Butterworths Medico-Legal Reports/Volume 73/Masterman-Lister v Jewell and another - 73 BMLR 1

Masterman-Lister v Jewell and another

[2002] EWCA Civ 1889

Court of Appeal, Civil Division

Kennedy, Potter and Chadwick LJJ

12-15 November, 19 December 2002

Mental incapacity - Practice - Parties - Claimant suffering brain damage as result of road traffic accident - Claimant compromising action - Claimant seeking to sue solicitors advising him to compromise - Claimant seeking to re-open issue of capacity - Whether claimant a 'patient' under the rules of the court - Whether burden of proof on claimant to show inability of managing or administering his affairs - Test to be applied to determine whether capacity in issue - Time at which issue of capacity to be raised - RSC Ord 80, r 10 - CPR Pt 21.

The claimant was born in 1963. In 1980, he was involved in a serious road traffic accident and suffered severe brain damage. The defendants were instructed to issue a claim. In 1987, the claimant accepted an offer to compromise the action. The claimant had attempted to work after the accident, but was only able to perform menial tasks and had not worked since 1989. He lived with his parents until 1992, when he purchased his own house. In late 1993, the claimant, having been told by the defendants that his claim could not be re-opened issued a writ for damages for negligence and/or breach of contract in relation to the defendants' conduct of his litigation. The statement of claim was not served until May 1996, and the defendants in their defence asserted that the claim was statute-barred. In 1997, the claimant was advised by a consultant in neuropsychiatric rehabilitation that he was, and had been since the accident a patient within the meaning of s 94(2) of the Mental Health Act 1983, namely a person who was incapable by reason of mental disorder of managing and administering his property and affairs. The claimant then sought to re-open the settlement of his personal injury action on the basis that it had never received the approval of the court, as was required at the relevant time pursuant to RSC Ord 80, r 10. That rule which defined the term 'patient' was replaced by CPR 21.1(2)(b). A trial of a preliminary issue, in relation to both actions was ordered, as to whether the claimant had been a 'patient' within the meaning of RSC Ord 80 and/or CPR Pt 21 at any time since September 1980. The judge ruled that the court should only take over the individual's function of decision making when it was shown on the balance of probabilities that the individual did not have the capacity sufficiently to understand, absorb and retain information, including advice, relevant to the matters in question sufficiently to enable him or her to make decisions based upon such information. He then considered the evidence and concluded that since 1983 at the latest, the claimant had been fully

73 BMLR 1 at 2

capable of managing and administering his property and affairs and therefore was not a 'patient' for the purposes of either the Act, Ord 80 or CPR Pt 21. The claimant appealed. On appeal issues arose as to the burden of proof; the test for determining capacity to litigate and compromise; and the time at which the issue of capacity should be raised.

Held - (1) The burden of proof rested on those asserting incapacity. The fact that there was evidence that as a result of a head injury sustained in an accident it was agreed that the claimant was incapable of managing his property and affairs did not mean that he could rely on the presumption of continuance. Although there

was no requirement in Ord 80 of CPR Pt 21 that a judicial officer had to consider medical evidence or be satisfied as to incapacity before a person could be treated as a patient, following the implementation of the Human Rights Act 1988, in order that a party was not deprived of his civil rights by being treated as a patient, the court should always, as a matter of practice, at the first convenient opportunity, investigate the question of capacity whenever there was any reason to suspect that it might be absent. That meant that, even where the issue did not seem to be contentious, a district judge who was responsible for case management would almost certainly require the assistance of a medical report before being able to be satisfied that incapacity existed.

(2) For the purposes of Ord 80 and Pt 21, the test to be applied to determine a person's capacity was issue-specific. What had to be considered was whether the party to legal proceedings was capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case might require, the issues on which his consent or decision was likely to be necessary in the course of those proceedings. If the party had capacity to understand that which he needed to understand in order to pursue or defend a claim, there was no reason why the law, whether substantive or procedural, should require the interposition of a next friend or litigation friend. Moreover, a person should not be held unable to understand the information relevant to a decision if he could understand an explanation of that information in broad terms and simple language. Furthermore, he should not be regarded as unable to make a rational decision merely because the decision which he did, in fact, make was a decision which would not be made by a person of ordinary prudence.

(3) Normally no problem arose as to when the issue of capacity should be raised. It raised itself. However, if the claimant lacked capacity and, without any fault on anyone's part, no one recognised that fact, the court could regularise the position retrospectively. Under CPR 21.3(4) any step taken before a child or patient had a litigation friend was to be of no effect, unless the court otherwise ordered. Provided everyone had acted in good faith and there had been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time, the court could not refuse to regularise the position. To do otherwise would be unjust and contrary to the overriding objective of the CPR, but in any given case the ultimate decision had to depend on the particular facts. Nevertheless, finality in litigation was also important, and the rules as to capacity were not designed to provide a vehicle for re-opening litigation which having apparently been properly conduct had for long been understood to be at an end.

(4) In the instant case, the judge had used the correct approach and had been entitled, on the evidence, to come to the conclusion that the claimant had been fully capable of managing and administering his property and affairs.

Cases referred to in judgment

Ball v Mannin (1829) 3 Bli NS 1, 6 ER 569.

Banks v Goodfellow LR 5 QB 549, [1861-73] All ER Rep 47.

Beall v Smith (1873) 9 Ch App 85.

Beaney, Re [1978] 2 All ER 595, [1978] 1 WLR 770.

C (mental patient: medical treatment), Re (1993) 15 BMLR 77, sub nom *C (adult: refusal of treatment), Re* [1994] 1 All ER 819, [1994] 1 WLR 290.

CAF, *Re* (23 March 1962, unreported).

Cumming, Re (1852) 1 De GM&G 537.

Durham v Durham (1885) 10 PD 80.

F v West Berkshire Health Authority (Mental Health Act Commission intervening) (1989) 4 BMLR 1, [1989] 2 All ER 545, sub nom *Re F (mental patient: sterlisation)* [1990] 2 AC 1, [1989] 2 WLR 1025, HL.

Gibbons v Wright (1954) 91 CLR 423, Aust HC.

Hart v OConnor [1985] 2 All ER 880, [1985] AC 1000, [1985] 3 WLR 214, PC.

Harwood v Baker (1840) 3 Moo PCC 282, 13 ER 117, PC.

Imperial Loan Co v Stone [1892] 1 QB 599, CA.

K Re, Re F [1988] 1 All ER 358, [1988] Ch 310, [1988] 2 WLR 781.

Leather v Kirby [1965] 2 All ER 441, [1965] 2 QB 367, [1965] 2 WLR 1318, CA.

Manches v Trimborn (1946) 115 LJKB 305.

Mason v Mason [1972] 3 All ER 315, [1972] 3 WLR 405.

MB (an adult: medical treatment), Re (1997) 38 BMLR 175, [1997] 2 FCR 541, CA.

Molton v Camroux (1849) 4 Exch 17, 154 ER 1107, Ex Ch.

Park's Estate, Re, Park v Park [1953] 2 All ER 408, [1954] P 89, [1953] 3 WLR 307; *affd* [1953] 2 All ER 1411, [1954] P 112, [1953] 3 WLR 1012, CA.

S (FG), Re [1973] 1 All ER 273, [1973] 1 WLR 178.

W (Enduring Power of Attorney), Re [2001] 4 All ER 88, [2001] Ch 609, [2001] 2 WLR 957, CA.

W v L [1973] 3 All ER 884, [1974] QB 711, [1973] 3 WLR 859, CA.

White v Fell (12 November 1987, unreported).

Winterwerp v Netherlands (1979) 2 EHRR 387, [1979] ECHR 6301/73, ECtHR.

Appeal

The claimant, Martin Joseph Masterman-Lister, appealed with permission of Wright J from his decision on 15 March 2002 ([2002] EWCA Civ 1889, [2002] All ER (D) 297 (Dec)) in relation to a preliminary issue, set out at [1], below, ordered to be determined by Master Murray on 29 March 2000, arising out of two claims brought by the claimant against Brutton & Co and Gordon Jewell and Home County Dairies in respect of personal injury resulting from a road traffic accident on 9 September 1980. The facts are set out in the judgment of Kennedy LJ.

Brian Langstaff QC, *Patricia Hitchcock* and *Anna Beale* (instructed by *Stewarts*) for the appellant.

Robin De Wilde QC and *Nick Brown* (instructed by *Blake Lapthorn,* Portsmouth) for Brutton & Co.

Richard Methuen QC and *Hugh Hamill* (instructed by *Clarke Willmott*, Southampton) for Mr Jewell and Home Counties Dairies.

Robert Francis QC for the Official Solicitor.

73 BMLR 1 at 4

KENNEDY LJ.

[1] This is an appeal by the claimant from a decision of Wright J ([2002] EWHC 417 (QB), [2002] All ER (D) 247 (Mar)) in relation to a preliminary issue namely:

> 'Whether the claimant has been a patient within the meaning of RSC Order 80 and/or Part 21 of the CPR at any time since the 8th September 1980 and, if so, what are the period or periods when the claimant has been a patient between the 8th September 1980 to date.'

On 29 March 2000 Master Murray ordered the trial of that issue in relation to both of the claimant's actions, and after a lengthy hearing in January and February 2002 the judgment was delivered on 15 March 2002.

