

Next Talk: 12:00 – 12:40

Deputyship Damages & Capacity



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“An expensive afterthought”

- ▶ “The only thing that is more expensive than education is ignorance” *Benjamin Franklin*
- ▶ Too much focus on whether a claimant lacks capacity *in the abstract*.
- ▶ Limited attention on
 - ▶ the nuance of *capacity* and how it links with the reasonable cost of deputyship: *Chris Fleming will deal*
 - ▶ specific arguments in contested litigation: *Brian McCluggage will deal*



ISSUES IN TODAY'S PRESENTATION

- ▶ A. Defining capacity
- ▶ B. The decision-making process
- ▶ C. Assessment of financial capacity
- ▶ D. Duration of deputyship & damages
- ▶ E. Proportionality of Crt of Protection Costs
- ▶ F. Conflicts of Interest
- ▶ G. Trusts as an alternative to Deputyship

Defining Capacity

- ▶ Section 2(1) & (2) MCA 2005:

- ▶ *(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.*

Defining Capacity

- ▶ S. 1 MCA sets out the following well known principles:
 - ▶ (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.
 - ▶ (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
 - ▶ (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.
 - ▶ (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.

The two aspects of capacity

- ▶ *Local Authority v P* [2018] EWCOP 10 at §15(2):
 - ▶ The *diagnostic test* is whether the person has an impairment or disturbance of mind.
 - ▶ The *functional test* is whether the impairment/disturbance renders the person unable to make the decision.

Four practical aspects of financial capacity

1. Day to day expenditure decisions
 2. Decisions in relation to care/rehabilitation
 3. Large capital expenditure e.g. car or a new property
 4. Managing a capital sum
- ▶ An individual claimant's capacity and needs may be different for each

Defining Capacity

- ▶ *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889:

“To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice ... Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and to advise her appropriately ... Finally, she needs sufficient mental capacity to understand and to make decisions based upon, or otherwise give effect to, such advice as she may receive.”

A decision specific process (1)

- ▶ s. 1(2) MCA 2005: all practical steps must have been taken to help P make a decision before he can be considered to be unable to make a decision.
- ▶ Could information be presented to P differently?
- ▶ It is not necessary for P to comprehend every detail of the issue. (see *LBL v RYJ* [2010] EWHC 2664 (Fam)).

A decision specific process (2)

- ▶ Chadwick LJ in *Masterman-Lister* at [75]:
 - ▶ *'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 – whether substantive or procedural should require interposition of a next friend*

A decision specific process (3)

- ▶ Beware the '*protection imperative*' (see *CC v KK* [2012] EWHC 2136 (COP))
- ▶ Consider whether there is a risk that P has become over reliant on others (see *Loughlin v Singh* [2013] EWHC 1641)

Assessing financial capacity (1)

- ▶ Four types of financial decisions:
 - ▶ Day to day expenditure – managing general income
 - ▶ Decisions in relation to rehabilitation
 - ▶ Decision as to large expenditure
 - ▶ Decisions as to investment and management of capital sum

Assessing financial capacity (2)

- ▶ Possible that a professional deputy is required to deal with more complex and high value decisions, and family can step in thereafter (see *Eagle v Chambers (No. 2)* [2004] EWCA (Civ) 1033)
- ▶ Unwise decisions are not necessarily indication of an inability to make decisions (see *Loughlin v Singh* at [35] and *DL v A LA* [2012] EWCA Civ 253)

Assessing financial capacity (3)

- ▶ Consider whether an interim payment would be helpful to assess how P (and those around him) deal with handling larger sums of money.
- ▶ To what extent is P able to deal with matters through the assistance of his/her case manager?

Evidence of deputyship costs

- ▶ Is evidence of deputyship costs expert evidence?
- ▶ What is best way to adduce deputyship evidence?
- ▶ Issue of independence?

A promotional poster for the TV show 'Deputy'. On the left, a man (Stephen Dorff) is shown in profile, wearing a wide-brimmed straw hat, dark sunglasses, and a red jacket with a white fur collar. He is looking out over a city skyline at sunset or sunrise. The sky is a mix of blue and orange. The city buildings are silhouetted against the bright light. The overall mood is gritty and cinematic.

STEPHEN DORFF

The hero no one saw coming.

DEPUTY

THU 1/2
FOX

1) DURATION

- ▶ Regaining capacity
 - ▶ On balance of probability or as a loss of chance?

- ▶ “Fluctuating capacity”:
 - ▶ Will the court make findings on balance of probability as to periods of time?
 - ▶ Or might the court make a reduction in the multiplier for deputyship damages?

Warrilow v. Norfolk NHS Trust

- ▶ [2006] EWHC 801, Langstaff J
- ▶ Judge held that the issue was not whether C was a patient but whether damages should be assessed on the footing that C would remain so regarded by judge of Crt of Protection
- ▶ Risk of inability to manage the capital sum considered as slight
- ▶ Depression rather than brain damage or psychosis
- ▶ Chances of future “patienthood” represented by two years costs of Court of Protection

AB v. Royal & Devon

- ▶ [2016] EWHC 1024, Irwin J
- ▶ C had a complicated history of drug use and personality disorder
- ▶ Clin neg case: spinal abscess not treated – paraplegia
- ▶ Judge accepted 1 yr incapacity irrespective of drug use and deputy needed to buy property and instigate care regime
- ▶ After 1 yr decisions less complex – established regime
- ▶ Lack of capacity at that stage derive from drug use not D's negligence

Re M

- ▶ [2013] 1 WLUK 533, Denzil Lush J (Crt of Protection)
- ▶ Elderly businessman temporarily lacking capacity due to stroke
- ▶ Competing applications for appt of deputy
- ▶ On medical evidence anticipated M would regain capacity
- ▶ Short duration of expected incapacity meant that a professional deputy was undesirable. Lose valuable time completing paperwork and familiarising with affairs
- ▶ Spouse and friends above professional advisor in order of preference

2) PROPORTIONALITY

- ▶ Suppose the damages fund (absent COP costs) is £300,000 for a 20 year old claimant.
- ▶ If a professional deputy is to manage for life, the multiplier is 72+ if normal life expectancy
- ▶ Even if fixed costs (£1,500 inc VAT) deputyship damages likely to be £120,000+.
- ▶ Commercial charging would likely lead to cost of deputyship exceeding remainder of damages
- ▶ Can D argue that proportionality is a factor?

