly refused).
  - Counsel contacted Bar Council + spoke to ethics advisers.
  - Applied per Rule 35.4 CPR 1998 for permission to instruct an expert to do a desktop assessment.
  - Hearing before the Court of Appeal where lawyers *"assist[ed] by way of providing information and presenting the Court with a number of ways to progress the matter"* (§18)

GETTING THE RIGHT EVIDENCE

- Proportionality
  - The nature of the investigation and evidence required will depend in part on the nature and complexity of the issues, and must be proportionate *(RP v Nottingham CC* [2008] EWCA Civ 462*).*
  - Single joint expert? (PD35 to CPR Rule 35, § 7).

- Medical professionals
  - Courts generally tend to require some form of medical evidence (Civil Justice Council, § 5.3).
  - The "ideal" expert may depend on the diagnosis – old age psychiatrists; mental health professionals; autism-informed psychologists etc.

GETTING THE RIGHT EVIDENCE

- Collateral information
  - Sometimes "a means to an end" (i.e. professional assessment), sometimes "the end themselves" (i.e. in lieu of further assessment).
  - The assumption is that courts can obtain these records through third parties *(Bradbury v Paterson* [2014] EWHC 3992*).*
  - CPR r.31.17(2)(a) is usually used:

    "[…] the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings".

  - That is an imperfect jurisdictional basis for this is unclear (Civil Justice Council, §5.11).
  - Can you "get away with it"?

GETTING THE RIGHT EVIDENCE

- Medical professionals (preparing an application)
  - Is a third party disclosure application required?
  - Review the reported cases / consult colleagues in mental capacity law.

  - Prepare letter of instruction with enclosures *(Bristol City Council v CC & Ors* [2026] EWCOP 19
    - *"Focussed and adapted to the facts of the particular case".*
    - *"Identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between any impairment and inability to decide."*
    - *"Lengthy and unwieldy recitations of the background facts and procedural history are to be avoided, as well as detailed descriptions of previous case law".*

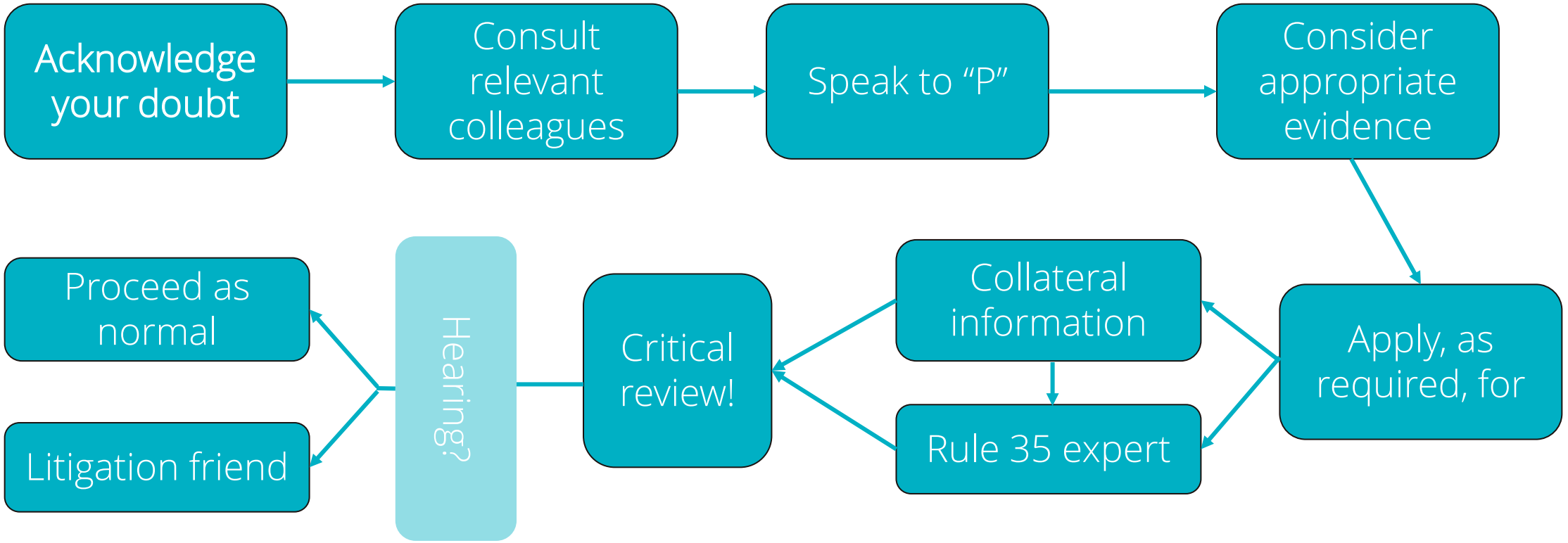
GETTING THE RIGHT EVIDENCE

- Medical professionals (applying / receiving the report)
  - Rule 35 application (is a paper-based assessment required?)
  - Receive and scrutinise the report.
    - Is the outcome as expected?
    - Does "P" accept it / is a hearing required?
    - Arrange a litigation friend.
    - If in doubt, consult a colleague specialising in mental capacity law.
  - Assist the court as required (including application to the Court of Protection?)

CHANGES IN THE FUTURE

- Civil Justice Council recommend:
  - Amendment to a Practice Direction to set out:
    - » Guidance on when medical evidence is required.
    - » Options for delegating the work of investigation.
  - Creation of:
    - » A clear power for the court to order third-party disclosure where necessary and proportionate.
    - » Guidance as to the use of this power.

TIMELINE


Acknowledge your doubt
Consult relevant colleagues
Speak to "P"
Consider appropriate evidence
Apply, as required, for
Collateral information
Rule 35 expert
Critical review!
Hearing?
Proceed as normal
Litigation friend

www.doughtystreet.co.uk

Thank you!