BACKGROUND

[2] For this section of my judgment I am indebted to the judgment of the trial judge. The claimant was born on 24 July 1963, and on 9 September 1980, when riding a motorcycle to his work as an engineering apprentice, he collided with a milk float driven by Mr Jewell, an employee of Home Counties Dairies. The claimant sustained very severe injuries, including a serious head injury. He was in hospital for over three months and when he returned to work in June 1981 he was only able to perform routine clerical work, which he continued to perform until March 1989 when he resigned. He has barely worked since that date.

[3] The claimant's parents consulted a solicitor, Mr Wilks of Brutton & Co, soon after the accident, and on 24 December 1980 proceedings were commenced against Mr Jewell and Home Counties Dairies. It took some time to gather together the medical reports and the information in relation to financial loss, so the statement of claim was not served until 7 September 1985. The defence denied liability and alleged contributory negligence which counsel for the claimant had advised could be assessed as high as 50%. In October 1985 there was a payment into court, which was not accepted, but on 11 September 1987 the payment into court

was increased to £70,000. Two days previously the claimant, his father and his solicitor had attended a lengthy conference with his counsel in London. At that time counsel had valued the claim at £117,000 on full liability, and recommended serious consideration of any payment into court representing half of that sum.

[4] Nevertheless the claimant was not happy with the offer of £70,000, and on 13 September 1987 he wrote to Mr Wilks. As the judge said, the letter asked three relevant and sensible questions as to the effect of delaying an acceptance. The claimant's father said in evidence that the letter, although physically written by the claimant, was largely dictated to him by his father, and that seems to be borne out by the entry for that day in the claimant's diary, but the entry also says that he and his father 'discussed all the possibilities of my court case' including 'accepting their present offer or waiting a while'.

[5] On 15 September 1987 there was a conference at the offices of Brutton & Co in Fareham attended by Mr Wilks, the claimant, both his parents, and Mr Boot, a financial director of the claimant's father's company and a family confidante. The payment into court was fully discussed. The attendance note of the solicitor records that the claimant, with the advice of his parents, instructed the solicitor to tell the other side that if a further £10,000 was paid into court the claimant would accept it. Mr Wilks did as instructed. The defendants' solicitors

took instructions from their clients, and were authorised to pay a further £6,000 provided there was acceptance within 24 hours. The claimant's father was telephoned and was, it seems, delighted. The claimant was markedly less enthusiastic but after considering the offer overnight he agreed to accept it, and the action was therefore settled for £76,000 and costs.

[6] For a time the claimant remained at home but in 1992, three years after he had given up work, he used £55,000 of his capital to buy a house. There he lives alone relying for income on state benefits. It was common ground before the judge that because of his physical and mental disabilities he is very unlikely ever to be able to obtain worthwhile remunerative employment.

[7] In late 1993 the claimant, having been told by Brutton & Co that his claim could not be reopened, consulted his brother-in-law Mr Knowles, who is a solicitor, and on 17 December 1993 a writ was issued against Brutton & Co for damages for negligence and/or breach of contract in relation to their conduct of his litigation. The statement of claim was not served until 21 May 1996, and not surprisingly the defence which was served on 6 February 1997 asserts that the claim is statute-barred.

[8] In June 1997 the claimant was examined by Dr Martyn Rose, a consultant in neuro-psychiatric rehabilitation. His view was and is that ever since the time of his accident the claimant has been a 'patient', within the meaning of s 94(2) of the Mental Health Act 1983, that is to say a person who 'is incapable, by reason of mental disorder, of managing and administering his property and affairs'. The claimant then sought to reopen the settlement of his claim in the original proceedings on the basis that it has never received the approval of the court, as then required by RSC Ord 80, r 10 (now CPR 21.10). Thus in March 2000 Master Murray ordered the trial of the same preliminary issue in relation to both actions.

RSC ORD 80

[9] The present CPR did not become effective until April 1999, so in this case we are primarily concerned with the previous provisions relating to litigants under a disability which were to be found in RSC Ord 80. Within that order, r 1 read:

> 'In this Order--

> "the Act" means the Mental Health Act 1983;
>
> "patient" means a person who, by reason of mental disorder within the meaning of the Act, is incapable of managing and administering his property and affairs;
>
> "person under disability" means a person who is an infant or a patient.'

Before I look more closely at that definition of a patient it is worth noting some of the consequences of being a patient. Rule 2(1) provides: 'A person under disability may not bring, or make a claim in, any proceedings except by his next friend.' Rule 2(3) provides: 'A next friend or guardian ad litem of a person under disability must act by a solicitor'. Rule 10 provides:

> 'Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made,
>
>
>
> shall so far as it relates to that person's claim be valid without the approval of the Court.'

The claimant was an infant when he began his action against Mr Jewell and Home Counties Dairies in December 1980. That disability was recognised and his father agreed to act and did act as next friend, so the proceedings were properly instituted. On 24 July 1981 the claimant reached the age of 18, and on 17 August 1981 he served notice of adoption in relation to his action. At that stage it had not occurred to anyone that the claimant might still be under a disability because he might be a patient for the purposes of RSC Ord 80, r 1. At no time prior to 1987 did any doctor raise that possibility, although Professor McLellan now says that it was implicit in his reports of October 1984 and September 1997. The claimant's solicitor, Mr Wilks, was an experienced personal injuries lawyer, and the possibility did not occur to him; nor did it occur to Mr Walker, the experienced personal injuries counsel who was instructed, and Mr Langstaff QC, who has appeared for the claimant before us, has made it clear that the lawyers originally instructed are not now being criticised for failing to recognise that the claimant might be a patient. Nonetheless, Mr Langstaff contends, as it was contended by Mrs Cox QC, as she then was, in the court below that at all times from the accident onwards the claimant was a patient who could only litigate or continue to litigate by his next friend, and who could only settle a claim with the approval of the court.

What does the definition mean?

[10] Mental disorder is defined in s 1(2) of the 1983 Act, and it seems to be common ground that if at any material time the claimant was incapable of managing and administering his property and affairs that was by reason of mental disorder within the meaning of the Act. So what is meant by being 'incapable of managing and administering his property and affairs?' The same wording can be found in s 94(2) in Pt VII of the 1983 Act which deals with the powers of the Court of Protection to manage the property and affairs of patients. Section 94(2) provides:

> 'The functions of the judge under this Part of this Act shall be exerciseable where, after considering medical evidence, he is satisfied that a person is incapable, by reason of mental disorder, of managing and administering his property and affairs; and a person as to whom the judge is so satisfied is referred to in this Part of this Act as a patient.'

Although the grounds of appeal begin with the assertion in para 1(a) that the judge erred in law in that he applied the wrong test for capacity, and various criticisms are made of the way in which he formulated the test, it emerged after Mr Langstaff had concluded his submissions as to the law that there is no criticism of the judge's formulation. What is criticised is his application of the law as he found it to be to the evidence in the case. Nevertheless permission to appeal was given by the trial judge because there is an important issue of law involved in relation to which there has been no previous decision of this court, and for that reason we have had the benefit of submissions from Mr Robert Francis QC on behalf of the Official Solicitor, so I do need to look at the legal position with some care.

73 BMLR 1 at 7

Capacity at different times and in different contexts

[11] Although as I have said, we are primarily concerned with whether or not the claimant was a patient for the purposes of RSC Ord 80, r 1 in September 1987, it is also necessary to consider his capacity at other times and in other contexts since that date.

[12] First, it has to be recognised that someone who is treated as a patient for the purposes of RSC Ord 80, r 1, who litigates by a next friend, is not necessarily and may never become accepted by the Court of Protection as a patient pursuant to s 94(2) of the 1983 Act. As is clear from the wording of s 94(2) the jurisdiction of the Court of Protection is only exercised when, after considering medical evidence, a nominated judge is satisfied as to the person's incapacity. Under Ord 80, r 1 no judicial officer has to consider medical evidence or be satisfied as to incapacity before a person can be treated as a patient. So the judge was in error when he indicated [2002] All ER (D) 247 (Mar) at [29] that where a person was so treated there was a 'consequent involvement of the Court of Protection'. However that error had no effect whatsoever on the judge's conclusions and I need say no more about it.

[13] Secondly, the issue of incapacity arises in relation to the claimant's ability to sue his former solicitors during the six years after September 1987, and the relevant provision is to be found in s 28(1) of the Limitation Act 1980 which reads:

> '... 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.'

Section 38(2) and (3) provide:

> '(2) For the purposes of this Act a person shall be treated as under a disability while he is an infant, or of unsound mind.
>
> (3) For the purposes of subsection (2) above a person is of unsound mind if he is a person who, by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing and administering his property and affairs.'

Section 38(4) deals with circumstances when a person is to be conclusively presumed to be of unsound mind, generally speaking when detained in hospital.

[14] Thirdly, the question arises of the claimant's capacity in relation to the commencement and conduct of the two actions which are before us. It is Mr Langstaff's contention that the claimant is a patient as defined by CPR 21.1(2)(b) which provides:

> '"patient" means a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his own affairs.'

The wording, it will be noted, differs slightly from the wording in RSC Ord 80, r 1, in that the title of the 1983 Act is set out in full, and the words

'property and affairs' are replaced by 'own affairs'. Mr Francis submits that the change may have some significance.

Capacity is important

[15] Quite apart from personal injury litigation it is clear that the issue of capacity is important to the Official Solicitor who, we are told, acts at any one time for about 1,700 'patients' in civil and family proceedings. An unknown number of other persons also act as litigation friends. In the Court of Protection 15,000 applications to register enduring powers of attorney are received each year on the ground that the donees have reason to believe that the donors are incapable of managing their property and affairs, and at any given time the Court of Protection has jurisdiction over a large number of estates of patients.