ABC v. DFT

- ▶ [2018] 2 WLUK 700, HHJ Yelton as High Cr Judge
- ▶ Incapacity and found to be permanent
- ▶ Damages for future rehabilitation - £200k
- ▶ Claim for deputyship costs - £872,787
- ▶ “simply cannot be fair to a defendant or proper in a developed legal system”
- ▶ Also found that once property purchased little work involved.
- ▶ Came to a “jury figure” of £125,000.

Fit with general principle?

- ▶ Sowden v. Lodge (2004): damages in personal injury are the reasonable costs of reasonable needs
- ▶ Robshaw (2015): “That process involves, in some instances, the need to look at the overall proportionality of the cost involved, particularly where the evidence indicates a range of potential costs.”
- ▶ Ellison (2015): “application to the quantification of damages for future costs of a general requirement of proportionality of the kind advocated by [D] would be at odds with the basic rules as to compensation for tort identified above.”

3) CONFLICTS OF INTEREST

- ▶ In-house COP department?
- ▶ The deputy providing evidence in her own cause?
- ▶ Arises outside of PI/Clin Neg damages where a Property & Affairs deputy instructs own firm for litigation or other life issues
- ▶ Code of Practice to the MCA recognises the issue
- ▶ *Can D contend that damages should be assessed on basis of an independent deputy?*

GGW v. East Sussex CC

- ▶ [2015] EWCOP 82
- ▶ Unrealistic to eradicate conflicts of interest entirely
- ▶ A principal function of the COP to manage conflicts
- ▶ Assessment of costs by the Senior Courts Costs Office ensures no abuse
 - ▶ *But that does not really assist with evaluation of damages in a civil case*
- ▶ Court of Protection may manage the conflict
 - ▶ If deputy to be appointed during proceedings, will solve the issue

OH v. Craven

- ▶ [2016] EWHC 3146, Norris J
- ▶ Trustees were connected with C's litigation sols
- ▶ "One stop shop" in PI litigation heeded and can be for convenience of litigants but "only one product"
- ▶ Rebuttable presumption of undue influence arises
- ▶ Burden on sols to rebut: usually requires independent advice: £1m+ = Chancery counsel written advice at sols expense with instructions and Opinion put in evidence

Re ACC (2020)

- ▶ [2020] EWCOP 9, Judge Hilder
- ▶ A “proportionate and required approach” to addressing conflict of interest for a deputy already appointed set out.
- ▶ Up to £2,000+ VAT no need to tender
- ▶ Otherwise 3 quotations inc own firm

- ▶ *HOW MIGHT THIS APPLY ACROSS INTO ASSESSMENT OF DEPUTYSHIP DAMAGES?* Get competing quotations rather than just a “deputyship expert’s” opinion?

4) TRUST AS AN ALTERNATIVE?

- ▶ PI Trusts are commonplace for tax and benefit reasons but also to provide some protection
- ▶ Difficulty: if C is the only beneficiary may dissolve the trust
- ▶ Perceived as a cheaper arrangement. Outside of COP.
- ▶ V v. R (2012): a trust does not provide adequate protection and if only purpose is to stop inappropriate spending it suggests incapacity
- ▶ Trust may be the best solution where fluctuating capacity or there is future uncertainty

LINDSAY v. WOOD (2006)

- ▶ [2006] EWHC 2895, Stanley Burton J
- ▶ Discretionary trust already in existence
- ▶ C's capacity in issue
- ▶ Found that if C was to refuse to place monies in the trust that would indicate incapacity – lack of rational decision-making
 - ▶ *So must follow that if C is prepared to use a trust it is a step which aids C in making decisions for himself. A trust may enlarge C's autonomy*

ABC v. DFT (2018)

- ▶ [2018] 2 WLUK 700, HHJ Yelton
- ▶ Suggested that a trust should be considered as an alternative to a deputy
- ▶ On the facts, a trust would be impractical and inappropriate
- ▶ Unfair on parents to ask either to be trustees
- ▶ Room for family arguments

Watt v. ABC (2016)

- ▶ [2016] EWHC 2532, Charles J
- ▶ £1.5m settlement in brain injury case
- ▶ Vital to identify what trusts suggested and what powers or restrictions on the deputy
- ▶ Need consider what C can do with support
- ▶ Advantages of a trust:
 - ▶ Deputy needs to apply s1(5) MCA best interests
 - ▶ Protection to deputy and third parties
 - ▶ Statutory structure for decision making
- ▶ However, no presumption of appt of deputyship

Other considerations

▶ Lay Deputies

- ▶ Family members
- ▶ Friends
- ▶ *May be useful where professional deputyship costs may be disproportionate.*
- ▶ *Have professional deputy for a few years then hand over to lay deputies*

▶ Joint Deputies

- ▶ A family member and a professional deputies
- ▶ Professional deputies do not like this
- ▶ But may be a way or make cost proportionate if family can take charge of most responsibilities