Summary
Seminar: Procedure for Determining Mental Capacity in Civil Proceedings
1 March 2024

Introduction:

On 1 March 2024, the Civil Justice Council (CJC) working group on the Procedure for Determining Mental Capacity in Civil Proceedings held a seminar at Friends House, Euston and online. With 120 registered delegates, the purpose of the seminar was to discuss the working group's consultation which closes on 17 March.[1] The following summary note provides an overview of the sessions held throughout the day. The working group are extremely grateful to delegates for their participation. The full programme is at Annex A. A delegates list is at Annex B.[2]

Welcome:

The Master of the Rolls (MR) and Chairman of the Civil Justice Council, Sir Geoffrey Vos, welcomed delegates to the seminar. He thanked the working group, particularly the co-chairs Daniel Clarke and Diane Astin, for their efforts in driving forward this work and addressing this important issue. He expressed that this work goes to the heart of what the CJC is about, it is an area of law with few direct financial imperatives driving development, and an issue which has often been skated around or tackled in a local way. The CJC works best by combining experiences to explore an issue, and the MR highlighted the importance of collaboration and learning from others, including from other jurisdictions. He closed by encouraging attendees to participate in the seminar, voice their experience, and share their expertise. He reflected that these contributions may be the key to addressing part of this issue.

Morning plenary session

Chair: Amy Shaw (Deputy Secretary to the CJC)
Panellists: Diane Astin (Housing member of CJC), Daniel Clarke (barrister), Alex Ruck-Keene KC (Hon) (barrister), District Judge (DJ) Michelle Temple, Her Honour Judge (HHJ) Karen Walden-Smith, Sophy Miles (barrister) and Catherine Hose (solicitor).

In the morning plenary session, members of the working group provided an introduction to the topics which would be discussed during the seminar. The topics covered broadly corresponded with the headings in the consultation paper, and were each the focus of one of the breakout sessions.

Following a short introduction from Amy Shaw, the co-chairs of the working group, Diane Astin and Daniel Clarke, set out the background for the consultation. Daniel approached the CJC following the publication of an article he had written in *Legal Action* magazine which identified the shortcomings in the rules in relation to litigation capacity in the civil courts.

DJ Michelle Temple introduced the topic of the role of the court in identifying and investigating issues of capacity. She set out some of the discussions that the working group have had on this topic, particularly whether the court can have a quasi-inquisitorial role and the issue of whether an opponent has any legitimate interest in determination of the issue of a party's capacity.

[1] Civil Justice Council Procedure for Determining Mental Capacity in Civil Proceedings Working Group Consultation Paper December 2023 (judiciary.uk)
[2] Delegates were asked to consent to appearing on the delegates list.

Alex Ruck Keene introduced the topic of third-party investigators. This topic follows on from the role of the court. In particular, the working group would like to hear from delegates during the breakout sessions on what kind of third party would be best placed to assist the court, and where funding would come from.

HHJ Karen Walden-Smith introduced the topic of the conduct of the hearing to determine capacity. The breakout session on this topic will discuss the role of the party's, and other parties', legal representatives, privacy and anonymity and challenges to the determination.

Sophy Miles introduced the topic of professional conduct. Issues to be discussed include whether it is clear for advisors, solicitors and barristers when they have a duty to raise the issue of their own client's incapacity, the issues that arise in practice and whether further guidance is needed.

Catherine Hose introduced the topic of funding and costs. She set out possible questions and issues to be discussed during this session, such as who should cover the cost of obtaining expert reports so determinations of capacity could be made.

The floor was then opened to questions and initial reflections from delegates. Common themes that emerged were:

- The importance of data. It is unclear how many cases that this issue affects.
- Scope of the consultation paper and the working group's work. The working group are investigating the issues that arise prior to the provisions of CPR 21 being applied (which presuppose that a party lacks litigation capacity).
- Clearer guidance for litigants, judges and the professions.
- The potential role for pre-action protocols (PAP)s in flagging the issue of capacity at an early stage in proceedings.

Breakout sessions:

The Role of the Court – identifying and investigating issues of incapacity
Morning session
Chair: Alex Ruck-Keene KC (Hon)
Rapporteur: Diane Astin

The following questions were discussed:

1. ***Is the process adversarial or is the court's role inquisitorial?***

One view was that this should not be such an issue. It is about the court exercising its case management functions.