Business affairs, presumptions and the burden of proof

[16] There is no definition in the 1983 Act or in the Rules of the Supreme Court or in the Civil Procedure Rules to assist as to the meaning of 'incapable of managing and administering his ... affairs' but in F v West Berkshire Health Authority (Mental Health Act Commission intervening) (1989) 4 BMLR 1 at 11, [1990] 2 AC 1 at 59, per Lord Brandon of Oakbrook, it was held that Pt VII of the 1983 Act, which includes s 94(2), does not extend to physical care and/or treatment. It includes 'only business matters, legal transactions and other dealings of a similar kind'.

[17] It is common ground that all adults must be presumed to be competent to manage their property and affairs until the contrary is proved, and that the burden of proof rests on those asserting incapacity. Mr Langstaff submitted that where, as in the present case, there is evidence that as a result of a head injury sustained in an accident the doctors who have been consulted agree that for a time the claimant was incapable of managing his property and affairs he can rely on the presumption of continuance. That I would not accept. Of course, if there is clear evidence of incapacity for a considerable period then the burden of proof may be more easily discharged, but it remains on whoever asserts incapacity. Furthermore it has to be recognised that when a person is treated as a patient, whether or not as a result of an order of the court, he is thereby deprived of civil rights, in particular his right to sue or defend in his own name, and his right to compromise in litigation without the approval of the court. They are important rights, long cherished by English law and now safeguarded by the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). In Re Cumming (1852) 1 De GM&G 537 at 557, Knight Bruce LJ said:

> 'It is the right of an English person to require that the free use of his property, and personal freedom, shall not be taken from him on the ground of alleged lunacy, without being allowed the opportunity of establishing his sanity or denying his insanity before a jury as a contesting party, not merely as a subject of inquiry.'

Neither RSC Ord 80 nor CPR 21.1 seem to meet that requirement, which is underlined by arts 6 and 8 of the convention. In *Winterwerp v Netherlands* (1979) 2 EHRR 387, [1979] ECHR 6301/73, a Dutch national detained in hospital complained that his detention had divested him of his capacity to administer his property, and thus there had been determination of his civil rights

and obligations without the guarantee of a judicial procedure, as laid down in art 6(1) of the convention. That complaint was accepted by the European Court of Human Rights, but neither Ord 80 nor CPR 21.1 contains any requirement for a judicial determination of the question of whether or not capacity exists. Mr Francis submits, and I accept, that this is a matter which should be considered by the Rules Committee, and meanwhile 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 (eg significant head injury) other than in cases where there has already been an order pursuant to s 94(2) of the 1983 Act. That means that, even where the issue does not seem to be contentious, a district judge who is responsible for case management will almost certainly require the assistance of a medical report before being able to be satisfied that incapacity exists. In this respect, an admission said to have been made by a person alleged to lack capacity cannot be regarded as being of great weight because of his or her alleged incapacity. The judge may consider that he would be assisted by seeing the person alleged to lack capacity, a view expressed by Wright J in this case. In my view it would be wrong to attempt to compel that person to attend, but the judge can always make his view clear, and in most cases that indication, together with a reminder as to the burden of proof, should suffice.

If capacity is in issue how should it be decided?

[18] In 1962 Wilberforce J in Re CAF (23 March 1962, unreported), held that, when considering a person's capacity to manage and administer his property and affairs, it is necessary to have regard to the complexity and importance of that person's property and affairs. This has been a matter of some debate in Australia, where there has been a suggestion that the test might be that of ability to deal in a reasonably competent fashion with the ordinary affairs of man, but in White v Fell (12 November 1987, unreported) where the issue of capacity arose in the context of limitation, Boreham J said at pp 9-10 of the transcript:

> 'The expression "incapable of managing her own affairs and property" must be construed in a common sense way as a whole. It does not call for proof of complete incapacity. On the other hand, it is not enough to prove that the plaintiff is now substantially less capable of managing her own affairs and property than she would have been had the accident not occurred. I have no doubt that the plaintiff is quite incapable of managing unaided a large sum of money such as the sort of sum that would be appropriate compensation for her injuries. That, however, is not conclusive. Few people have the capacity to manage all their affairs unaided ... It may be that she would have chosen, and would choose now, not to take advice, but that is not the question. The question is: is she capable of doing so? 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.'

So the whole test was related to the individual plaintiff and her immediate problems. That was the approach adopted by Wright J in the present case, and before us everyone has accepted it to be the right approach. Mr Francis submits that the change in the wording from RSC Ord 80 to CPR 21.1 emphasises the need to focus on the litigation under consideration rather than the whole of the claimant's business affairs and, although it could be argued that a different approach has to be taken in relation to s 28(1) of the 1980 Act, the words used relate the disability to the specific right of action.

[19] An application to the Court of Protection under Pt VII of the 1983 Act is different. There the judge must consider the totality of the property and affairs of the alleged patient, and no doubt if it is shown that he lacks the capacity to manage a significant part of his affairs the court will be prepared to act, exercising control in such a way that the patient continues to have control in relation to matters which he can handle.

[20] The decision of Boreham J in White's case ([2002] All ER (D) 247 (Mar)) gives a clear indication of how he thought that capacity should be judged in the context of personal injuries litigation, and Wright J followed the same path. He said (at [29]) that the court should only take over the individual's function of decision-making:

> 'when it is shown on the balance of probabilities that such person does not have the capacity sufficiently to understand, absorb and retain information (including advice) relevant to the matters in question sufficiently to enable him or her to make decisions based upon such information.'

[21] Mr Langstaff does not take issue with that approach, but he submits that, when the decision has to be made in relation to a claimant in existing or contemplated personal injuries litigation, what has to be considered is not only the part which a litigant must play in litigation up to the time when judgment will be delivered, but also his capacity thereafter to manage any proceeds of litigation. In this respect the focus must be on the capacity or ability of the individual and not upon the actual outcome. A litigant who meets the criteria for capacity should still be regarded as a patient even if it can be shown that he has in fact made wise decisions and taken good advice. What he has done is relevant but not determinative in considering whether the criteria are or were satisfied at the relevant time.

[22] There is no reported English decision directly concerned with the capacity to litigate and compromise but the courts have considered capacity in other contexts, for example the capacity to make a will (Bankes v Goodfellow [1870] LR 5 QB 549). In the limitation case of Leather v Kirby [1965] 2 All ER 441 at 444, [1965] 2 QB 367 at 384, Lord Denning MR found that the plaintiff had no insight at all into his mental state: 'He was not capable of instructing a solicitor properly. He certainly was not capable of exercising any reasonable judgment on a possible settlement.' Accordingly the action should have been started by a next friend. It was not, but that was put right at the trial when at the suggestion of the judge a next friend was appointed.

[23] In Re Beaney [1978] 2 All ER 595 at 601, [1978] 1 WLR 770 at 774 the court was concerned with the validity of a gift made by a donor suffering from senile dementia, Mr Martin Nourse QC, sitting as deputy judge of the Chancery Division, said:

> 'The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise, the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject-matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other, if its effect is to dispose of the donor's only asset of value and thus for practical purposes to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of.'

[24] In Re C (mental patient: medical treatment) (1993) 15 BMLR 77 at 79, sub nom Re C (adult: refusal of treatment) [1994] 1 WLR 290 at 292 a paranoid schizophrenic sought an injunction to prevent the amputation

of his infected leg without his written consent, and Thorpe J said:

> 'For the patient offered amputation to save life, there are three stages to the decision: (1) to take in and retain treatment information, (2) to believe it and (3) to weigh that information, balancing risks and needs.'

[25] In the subsequent medical treatment case of Re MB (an adult: medical treatment) (1997) 38 BMLR 175 at 186-187, [1997] 2 FCR 541 at 553-554, Butler-Sloss LJ said:

> '(4) A person lacks capacity if some impairment or disturbance of mental functioning renders the person unable to make a decision whether to consent to, or to refuse, treatment. That inability to make a decision will occur when: (a) the patient is unable to comprehend and retain the information which is material to the decision, especially as to the likely consequences of having or not having the treatment in question; (b) the patient is unable to use the information and weigh it in the balance as part of the process of arriving at the decision.'

[26] Mr Langstaff's formulation of that test for present purposes was that there must be: (1) understanding, and (2) retention of matters relevant to the decision, followed by (3) evaluation. Mr Francis submitted that a person's ability to manage his or her property and affairs requires an ability to make and communicate, and where appropriate give effect to, all decisions required in relation to them. So the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision. Mr Francis further submits that the court should have regard to the complexity of decisions under consideration but not to the court's own valuation of the gravity of those decisions because it is not for the court to decide in a non-medical treatment case what is or is not serious in the life of the person before it. To that extent he is critical of the use by Wright J of the word 'sufficiently' at [29] of his judgment and also of the judge's failure specifically

to refer to the ability to weigh information in the balance. Whilst I agree with the approach put forward by Mr Francis, I do not accept his criticisms of the trial judge. In my judgment the judge's use of the word 'sufficiently' was appropriate on each occasion, and the concept articulated by the judge of having sufficient information to enable one to make decisions based on that information is simply another way of referring to the ability to weigh information in the balance.

