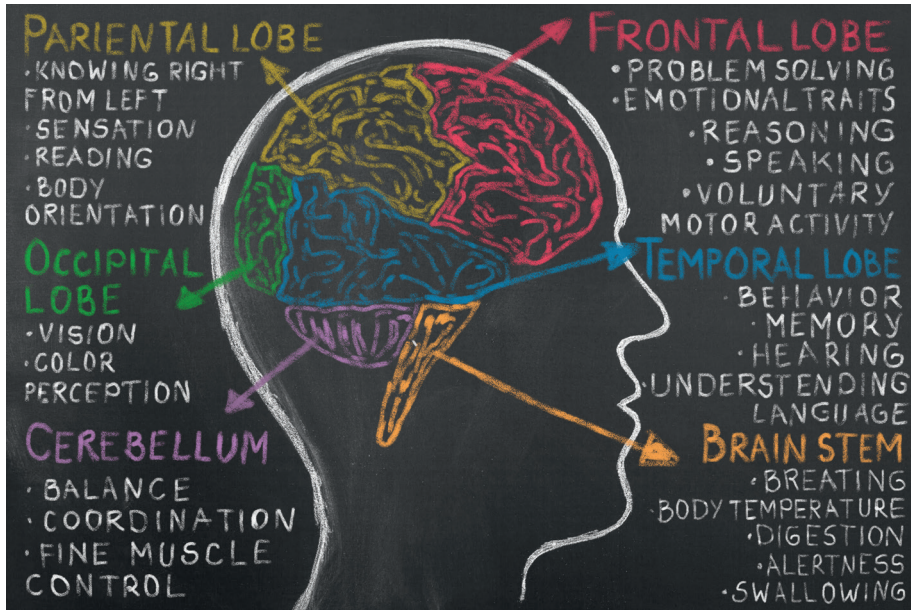


# Practical advice on capacity to litigate

Giles Eyre & Linda Monaci present a case study on mental capacity to litigate, including key learning points for practitioners



## IN BRIEF

► Illustrates the challenges for solicitors and experts via a fictitious example of a borderline mental capacity case.

John, now 19 years old, is pursuing a personal injury claim against his employer. He had sustained a severe traumatic brain injury (TBI) and some orthopaedic injuries in an accident at work. Liability was established at trial but damages are yet to be assessed.

## Background history

John lived in a flat organised by social services from the age of 13 years of age due to physical abuse by his mother and step-father. He left school at 15. He regularly smoked cannabis and for a period also heroin. He worked six months on a building site but left after an argument with his manager. Just before the index event he found further employment on a building site, where the accident occurred.

At discharge from hospital, he returned to his flat. He received little community rehabilitation.

At the first neuropsychological assessment, 13 months post-accident, John was not coping well at home; he was eating ready meals or snacks and he rarely went

out. The assessment findings were that the TBI likely caused a mild reduction of processing speed but otherwise intellectual abilities were intact. John experienced moderate memory problems and the results of tests of executive skills were variable. He reported some issues controlling his temper with interpersonal difficulties, fatigue and lack of interest in pursuing goals. He was not dealing with correspondence or returning his solicitor's calls; an older sister had been appointed his Litigation Friend.

The initial neuropsychological assessment found he did not have capacity to litigate but it was recommended that this should be re-assessed after a period of rehabilitation as interpersonal problems and mood were likely to have a negative impact on his mental capacity.

A second neuropsychological assessment was carried out three years post-accident. John continued to live alone but his girlfriend (they met two years post-accident) and their daughter (two months) visited him every day. The girlfriend reported that John's extreme moods made living together impossible. John had not yet been accepted for a return to work and he continued to experience interpersonal difficulties with limited social interactions; he continued to use cannabis in moderation but no other drugs or alcohol. Spare cash went on fixed

odds betting machines. His sister continued to support him but overall he appeared improved in mood and more able to deal with everyday life. She no longer wished to act as litigation friend, saying she was not needed, although it appeared she found John's moods difficult to manage.

John lived on state benefits and paid his utility bills, his shopping and household items; he contributed £20 most weeks towards his daughter's expenses. On formal cognitive testing, he continued to show a reduction of processing speed, moderate memory problems and variable results on tests of executive skills.

John's solicitor asked for an expert opinion on whether John had regained capacity and whether a litigation friend was still needed. The solicitor also sought expert opinion on whether John had the mental capacity to handle the substantial damages he was considered likely to receive.

## Legal principles: capacity

The solicitor's instructions raised the issues of capacity to conduct litigation and capacity to manage finances. Capacity is to be judged in relation to the decision or activity in question and not globally. 'A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain' (s 2, Mental Capacity Act 2005 (MCA 2005)). But 'a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success' (s 1(3), MCA 2005).

Under s 3, MCA 2005 it is provided that 'a person is unable to make a decision for himself if he is unable:

- to understand the information relevant to the decision;
- to retain that information;
- to use or weigh that information as part of the process of making the decision;
- to communicate his decision (whether by talking, using sign language or any other means).'

'The information relevant to a decision includes information about the reasonably foreseeable consequences of: a) deciding one way or another, or b) failing to make the decision.'

To make that assessment more difficult 'a person is not to be treated as unable to make a decision merely because he makes an unwise decision' (s 4, MCA 2005).