Another view was that it can be very much adversarial. Personal injury (PI) claims in particular were raised as an example of claims where capacity can be an issue in the substantive proceedings. For example, where one party argues that there is an impairment of the brain, but the Defendant is alleging fundamental dishonesty. Experience was shared of a case in which the court decided not to deal with the assessment of capacity as a preliminary issue but as part of the trial, even though the Litigation Friend was present and ready to assist. Several other participants agreed and had experience of the assertion of incapacity being used tactically.

A discussion followed about whether the other party should have a role in the determination of capacity. Again, PI was raised as it was felt that it is hard to say that a Defendant in a PI claim should have no role in the determination of capacity. If it is alleged that party lacks capacity to deal with

property and financial affairs, this will be relevant to quantum, and can have an impact on settlement because it makes a difference to the value of the claim.

In other cases, it might be said that Defendant does not have much of an interest, other than the impact on overall costs and delay.

There was overall agreement that it is a difficult issue and that clear guidance as to how it should be dealt with would be useful.

The Official Solicitor is seeing increasing numbers of cases in which capacity is in issue. Two types of case in particular were raised:

(1) Personal injury claims where there is an allegation of fundamental dishonesty.
(2) Cases in which there are family members willing to act as a Litigation Friend, but the court is concerned that none are suitable to act, and so court approaches the Official Solicitor with a request to act as Litigation Friend.

For the Official Solicitor (and other Litigation Friends), where there are allegations of fundamental dishonesty, this affects the signing of the certificate of suitability (with the undertaking as to costs) because if the court finds fundamental dishonesty, the Litigation Friend will be liable for all of the costs.

To say the other party has no interest in the determination could undermine the argument that the person is trying to mislead the court.

A District Judge shared their perspective hearing cases at the other end of the spectrum; in particular, anti-social behaviour and possession claims. For these cases, determination of capacity becomes an inquisitorial process, and the judge is best placed to grasp the issues. The need for training was identified, particularly in the context of housing. The judge also raised a new approach to 'access injunctions' which are sought by social landlords to gain access for gas and other safety checks. It often does not seem to strike people applying for the injunctions that there may be a mental health reason behind a refusal of access.

2. PAPs/court forms – obligations on other parties to raise the issue:

The effectiveness of highlighting the issue or including questions within the PAPs and on court forms was discussed. Concern was expressed that completing the form correctly will require understanding of the appropriate test and the nature of allegations. This may create issues with compliance, particularly by litigants in person.

Attendees discussed the vulnerability box on court forms. More often than not it was felt that a lot of information is included in the box which is not necessarily to do with vulnerability. There was uncertainty about the value of adding a further question on capacity, which could cause duplication.

Delegates from Citizens Advice Bureau shared their experience of the increased volume of people seeking support who have complex issues. It was felt that this reflects the lack of advice and support available.

The challenge of developing and designing digital portals to cater for complex issues was raised, particularly the need to ensure that people do not get lost in the digital process.

3. Should the issue of vulnerability be addressed later in the process? Do you wait until party has representation?

It was felt that a more interactive box on the court form could provide an educational opportunity. For example, for injunctions, the form could reflect a proper test or be designed to ask questions such as 'can person do this/not do this?'

4. ***Can you actually isolate the issue of capacity? What should be the test? Should you have to consider 'genuine reason to doubt' capacity before being prompted to provide information in the vulnerability box?***

Issues of vulnerability do not necessarily go to capacity. Some judicial experience shared was that they have never seen anything in the vulnerability box on a form that has prompted questions of capacity. Rather, the issues raised on the form have raised a question of reasonable adjustments.

There was some evidence shared that parties are sometimes reluctant to complete the vulnerability box in relation to themselves due to concern about giving confidential information to the other side. Consideration is being given to changing the process to one where the party is invited to write to the court privately to highlight if they consider themselves to be vulnerable.

5. ***What about the obligations on legal advisers – to raise concerns about own client – to the court? And, is it clear enough when might raise issues of other party?***

There was agreement that better guidance was needed.

A barrister suggested that it can be tied into the handbook or professional obligations but better guidance/a practice note was needed, particularly on the duty to the court. This would help to resist push back from client (particularly professional clients). The question was raised whether it could be incorporated into the Overriding Objective.

Practical issues of cost and time were raised in the context of cases in which the barrister is alive to the issue, but instructing solicitors are not. In this situation, they would need to advise their client about capacity and then embark on the expensive process of getting evidence and possibly an application for Litigation Friend. This is an example of where the route is clear but practical issues arise.