[27] What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage claimants in personal injury actions with capacity to deal with all matters and take all 'lay client' decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the claimant is to be regarded as a patient from the commencement of proceedings. Of course, as Boreham J said in White's case, capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere.

Causation and other matters

[28] Where a lack of capacity to manage property and affairs is demonstrated the court will have to determine whether the incapacity is due to mental disorder as defined in the 1983 Act. As indicated in [10],

above that is not a problem in this case, and I therefore decline to comment on the way in which mental illness was defined in W v L [1973] 3 All ER 884 at 890, [1974] QB 711 at 719.

[29] The conclusion that in law capacity depends on time and context means that inevitably a decision as to capacity in one context does not bind a court which has to consider the same issue in a different context. A person may be a patient for purposes of RSC Ord 80, r 1 or CPR 21.1, but not for the purposes of s 94(2), and any medical witness asked to assist in relation to capacity therefore needs to know the area of the alleged patient's activities in relation to which his advice is sought. The final decision as to capacity, it is agreed, rests with the court but, in almost every case, the court will need medical evidence to guide it.

When should the issue of capacity be raised?

[30] 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. Sometimes the doubts may arise in relation to an opponent acting in person, and then it may be appropriate to bring the issue of capacity before the court. Maybe, as suggested by Mr Methuen QC, for Mr Jewell and Home Counties Dairies, it would help if the initiating court forms (N1 and N9) or the personal injuries protocol were to contain some material drawing attention to the issue of capacity, and it certainly seems desirable for some change to be made so that a person cannot, as at present, become a patient for the purposes of CPR 21.1 without knowing what is going on. That could be achieved by requiring that, unless the court otherwise orders, anyone intending to become a litigation friend without a court order served upon

the intended patient notice of his intention to act as litigation friend, and a copy of the certificate of suitability, so that the intended patient is then in the same position that he would be in were there to be an application for a litigation friend to be appointed by order of the court (see CPR 21 PD 3.3(2)). But what if, as is said to have been the case here, the claimant did lack capacity but, without any fault on anyone's part, no one recognised that fact? RSC Ord 80 and CPR 21 are worded in such a way as to indicate that in that event the litigation is ineffective and decisions made in the course of litigation are invalid: see, for example, Ord 80, rr 2(1) and 10, CPR 21.2(1) and 21.10(1), but CPR 21.3(4) does suggest a solution. It provides: 'Any step taken before a child or patient has a litigation friend shall be of no effect unless the court otherwise orders.'

[31] So a court can regularise the position retrospectively, and that was also possible under the RSC (see Leather v Kirby [1965] 2 All ER 441, [1965] 2 QB 367). Provided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position. To do otherwise would be unjust and contrary to the overriding objective of the CPR, but in any given case the ultimate decision must depend on the particular facts. In the context of litigation rules as to capacity are designed to ensure that claimants and defendants who would otherwise be at a disadvantage are properly protected, and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained. However, finality in litigation is also important, and the rules as to capacity are not designed to provide a vehicle for reopening litigation which having apparently been properly conducted (whatever the wisdom of the individual decisions in relation to it) has for long been understood to be at an end.

THE FACTS - CRITICISMS

[32] I turn now to what is really at the heart of the claimant's case, namely the way in which the judge applied the law to the evidence. Mr Langstaff, and Miss Hitchcock in reply, make a number of criticisms, which I can summarise as follows. (1) The judge failed to have sufficient regard to and failed to address the agreed consequences of the serious head injury, namely serious memory deficit, dysexecutive syndrome and pain. The medical evidence, it is said, was not properly analysed. (2) The judge failed to focus on the ability of the

claimant to make decisions at the relevant time, and instead looked at outcomes, at decisions made with the benefit of close parental support. (3) The judge failed to distinguish between, on the one hand the acknowledged ability of the claimant to deal with lesser problems such as handling relatively small sums of money, and on the other hand his contested ability to make appropriate decisions in relation to, for example, large sums. (4) The judge failed to give sufficient weight not only to the claimant's medical witnesses but also to his lay witnesses, namely his parents, Mr Vetterlein and Mr Chidgey. (5) The judge gave too much weight to the claimant's diaries and too little weight to other evidence indicative of impaired decision-making capacity. In order to evaluate these criticisms it is necessary to look first at what was common ground, the outline history, and the extent to which the experts disagreed before turning to look at the evidence and the judge's evaluation.

73 BMLR 1 at 14

Common ground and medical reports

[33] The accident in which the claimant was injured having happened in September 1980 when he was 17 years of age, the claimant returned to work after about nine months. His orthopaedic injuries and his frontal lobe injury meant that it was impossible for him to return to work as an engineering apprentice, but he was given routine clerical work, and his claim for damages for personal injuries against the driver of the milk float and that driver's employers was pursued. That meant that the claimant was in reasonably regular contact with his then solicitor, Mr Wilks, an experienced personal injuries lawyer, and was examined by a number of doctors. With the possible exception of Professor McLellan no one is known to have voiced any misgivings about his capacity to manage his own affairs, including in particular the litigation upon which he was then embarked.

[34] In September 1987 that litigation was brought to an end in circumstances to which I have already referred. The claimant was then working for British Aerospace and living at home. In 1989 he gave up his job and in 1992 he moved to his own house. He then began the present proceedings, and in June 1997 he was examined by Dr Martyn Rose, to whose reports I have already referred (see [8], above). Over the next four-and-a-half years the claimant was examined by a total of six consultants, including Dr Rose. Dr Moffatt, a neurologist, and Dr Powell, a clinical psychologist, were, like Dr Rose, instructed by the claimant's present solicitors. Broadly speaking their expertise was matched by that of Dr Jacobson, a neuro-psychiatarist, Dr Roberts, a neurologist, and Dr Leng, a neuro-psychologist, all of whom were instructed by solicitors acting for the defendants. In preparation for the trial the doctors were paired off by reference to their areas of expertise, and in January 2002 each pair of doctors produced a joint report indicating what could and could not be agreed. The reports indicate a large measure of agreement as to the nature of the head injury and its effects, and I quote short extracts from each joint report:

(1) Dr Rose and Dr Jacobson

> 'Dr Jacobson considers that the claimant regained capacity because the aggravating effects of depression on cognitive functions lessened as his depression improved. Dr Jacobson notes that the bulk of cognitive recovery after brain injury occurs in the first two years, with small diminishing degrees of further recovery in year three, and the time point of regaining capacity at up to three years is marked by resolution of depression and reaching a plateau of cognitive recovery.
>
> Dr Rose does not accept that the claimant regained capacity. Neither does he believe that before 1984 capacity was caused by fluctuating moods. He believes that Mr Masterman-Lister's cognitive abilities will always have been significantly effected to the point of rendering him a patient within the meaning of the 1983 Mental Health Act, and that the fluctuating mood will have simply added to the level of incapacity.'

The report then goes on to deal with the significance of the claimant's diaries and other evidence in relation to the claimant's life since 1980, about which the doctors were not agreed.

(2) Dr Moffatt and Dr Roberts

They agreed that:

> 'He sustained a severe brain injury in a road accident on 9 September 1980 due to concussion and anoxic brain damage or both. He has been left with little in the way of physical disabilities or impairment of his general intellectual functions as a result, but has remained with an unreliable memory, his abilities to organise his life and affairs are affected, and his personality changed.
>
> The tests carried out earlier after the head injury and more recently by four neuro-psychologists have all confirmed a memory impairment without evidence of general intellectual deterioration. All three neuro-psychologists who have tested him recently have found some impairment of functions generally accepted to be subserved by the frontal lobes of the brain.'

They disagreed 'about the extent to which the brain injury has affected his ability to manage his affairs since the accident'. Again there was consideration of the diaries, and the evidence from other sources.

(3) Dr Leng and Dr Powell

After expressing similar views as to the head injury and its effects their joint report states:

> 'We agree that his neuro-psychological test performance is not so bad that the results speak for themselves and utterly rule out his having capacity.
>
> Conversely his neuro-psychological test performance is not so preserved that it can be taken for granted that he has capacity.
>
> Rather, the neuro-psychological test results should be seen as one strand of evidence, certainly raising the issue of capacity but needing to be considered in conjunction with all other sources of evidence.
>
> In other words, at this level of deficit of test performance, some patients will have capacity, and some will not, depending on the entirety of evidence and on the precise circumstances.
>
> We fully understand that ultimately it is a decision for the court as to whether he is capable of managing his own affairs, but we have formed our own view of all the material and Dr Leng leans to the view that he does have capacity and Dr Powell leans to the view that he does not.
>
> In brief, Dr Leng feels that the diary entries and letters seem to demonstrate sufficent capacity to manage his own affairs, and that there is no reason to suppose that he was not also so capable at the time of accepting the offer of settlement (i e by the time the settlement was accepted his recovery had long since plateaued). On the other hand, Dr Powell feels that the diaries were not compiled with the intent of collecting evidence on capacity, but even so, the

> diaries and letters do yield evidence of rigidity of thinking, poor judgment, immaturity, cognitive deficit and vulnerability, which when taken in conjunction with the deficit of mind evident on tests, indicates that he needs the Court of Protection to safeguard his interests.'

[35] The last joint report, in particular, highlights the point that in this case the medical evidence on testing does not speak for itself. Test results are one strand of evidence, to be considered by the court with all other sources, and as to the

conclusion which should be reached it is clear that the experienced consultants were not agreed. They were all called to give evidence at the trial, and it can be seen from the transcripts of evidence that their positions remained very much as they had been before the trial began.