## Expert's role

The expert must address:

- Whether the person has an impairment of the mind or brain, or is there some

sort of disturbance affecting the way their mind or brain works, whether the impairment or disturbance is temporary or permanent? (the 'diagnostic threshold')

- ▶ If so, does that impairment/disturbance mean that the person is unable to make the decision in question at the time it needs to be made? (the 'functional' test)

The expert must then go on to assess the ability to make a decision by answering the following questions:

- ▶ Does the person have a general understanding of what decision they need to make and why they need to make it?
- ▶ Does the person have a general understanding of the likely consequences of making, or not making, this decision?
- ▶ Is the person able to understand, retain, use and weigh up the information relevant to this decision?
- ▶ Can the person communicate his or her decision?

For capacity to litigate, the claimant must have 'first the insight and understanding of the fact that he has a problem in respect of which he needs advice... Secondly, having identified the problem, it will be necessary for him to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and to advise him appropriately... Finally, he needs sufficient mental capacity to understand and make decisions based upon, or otherwise give effect to, such advice as he may receive' (*Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2002] All ER (D) 297 (Dec)). The claimant must be able to conduct the claim with the assistance of lawyers, not just be able to understand the advice of his lawyers.

### Expert's task

Carrying out mental capacity assessments is a complex task. For instance, in this case, John presented with pre-morbid emotional vulnerability, and limited education and life experiences. It was important to take into account how he used to make decisions before the TBI because an individual with mental capacity is entitled to make unwise decisions. Although he had lacked capacity to conduct litigation, it appeared he had since been able to return to manage some aspects of his daily life reasonably well. His sister also indicated that she no longer felt that her role as Litigation Friend was justified.

The expert, in the clinical interview, seeks an indication of the claimant's level of functioning in everyday life and the way in which he deals with problems, what decisions he can make independently and what he may need help with, so indicating his ability to deal with issues. This can then be compared with the reports and information acquired from

third parties. A formal cognitive assessment of the claimant (not just a screening) is helpful to understand the claimant's cognitive functioning, namely intellectual, memory, language and executive skills, which will all impact on his ability to make decisions, together with specific questions aimed at assessing mental capacity. In relation to capacity to conduct litigation and therefore to instruct a solicitor, questions will be aimed at establishing John's understanding of the claim, for instance what happened to him, how the claim has progressed, the role of his lawyers and of the other party, and of the judge and what can happen if the case goes to court. It is helpful to understand the claimant's awareness of issues in relation to liability, and the nature of issues that are in dispute or have not been resolved in relation to the amount payable.

## “Carrying out mental capacity assessments is a complex task”

In relation to capacity to administer the award and to manage finances, questioning is aimed at verifying John's knowledge of his assets, amounts available in a bank account, any loans, the cost of running the household, how much is spent every week/month, how much income he has, what financial decisions he makes, how he would apply for a credit card or loan, how he would go about applying for a mortgage, how interest is calculated, what he would do if he were awarded a large amount of compensation, and what the purpose of such compensation would be. It is also relevant to ascertain that the claimant is aware of the cost of usual everyday items, depending on his habits, for instance the cost of milk, cigarettes, beer, a ready meal or his typical weekly shopping and whether he budgets for larger items of expenditure, and how John believes he is managing money, for instance if he overspends, and how that compares with before the TBI.

As claimants with TBI may have poor awareness and be unreliable historians, additional information from interviews and sometimes witness statements from third parties are important; reports of family/partner/friends, and from the claimant's solicitor can be particularly helpful. It is also helpful to understand the claimant's engagement with various activities (including dealing with the solicitor) and interactions with people close to him, his understanding of

common everyday life issues and his ability to weigh up pros and cons. Any history of financial mismanagement is important.

Solicitors can assist by describing how they have found the claimant in their dealings with him, which can stretch over years. In particular, specific information on what issues have been discussed with the claimant about the claim (eg disputed liability, outstanding issues) and financial matters (eg discussion about a trust fund, its pros and cons, the appointment of trustees and the impact on the claimant's freedom of action) is helpful.

### Summary

John is a borderline case, particularly in relation to administering the award, and the opinion on capacity will depend on a close consideration of the evidence available and whether the burden of proof (that he lacks capacity) has been satisfied. **NLJ**

## Mental capacity assessment: learning points:

- ▶ Whenever any doubts arise as to capacity, it is essential to instruct an expert to carry out a mental capacity assessment to avoid possible issues later on, which could include setting aside a settlement reached without a Litigation Friend being in place (see *Dunhill v Burgin* [2014] UKSC 18).
- ▶ The expert must reach a conclusion on capacity, on the balance of probabilities, applying the statutory tests in MCA 2005.
- ▶ The expert must justify that conclusion logically from the findings of fact, and the factual information provided, from the claimant, from witnesses, from the lawyers and from formal assessment.
- ▶ It is important not to penalise a claimant for having limited life experience and lower educational attainment. An important consideration is the claimant's ability to give instructions and seek, understand and follow the advice of his legal team.
- ▶ When considering capacity to administer an award and manage finances, it is important to consider the claimant's ability to budget and to anticipate future expenditure, and his understanding of the heads of claim and the purpose for which damages are awarded (even though a claimant with capacity is free to spend damages as he wishes).

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