The medical evidence at trial

[36] Mr Langstaff drew our attention to passages in the transcripts of the evidence of Dr Powell and Dr Moffatt which emphasised the importance of the memory deficit and its impact upon the decision-making process. He pointed out, rightly, that Dr Roberts accepts that as a result of his head injury the claimant is vulnerable. He said so in his letter of 14 March 2001. Dr Roberts would like to see the claimant 'contributing to a discussion of his financial needs with other trustees, who will not allow him to have full control'. But it is important to see how that letter goes on. Dr Roberts continued:

> 'It is not my view that this makes him incapable of understanding and managing his life otherwise without supervision. The question is clearly one of degree, which is not appropriately assessed by judging everyone with some impairment of frontal lobe function as incapable of managing their affairs.'

[37] Dr Powell in his report of 5 June 2001 said that the claimant:

> 'Needs supervision in managing any large sum of money. Therefore, by definition, he was incapable of deciding for himself whether the offer he was made in settlement of his claim was fair or not.'

That, as Mr Langstaff concedes, is a total non-sequitur.

[38] Mr Langstaff submitted that Dr Roberts' conclusion that for many years the claimant has not been a patient within the meaning of RSC Ord 80, r 1 is attributable to the doctor's rejection of the paternalism of the Court of Protection, and he further submitted that Dr Leng and Dr Jacobson relied not on clinical examination or medical assessment of injury, but rather on their view of the diaries even though Dr Leng described the entries as shallow, repetitive, banal and immature. Mr Langstaff submitted that at the end of the day the judge had a lot of evidence of incapacity coming not only from the doctors but also from the claimant's parents and friends, which was met only by reference to the diaries. I am afraid that I regard that as a misrepresentation of the position. Each of the doctors was plainly attempting to assist the court by evaluating the position overall, recognising that at the end of the day it was for the judge, in the light of the all of the evidence, to reach a conclusion. This was not a case where there was a strong case for the claimant which called for an answer. It was, on the contrary, a case where capacity had to be assessed in relation to a spectrum, and that is neatly illustrated by one answer given by Dr Moffatt when asked about the distinction between his evidence and that of Dr Roberts. He said:

> 'I suppose really at the end of the day the distinction is ... Dr Roberts seems to suggest that a form of benign paternalism is easily sufficient to support this man and ... I would plump for the more Draconian approach.'

Non-medical evidence at trial

[39] The claimant did not give evidence but his parents did, and so did two of his friends, Mr Vetterlein and Mr Chidgey. The court also heard from Professor McLellan and Mr Wilks. Mr Langstaff invited our attention to the evidence of Mr Vetterlein where he describes the claimant as being unable to weigh up the pros and cons. He said of the plaintiff 'you can almost see the cogs not meshing' and he spoke of the claimant's failure to make progress with applications for benefits. Similarly, Mr Chidgey said that the claimant is 'not able to cope with complex situations or things were there is more than one element ... he also has a tendency to see what he can see very much in black and white'. Mr Langstaff submitted that the evidence of Mr Vetterlein and Mr Chidgey and the other lay evidence was important evidence which the judge failed sufficiently to analyse.

[40] In addition to the oral evidence the judge had before him a mass of documentary evidence, including in particular the claimant's diaries kept throughout the relevant period, and his letters. From those sources Mr Langstaff drew our attention to seven entries which, he submitted, demonstrated the claimant's lack of capacity in relation to matters of substance:

> '(1) On 1 November 1987, soon after his claim was settled, the claimant wrote in his diary that he would give every single penny he had away to be able to go out with a girl with whom he was then infatuated.
>
> (2) On 29 December 1987 the claimant took a different girl to a shop and bought her a music centre. We were told that it cost £336·70.
>
> (3) On 25 April 1989 the claimant recorded receiving a very troubling letter from the Vegan Society which was in financial difficulty. He went to the building society where his money was invested, and drew £500, £125 for a life membership and £375 as a donation.
>
> (4) On 25 September 1990 the claimant was interviewed at Lymington Police Station after taking part in an anti-hunt demonstration during the course of which a van had been burnt. Part of the police record of the interview reads: "He tried to explain that the two girls had nothing to do with the arson but were unfortunate in that they happened to be with him. He offered to pay all of any subsequent claim for compensation." It was submitted to us that his offer was indicative of financial irresponsibility. It could, of course, have been a very sensible and responsible attempt to avert a prosecution.
>
> (5) In a letter to a friend written in July 1994 the claimant explained how he had caused trouble at a site office of some builders. The police had to be called and the claimant told the duty sergeant that his brother-in-law was a London solicitor and that he had numerous dealing[s] with legal matters before. Whatever view one takes of the conduct as recorded it is difficult to see how it can be said to demonstrate any lack of capacity.
>
> (6) In another letter written in December 1994 the claimant describes breaking the release valve of a pressure cooker, and going to buy a replacement. He lost it on the way home and got another one next day. He then found the one that he had lost, and found a spare one at

> home.
>
> (7) On 28 April 1996 in another letter the claimant records being criticised by a girl friend because he had overstocked his freezer with

> some items (i e vol-au-vent cases and vegan sausages). Plainly he was not keeping proper control of the contents of his freezer, as he acknowledged.'

[41] Mr Langstaff also reminded us that after leaving British Aerospace the claimant was at times unrealistic when seeking employment, regarding himself, for example, as capable of using ladders.

The judge's approach

[42] Having dealt with matters of law the judge turned to the evidence, and he began with the medical evidence, pointing out what was agreed. There was, as the judge recorded ([2002] All ER (D) 247 (Mar) at [32]), a 'significant impairment of executive function ... compounded by a very serious deficit of memory'. To some extent the claimant could compensate for his defective memory by using his diary and keeping lists, but the judge went on to point out:

> 'The dysexecutive syndrome itself involves changes in personality such as obsessionality, immaturity, rigidity of thinking, eccentricity and emotional outbursts. The effect of this syndrome is to impair his ability to organise his life and to plan many of his everyday functions. On the other hand, it is again accepted on all sides that the nature of the damage to Martin's brain is such that his pre-accident level of intelligence is very largely preserved. It is further agreed that Martin's condition has remained essentially unchanged since about 1983.'

[43] The judge then listed (at [33]) ten factors identified by Dr Powell and Dr Rose as indicative of lack of capacity. I need not recite the list. That paragraph ends:

> 'Dr Powell adds that when these deficits are coupled with self centred thinking and a rigidity of approach his relationships with other people and with the problems of life "don't mesh". I have to observe, however, that not all these matters will engage, even indirectly, with business and similar matters.'

[44] The failure to 'mesh' was of course the point made by Mr Vetterlein, whose evidence together with that of Mr Chidgey illustrated those effects of the dysexecutive syndrome which the judge recognised to be agreed.

[45] The judge then considered the equivocal test performances, and Dr Powell's acceptance that the claimant was very much a borderline case. Dr Rose was more emphatic, but the judge found that to be attributable to his approach to the concept of protection, the purpose of which he regarded as being to protect individuals from making foolish mistakes. That was borne out by a passage from the evidence of Dr Rose to which our attention was invited. The judge also noted that Dr Rose did not take into account when assessing capacity the availability of advice, although he did consider whether the claimant understood the need to obtain advice. The judge (at [35]) then made reference to the evidence of Dr Jacobson, Dr Moffatt and Dr Roberts, who all believed that the claimant's brain injuries 'may have contributed to his obsessive and

rigid behaviour, but have not determined his interests'. Dr Rose did not agree. He considered that the claimant's eccentricities are the direct result of the brain

injuries. The judge then compared the experience of the medical witnesses in relation to that issue, and for that reason preferred the view of the majority.

[46] The judge then went on to look at Dr Roberts' suggestion that when dealing with a large sum the claimant would benefit from reliable trustees and found, for the reasons which he gave (at [36]), that Dr Roberts 'was thinking in terms of wisdom and not understanding' so the evidence of Dr Roberts did not assist the claimant's case.

[47] The judge (at [37]) then looked at the differing ways in which the doctors looked at the diaries, and concluded thus:

> 'Having spent many days reviewing the diaries and the letters I am satisfied that this material taken in conjunction with the other evidence as to how Martin has functioned over the past twenty years is of very considerable assistance to me in reviewing the opinions expressed by the doctors and in assessing to what extent their differing views have been justified in practice.'

After that the judge looked at the medical evidence obtained in relation to the original action, and the evidence of Professor McLellan, before turning to look at non-medical evidence.

[48] Mr and Mrs Lister the judge found to be 'enormously protective' of the claimant and that led them both, to some degree at least, to exaggerate his difficulties. The judge gave an example of exaggeration which I need not repeat, and went on to outline the nature of the parents' concerns, including those related to veganism and animal rights. Before us there is no criticism of that review. The judge's reference to the evidence of Mr Vetterlein and Mr Chidgey does not include those passages in their evidence to which I have referred earlier in this judgment, but, as I have indicated, the judge was alive to the points illustrated by their evidence because he referred to them when dealing with the medical evidence.

[49] The judge then considered the evidence of Mr Wilks, including his evidence that the claimant spent one-and-a-half hours providing a witness statement, and the fact that the claimant was to be called as a witness if his claim had not been settled. Mr Wilks dealt in detail with his contact with his client, and with the way in which the settlement was arrived at. Notably the claimant's father is recorded (at [58]) as accepting that had he not been available:

> '... Martin would very probably have accepted the offer of investment advice that Mr. Wilks had made to him, and failing him, would probably have consulted his bank manager.'

The judge examined the evidence as to how the claimant managed his bank account, and his credit card, and noted no change for the worse when the claimant left home and moved into his own house.

[50] The judge also noted that on a number of occasions from 1983 onwards the claimant was involved in civil litigation, often with the assistance of his solicitor brother-in-law Mr Knowles without there being any suggestion of lack of capacity. In 1992 when buying his house the claimant arranged his own bridging loan.

[51] As to the £500 to the Vegan Society on which Mr Langstaff still relies, the judge pointed out that the

society is a consuming passion of the claimant and

added: 'I cannot see that such an act of generosity could be possibly be interpreted as irrational, or in any way supporting a suggestion that he was unfit to manage his affairs.' The claimant has more than once been on the council of the society.

[52] The judge gave an example of the claimant acting responsibly to protect young girls, and in the final section of his judgment reviewed the claimant's letters, including a most impressive letter to his nephew which, as the judge said, was a letter that any adult could be proud of writing. Miss Hitchcock invited our attention to other letters. I have read those, but the point made by the judge is a valid one. Any adult might also be proud of the claimant's achievement with the Samaritans.

[53] The judge said (at [74]):

> '... the evidence of the last 20 years enables me to arrive with confidence at certain conclusions. So far as the ordinary incidents of life are concerned such as feeding and caring for himself and the ordinary incidents of day to day living, Martin is perfectly capable of looking after himself with a minimum of outside assistance. When greater problems present themselves he is able to recognise that such problems exist, and his reasoning faculties enable him to deal with a good many of them himself. Where more formidable problems arise he recognises that they exist, is able to recognise that he needs external advice to deal with them and is able to go to appropriate sources for such advice - generally his mother and father, but his sources are by no means limited to them ... while the mental disorders identified by the various medical experts in the present proceedings are of such a nature that, if present to a sufficiently severe degree, are undoubtedly capable of rendering a sufferer incapable of managing his property and affairs, the conclusion that I have come to on all the evidence before me is that the degree and extent to which Martin suffers from such disabilities falls far short of that standard.'

MY CONCLUSION

[54] I have gone through the judgment at some length in order to demonstrate that there is no substance in the criticisms that are now being made. As Mr de Wilde QC for Brutton & Co pointed out, there were other achievements of the claimant to which the judge did not refer (ie learning to drive, learning to type and obtaining two passes at O-Level). But the judge did spell out and give proper weight to the medical evidence as to the effects of the head injury. He was fully alive to the fact that what he was investigating was capacity not outcomes, although of course outcomes can often cast a flood of light on capacity, as they did in this case. The judge was also alive to the distinction between management of day-to-day affairs and the management of more serious problems. That very distinction is highlighted in the part of para [74] of the judgment which is quoted above. In the judgment every witness, medical and lay, was considered. Of course not everything they said was recited, but no significant point seems to have been overlooked, and for the reasons which he gave the judge was fully entitled to evaluate the contemporaneous evidence from the diaries and the letters as he did. Indeed there is so little in the seven points identified by Mr Langstaff that the selection in no way undermines the judge's approach. In the course of his judgment the judge dealt with fiscal control, including the odd items of

relatively large expenditure. The loss of a pressure cooker valve and the overstocking of a freezer may well be examples of the claimant's problem with his memory, but they are also examples of mishaps which can occur to those who do not have his handicaps. Certainly neither they nor the unrealistic job application can be regarded as matters casting doubt upon the judge's conclusion that since 1983 at the latest the claimant has been fully capable of managing and administering his property and affairs. That, as it seems to me, is a

sufficient answer to the preliminary issue, and I would therefore dismiss this appeal.

POTTER LJ.

[55] I agree. Having seen in draft the judgment of Chadwick LJ, I am also indebted to, and agree with, his exegesis of the position under RSC Ord 80, as now embodied in CPR 21, against the background of the general law in relation to mental capacity.

CHADWICK LJ.

[56] I agree that these appeals must be dismissed for the reasons set out by Kennedy LJ. But the issues raised are of general importance - as well as being of great importance to the claimant and his parents - and I have thought it appropriate to add some observations of my own.

[57] English law requires that a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself. Illustrations of the requirement are found in relation to the making of testamentary dispositions (Harwood v Baker (1840) 3 Moo PCC 282; Banks v Goodfellow LR 5 QB 549, [1861-73] All ER Rep 47), the execution of voluntary deeds (Ball v Mannin (1829) 3 Bli NS 1, 6 ER 569; Re Beaney [1978] 2 All ER 595, [1978] 1 WLR 770), the entry into marriage (Durham v Durham (1885) 10 PD 80; Re Parks Estate [1953] 2 All ER 408, [1954] P 89), the consent to a decree of divorce (Mason v Mason [1972] 3 All ER 315, [1972] 3 WLR 405) and the consent to or refusal of medical treatment (Re C (adult: refusal of treatment) (1993) 15 BMLR 77, [1994] 1 WLR 290; Re MB (an adult: medical treatment) (1997) 38 BMLR 175, [1997] 2 FCR 541). In such cases, the disposition or consent, if made or given without the necessary mental capacity, is void and of no effect. The position is otherwise in the case of a bargain made for consideration. There the rule is that a contract made by a person without the necessary mental capacity is voidable against the other party; but only if it is shown that the other party knew of the lack of capacity - see Molton v Camroux (1848) 2 Exch 487, (1849) 4 Exch 17; Imperial Loan Co v Stone [1892] 1 QB 599; Hart v OConnor [1985] 2 All ER 880, [1985] AC 1000.

[58] The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained. Those two propositions find expression in the passage from the judgment of Mr Martin Nourse QC in Re Beaney [1978] 2 All ER 595 at 601, [1978] 1 WLR 770 at 774 to which Kennedy LJ has referred. But they can be traced from much earlier authority. In Ball v Mannin (1829) 3 Bli NS 1 at 12 and 22, 6 ER 569, the House of Lords upheld a direction to the jury that what was required was that a person should be (at 21) 'capable of understanding what he did by executing the deed in question when its general import was fully explained to him'. In Harwood v

Baker (1840) 3 Moo PCC 282 at 290, the Judicial Committee of the Privy Council explained that -

> 'in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property ...'

In *Manches v Trimborn* (1946) 115 LJKB 305, Hallett J pointed out that the answer to the question whether the mental capacity necessary to render the consent of the party concerned a real consent was present in any particular case would depend on the nature of the transaction. The cases were reviewed by the High Court of Australia in *Gibbons v Wright* (1954) 91 CLR 423. Sir Owen Dixon CJ, in a passage at 438, to which Mr Nourse QC referred in *Re Beaney* ([1978] 2 All ER 595 at 601, [1978] 1 WLR 770 at 774), stated the principle in these terms:

> '... the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.'

The same test was applied by this court in *Re Park's Estate* [1953] 2 All ER 1411 at 1430, [1954] P 112 at 127. Singleton LJ said:

> 'Was the deceased on the morning of May 30, 1949, capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? In order to ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.'

[59] In Re K, Re F [1988] 1 All ER 358 at 361, [1988] Ch 310 at 313, Hoffmann J treated as 'well established' the proposition that:

> 'capacity to perform a juristic act exists when the person who purported to do the act had at the time the mental capacity, with the assistance of such explanation as he may have been given, to understand the nature and effect of that particular transaction.'

He cited *Re Beaney* [1978] 2 All ER 595, [1978] 1 WLR 770 as authority. That passage was approved by this court in *Re W* (*Enduring Power of Attorney*) [2001] 4 All ER 88, [2001] Ch 609.

[60] The broad propositions are not in doubt. The question of difficulty in any particular case is likely to be whether the party does have the mental capacity, with the assistance of such explanation as he may be given, to understand the

nature and effect of the particular transaction. In *Re C (adult: refusal of treatment)* (1993) 15 BMLR 77, [1994] 1 WLR 290, Thorpe J rejected what had been described as 'the minimal competence test' - the capacity to understand in broad terms the nature and effect of the proposed treatment - in favour of a more specific test. As he put it ((1993) 15 BMLR 77 at 824, [1994] 1 WLR 290 at 295):

> '... the question to be decided is whether it has been established that C's capacity is so reduced by his chronic mental illness that he does not sufficiently understand the nature, purpose and effects of the proffered amputation.'

[61] Hoffmann J addressed the same point in Re K, Re F [1988] 1 All ER 358, [1988] Ch 310. He allowed an

appeal against the decision of the Master of the Court of Protection refusing registration to an enduring power of attorney on the ground that the donor, although capable of understanding the nature of the power, was herself incapable by reason of mental disorder of managing her property and affairs at the time that she executed the power. He held ([1988] 1 All ER 358 at 362, [1988] Ch 310 at 315) that:

> 'there is no logical reason why, though unable to exercise her powers, [the donor] could not confer them on someone else by an appropriate juristic act. The validity of that act depends on whether she understood its nature and effect, and not on whether she would hypothetically have been able to perform all the acts which it authorised.'

But he went on to consider what was meant by understanding the nature and effect of the power. He said ([1988] 1 All ER 358 at 363, [1988] Ch 310 at 316):

> 'I do not think that it would be sufficient if he realised only that it gave cousin William power to look after his property. Counsel as amicus curiae helpfully summarised the matters which the donor should have understood in order that he can be said to have understood the nature and effect of the power: first, if such be the terms of the power, that the attorney will be able to assume complete authority over the donor's affairs; second, if such be the terms of the power, that the attorney will in general be able to do anything with the donor's property which the donor could have done; third, that the authority will continue if the donor should be or become mentally incapable; fourth, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court. I do not wish to prescribe another form of words in competition with the explanatory notes prescribed by the Lord Chancellor, but I accept the summary of counsel as amicus curiae as a statement of the matters which should ordinarily be explained to the donor whatever the precise language which may be used and which the evidence should show he has understood.'

[62] The authorities to which I have referred provide ample support for the proposition that, at common law at least, the test of mental capacity is issue specific: that, as Kennedy LJ has pointed out, the test has to be applied in relation

to the particular transaction (its nature and complexity) in respect of which the question whether a party has capacity falls to be decided. It is difficult to see why, in the absence of some statutory or regulatory provision which compels a contrary conclusion, the same approach should not be adopted in relation to the pursuit or defence of litigation.

[63] Litigation is conducted in accordance with rules of court. It is no surprise, therefore, that the Rules of the Supreme Court (RSC) have made provision, since first promulgated in the First Schedule to the Supreme Court of Judicature Act 1875, for the conduct of actions by and against persons of unsound mind. Order XVIII of those rules provided that, in all cases where persons of unsound mind not so found by inquisition might have sued or been sued before the Supreme Court of Judicature Act 1873, they might sue in any action by their next friend 'in manner practised in the Court of Chancery' before the 1873 Act and might defend any action by their guardian ad litem. The practice in the Court of Chancery before 1873 was explained in the judgment of James LJ in Beall v Smith (1873) 9 Ch App 85 at 91-92:

> 'The law of the Court of Chancery undoubtedly is that in certain cases where there is a person of unsound mind, not so found by inquisition, and therefore incapable of invoking the protection of the Court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend ... It is not by reason of the incompetency, but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings.'

[64] The RSC were made under the power conferred by s 99(1) of the Judicature Act 1925 (now found in s 84(1) and (2) of the Supreme Court Act 1981). The power is to regulate and prescribe practice and procedure. There is no reason to think that the rule-making body intended - or had power - to alter the substantive law as to the test of mental capacity applicable in relation to the pursuit or defence of legal proceedings; and, as I have said, no reason to think that that test was not the issue-specific test long recognised by the common law.

[65] RSC Ord 80, r 2(1) provided that a person under disability might not bring proceedings except by his next friend and might not defend proceedings except by his guardian ad litem. Subject to anything to be inferred from the use of the defined phrase 'person under disability', there is nothing in that sub-rule which alters the general law. The pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity; and the court is concerned not only to protect its own process but to provide protection to both parties to litigation which comes before it. A defendant is entitled to expect that he will not be required to defend proceedings brought against him by a person of unsound mind acting without a next friend. Order 80, r 2(2) was facilitative: it provided that anything which in the ordinary conduct of the proceedings is required or authorised to be done by a party to proceedings shall or may, if the party is a person under a disability, be done by his next friend or guardian ad litem.

[66] RSC Ord 80, r 3(2) provided that (save in particular cases) an order appointing a person as next friend or guardian ad litem was not necessary. That, as it seems to me, is of some significance. The rule-making body plainly contemplated, and intended, that the question whether a party was required to act

73 BMLR 1 at 25

through a next friend or guardian ad litem (as the case might be) should, in the ordinary case, be determined by the party himself or by those caring for him; perhaps with the advice of a solicitor but without the need for inquiry by the court. Order 80, r 2(3) required that a next friend or guardian ad litem must act by a solicitor; and r 3(8)(i) required that, in such a case, the solicitor was to file a certificate certifying that he believed the party to be a patient, with his grounds of belief. But there was no requirement, as such, in the rules for the filing or consideration of medical evidence. If the rule were to work in practice, the test of mental capacity should be such that, in the ordinary case, the need for a next friend or guardian ad litem should be readily recognised by an experienced solicitor.

[67] RSC Ord 80, r 10(1) provided that, where in any proceedings money was claimed by a person under disability, no settlement or compromise of the claim should be valid without the approval of the court. That requirement supplements the general law as to bargains with persons of unsound mind - as explained in Imperial Loan Co v Stone [1892] 1 QB 599 and Hart v OConnor [1985] 2 All ER 880, [1985] AC 1000. Absent that rule, a defendant sued by a person whom he knew to be of unsound mind - because, for example, the claimant was an adult acting by a next friend - could not safely compromise the claim by a payment. There was a risk that the compromise would be set aside. In that context, the rule may be seen as facilitative; it enables a binding compromise to be made. It is also, when read in conjunction with Ord 80, r 12, protective of the claimant's interests - in that the court is concerned both to approve the compromise and to give directions as to how the money paid under the compromise shall be dealt with.

[68] RSC Ord 80, rr 10 and 12 must be read in the context of r 2. The hypothesis underlying rr 10 and 12, as it seems to me, is that the claimant who is under a disability will bring his claim by a next friend, as r 2 requires; so that the defendant, and the court, will be on notice that rr 10 and 12 are engaged. To my mind it is not self-evident that rr 10 and 12 have any application where the claimant brings a claim in contravention of r 2 - so that, in the eyes of the defendant and the court, he is asserting that he is not under a disability. If rr 10 and 12 were intended to apply in such a case (which I doubt) then it would be open to question whether the rule making body had power to change the substantive law expounded in Imperial Loan Co v Stone and Hart v OConnor. The question does not arise on this appeal; and will not arise in these proceedings if (as I

would hold) the appeal should be dismissed. It is unnecessary to decide it. But it may well be that an important assumption which underlies the present appeal - that, if the claimant were under disability in September 1987, the compromise into which he entered must be set aside - would prove, on examination, to be ill-founded.

[69] As I have said, subject to anything to be inferred from the use of the defined phrase 'person under disability', there is nothing in RSC Ord 80 which purports to alter the substantive law as to the test of mental capacity applicable in relation to the pursuit or defence of legal proceedings; and no reason to think that the rule making body intended - or had power - to make such an alteration. '[P]erson under disability' is defined to mean 'a person who is an infant or a patient': and 'patient' means 'a person who, by reason of mental disorder within the meaning of the [Mental Health Act 1983], is incapable of managing and administering his property and affairs'. It is plain that the lack of capacity which brings a person within the definition of 'patient' for the purposes of the rules must

be attributable to mental disorder as defined by the Act; but it is necessary to consider what, if any, further relevance the 1983 Act may have in relation to the test of mental capacity applicable to the pursuit or defence of legal proceedings.

[70] The jurisdiction formerly exercised by the Crown as parens patriae in relation to persons who, by reason of unsound mind, were unable to manage their property or affairs ceased to be exercisable on the coming into force, on 1 November 1960, of the Mental Health Act 1959 and the revocation of the last warrant by which that jurisdiction had been assigned to the Lord Chancellor and the judges of the Chancery Division - see the observations of Lord Brandon of Oakbrook in F v West Berkshire Health Authority (Mental Health Act Commission intervening) (1989) 4 BMLR 1 at 9, [1990] 2 AC 1 at 57-58. Since 1960 the position has been governed by the provisions of the 1959 Act (subsequently repealed and replaced by the 1983 Act) and the common law - (1989) 4 BMLR 1 at 10, [1990] 2 AC 1 at 58.

[71] At the time when the RSC were made s 103(1)(h) of the 1959 Act (now s 96(1)(i) of the 1983 Act) conferred power on the judges nominated for the purposes of Pt VIII of that Act (now Pt VII of the 1983 Act), and on the Master, Deputy Master and nominated officers of the Court of Protection, to give directions for the conduct of legal proceedings in the name of a patient or on his behalf. In that context 'patient' means a person in respect of whom the judge exercising the power is satisfied, after considering medical evidence, that he is incapable, by reason of mental disorder, of managing and administering his property and affairs - see s 101 of the 1959 Act (now s 94(2) of the 1983 Act). Where such directions are given, the person authorised under the Act is entitled to be next friend or guardian ad litem - see RSC Ord 80, r 3(3). But what if the Court of Protection has not become involved?

[72] The relationship between the jurisdiction of the Court of Protection to order and give directions for, or to authorise, legal proceedings in the name or on behalf of, a patient within the meaning of s 101 of the 1959 Act (as it then was) on the one hand and rules of court providing for the appointment of a next friend or guardian ad litem for a person under disability on the other hand was considered by Ungoed Thomas J in Re S (FG) [1973] 1 All ER 273, [1973] 1 WLR 178. He pointed out that persons under disability, for the purposes of the rules of court, could include persons incapable of managing and administering their property and affairs who were not 'patients' for the purposes of the 1959 Act. The reason was that the rules of court did not contain or impose the requirement of judicial satisfaction after the consideration of medical evidence. So there is no reason why the test of mental capacity, when applied to the power to pursue or defend legal proceedings, should necessarily lead to the same conclusion as it will when applied in order to determine whether the same person is or is not a patient within the 1983 Act. Although the test is probably the same test - see the observation attributed to Sir Raymond Jennings QC and approved by Wilberforce J in Re CAF (23 March 1962, unreported) but noted in Heywood & Massey: Court of Protection Practice (13th edn, 2002) para 2.006 - the 'property and affairs' in relation to which the test falls to be applied are likely to be different. It

is, I think, rare for a judge of the Court of Protection to be asked to exercise the power to give directions or authority in relation to the conduct of legal proceedings (under s 96(1)(i) of the 1983 Act) in isolation; it will be more usual for that power to be invoked in conjunction with, or following, the appointment of a receiver under s 99(1) - see s 99(2) of the Act. In that context

'property and affairs' will extend to the whole of the person's property and affairs; not just to the affairs encompassed by the litigation.

[73] In F v West Berkshire Health Authority (Mental Health Act Commission intervening) (1989) 4 BMLR 1, [1990] 2 AC 1 it was held that, although the expression 'the affairs of patients' - taken by itself and without regard to the context in which it appears - was capable of extending to medical treatment, it must be construed, in the context of Pt VII of the 1983 Act, as including only 'business matters, legal transactions and other dealings of a similar kind' - see Lord Brandon's observations ((1989) 4 BMLR 1 at 11, [1990] 2 AC 1 at 59). In my view the expression 'property and affairs' should be given the same meaning in the context of RSC Ord 80. It is pertinent to have in mind that the relevant inquiry, in the context of that rule, is whether a person has the mental capacity which the law requires in a person who is to be permitted to pursue or defend legal proceedings without the interposition of a next friend or guardian ad litem (as the case may be). The answer to that inquiry does not turn on whether or not the person has the requisite mental capacity to make some other legally effective decision.

[74] The point is illustrated by the outcome in Re C (adult: refusal of treatment) (1993) 15 BMLR 77, [1994] 1 WLR 290. C had been admitted to a secure hospital as a patient under Pt III of the 1983 Act. He was subsequently diagnosed as suffering from gangrene in the foot. Acting by his next friend he sought an injunction to restrain the hospital from amputating. Thorpe J held that C had the requisite mental capacity to make a decision to refuse treatment. As he put it ((1993) 15 BMLR 77 at 82, [1994] 1 WLR 290 at 295):

> 'Although his general capacity is impaired by schizophrenia, it has not been established that he does not sufficiently understand the nature, purpose and effects of the treatment he refuses. Indeed, I am satisfied that he has understood and retained the relevant treatment information, that in his own way he believes it, and that in the same fashion he has arrived at a clear choice.'

Nevertheless, it was never in doubt that C was a patient for the purposes of the procedural rule which required that his suit could not have been brought except with the interposition of a next friend. There is no inconsistency between the requirement that a party to legal proceedings comply with RSC Ord 80 and a decision that he has an understanding of the nature, purpose and effects of the medical treatment which is under consideration in those proceedings. The test is issue specific; and, when applied to different issues, it may yield different answers.

[75] For the purposes of RSC Ord 80 - and, now, CPR 21 - the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such 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 the interposition of a next friend or guardian ad litem (or, as such a person is now described in the CPR, a litigation friend).

[76] That approach seems to me consistent with the approach adopted by this court in Leather v Kirby [1965] 2 All ER 441, [1965] 2 QB 367, a decision on

whether a claimant was of 'unsound mind' for the purposes of what was then s 22 of the Limitation Act 1939 (now replaced by s 28 of the Limitation Act 1980). A person is of 'unsound mind' for the purposes of the 1980 Act if he is 'a person who, by reason of mental disorder within the meaning of the Mental Health Act 1983, is incapable of managing and administering his property and affairs' (see s 38(3)). The language is the same as that used in RSC Ord 80, r 1; and there is good reason why the test should be the same in each context - see the observations of Danckwerts LJ in *Leather v Kirby* ([1965] 2 All ER 441 at 445, [1965] 2 QB 367 at 385). In upholding the trial judge's decision that the claimant was of unsound mind - so as to prevent the relevant period of limitation from running against him - Lord Denning MR, said ([1965] 2 All ER 441 at 444, [1965] 2 QB 367 at 384):

> 'After a time he was to some extent able to appreciate (from being told by others) something of what had happened to him, and indeed to his scooter. But he could not concentrate on it for any length of time. Not long enough to be able to appreciate the nature and extent of any claim that he might have. In particular he had no insight at all into his own mental state. He was not capable of instructing a solicitor properly. He certainly was not capable of exercising any reasonable judgment on a possible settlement.'

The features which Lord Denning MR identified in that passage are features which, as it seems to me, would lead, plainly, to a conclusion that the claimant was a person under a disability for the purposes of RSC Ord 80.

[77] The same approach was adopted by Boreham J in White v Fell (12 November 1987, unreported). In that case, also, it was necessary to decide whether the claimant had been incapable of managing her property and affairs in the context of a Limitation Act defence. The judge identified three features to which he thought it appropriate to have regard. First, the need for the claimant to have 'insight and understanding of the fact that she has a problem in respect of which she needs advice'. Second, the need to be able to instruct an appropriate adviser 'with sufficient clarity to enable him to understand the problem and advise her appropriately'. Third, the need 'to understand and make decisions based upon, or otherwise give effect to, such advice as she may receive'. Boreham J accepted that the claimant was 'now quite incapable of managing unaided a large sum of money such as the sort of sum that would be appropriate compensation for her injuries'. Further, he accepted that, if she succeeded in her claim for compensation 'as almost inevitably she will', she would need to 'take, consider and act upon appropriate advice'; but that she might choose not to take advice. He accepted that 'she may not understand all the intricacies of litigation, or of a settlement, or of a wise investment policy'. But he was satisfied that, nevertheless, the claimant had not been shown to be incapable of managing her affairs. She had had the necessary understanding to take the decisions which she needed to take in relation to a claim for compensation.

[78] Wright J held that he should follow that approach in the present case. He rejected the submission, advanced on behalf of the claimant, that a finding of incapacity was required 'if the effect of the injury to his brain renders [the claimant] vulnerable to exploitation or at the risk of the making of rash or irresponsible decisions' (see [2002] EWHC 417 (QB) at [24], [2002] All ER (D) (Mar) at [24]). I think that he was right to do so. The courts have ample powers

to protect those who are vulnerable to exploitation from being exploited; it is unnecessary to deny them the opportunity to take their own decisions if they are not being exploited. 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.

[79] The judge found assistance in recommendations made by the Law Commission in 1995, in Pt III of its report Mental Incapacity (Law Com no 232). The report drew attention (at paras 3.16 and 3.17) to the need that a person should be able both: (i) to understand and retain the information relevant to the decision which

has to be made (including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make any decision), and (ii) to use that information in the decision-making process. I think that he was right to have regard to those recommendations. I think he was right, also, to have in mind the qualifications (expressed in paras 3.18 and 3.19 of the report) that a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and that he should not be regarded as unable to make a rational decision merely because the decision which he does, in fact, make is a decision which would not be made by a person of ordinary prudence.

[80] It had appeared from the grounds of appeal annexed to the appellant's notice in these appeals that the appellant would contend that the judge 'erred in law in that he applied the wrong test for capacity and in formulating the test'; had 'uncritically followed the narrow approach applied by Boreham J in White v Fell' had failed to address 'the robust criticisms of this test' made on behalf of the appellant; and had failed 'to take into account the importance of risk and vulnerability'. When giving permission for an appeal to this court the judge expressed the view that there was an important point of law involved.

[81] It was a matter of some surprise, therefore, that counsel for the appellant disclaimed any intention to advance a fundamental attack on the judge's approach as a matter of law. The furthest he sought to go was to submit that the judge ought to have taken into account, when deciding whether the claimant had had the requisite capacity to pursue a claim in legal proceedings, the fact that (as alleged) the claimant would plainly not have had the requisite capacity to manage and administer a large award of damages.

[82] It might have been thought that an obvious difficulty in the way of that submission, in the present case, was the fact that the claimant had taken what were accepted to be sensible decisions in the management of the not inconsiderable sum which he had received under the compromise in 1987. But it was said that the question whether he had capacity to take those decisions was not to be answered solely by reference to outcomes. I accept that as conceptually correct. For the same reason that - as the Law Commission pointed out - a person is not to be regarded as unable to make a rational decision merely because the decision which he does make is one which would not be made by a person of ordinary prudence, so he is not to be regarded as having capacity merely because the decision appears rational. But, to my mind, outcomes are likely to be important (although not conclusive) indicators of the existence, or lack, of understanding.

[83] More pertinently, I reject the submission that a person who would be incapable of taking investment decisions in relation to a large sum received as compensation is to be held, for that reason, to be incapable of pursuing a claim for that compensation. I accept that capacity to pursue a claim requires capacity

to take a decision to compromise that claim; and that capacity to compromise requires an understanding of what the effects of a compromise will be - in particular, an understanding that it will be necessary to deal with the compensation monies in a way which will provide for the future. But that does not, as it seems to me, require an understanding as to how that will be done. As Hoffmann J pointed out in *Re K, Re F* [1988] 1 All ER 358 at 362, [1988] Ch 310 at 315, there is no logical reason why a person who understands that something needs to be done, but who does not have the requisite understanding to do it for himself, should not confer on another the power to do what needs to be done.

[84] In my view the judge identified correctly the principles which he had to apply in addressing the issue which was before him. Kennedy LJ has explained why the criticism that the judge failed to apply those principles to the facts must be rejected. I agree. The application of those principles led the judge to a conclusion which he was entitled to reach. For my part, I find it of particular significance that, in this case, two experienced solicitors acting for the claimant in litigation did not recognise the need for the appointment of a next friend; and that no criticism is made of either in that respect. These appeals should be dismissed.

Appeal dismissed.