Training was also discussed. The importance of embedding training early on, and the need for face-to-face training about how to signpost people was raised. It was felt that training must start early and be refreshed. It was felt that short, online training modules were not sufficient.

6. ***Do judges have sufficient power to resolve the question? Is there a power gap somewhere?***

The working group have discussed the powers of the County Court, concluding that the system is rather fuzzy. Judges are doing creative things to work around the issue, but there is a question about powers.

It was felt that it is less of an issue for high value Personal Injury cases. A delegate shared their experience of a case with a litigant in person as the Claimant and the NHS as the Defendant. The issue of capacity was raised, and party agreed to a psychiatric report which confirmed lack of litigation capacity.
Unfortunately, the case is now stayed as due to difficulties in getting a suitable Litigation Friend.

No delegate shared experience of where an individual had not consented to assessment of capacity, but it was felt that there is a power gap if capacity is unclear and the individual does not want capacity to be investigated.

Experience of cases concerning injunctions or possession and legally aided parties was shared. Usually, the court has found a way, but it was agreed that it would be better if a process was formalised. A delegate shared experience of a case in which the judge took on an effectively inquisitorial role regarding the provision of documents, however the party was not willing to engage and see a psychiatrist. The judge held a hearing, heard from the client, and decided that they lacked capacity.

It was suggested that it could be requested that such cases be listed before Court of Protection (COP) judges. They have more training and experience in issues of capacity.

In response, it was noted that it is already the case that cases will often be referred within a court to a COP nominated judge. It is still difficult to get enough evidence and may fall short of the gold standard of a psychiatric report, but you have to do the best you can.

Another issue was raised where a delegate had experience of a litigant who was happy to co-operate and an order made that the party would produce a GP report, but the GP refused to do so unless the court ordered it directly from GP. This raised the question of judicial power.

There was a further discussion about GPs, including the content of letters. It was suggested that a proper form for a GP to complete would be helpful and would avoid the issue of receiving a formulaic letter stating how long the individual has been a patient and what medication they are on. Another issue raised was that many GPs do not feel comfortable, even when provided with a full letter of instructions, completing a document unless lack of capacity is clearly obvious.

It can be time consuming to get basic details: for example, one delegate raised that in one case it took three days just to find out who the treating psychiatrist was.

It was felt that the current form needs revising. One attendee remarked that the COP 3 form was better than the Official Solicitor form.

7. Why do we need medical evidence?

There was a question from delegates about how to answer the question of whether a person has capacity, unless it is obvious, without medical records. A current Court of Appeal case was referenced where two psychiatrists have concluded that a person lacks capacity, but the court disagrees.

A judge noted that in anti-social behaviour and housing cases, if the local authority is on notice that party may be vulnerable or lack capacity, the judge will tell the housing officer to contact social services to raise issue of possible capacity. The adult social services team then come on board, and they get the evidence on capacity. As indicated in previous discussions, it may be problematic or unrealistic to get the client to obtain a report stating lack of capacity.

The issue of potential for disrupting the therapeutic relationship between the GP and the party was raised. It was suggested that it may be better for social services to complete a report, rather than the GP.

It was agreed that it is important to have a report, as it is about rebutting the presumption that a person has capacity.

The Role of the Court – identifying and investigating issues of incapacity
Afternoon session
Chair: HHJ Karen Walden-Smith
Rapporteur: Diane Astin

The following questions were discussed:

1. ***Is it an inquisitorial role? Does opponent have a legitimate interest in capacity? Investigation role?***

The consensus was that the role of the court must be inquisitorial. The judge cannot be operating as a 'referee'. The court can have different roles for different issues; it is part of the court exercising its jurisdiction, as you see if you look at *Dunhill v Burgin [2014] UKSC 18*.

It was felt that, however the hearing is done, and however capacity is determined within civil proceedings, it must be a separate hearing, with a different judge. There was the suggestion that the issue could be sent to a specialist court for a determination.

The consensus was that the opposite party does have a legitimate interest because a finding that a party may lack capacity may lead to a stay with no easy way of resurrecting the proceedings. The other side may therefore have a role to play but should not have access to confidential or privileged material. The court needs to be astute to avoid satellite litigation.

The presumption is that everyone has capacity. This may be flagged up by (1) the court looking at a party and having concerns, (2) a party raising concerns. The question of how to move CPR Part 21 forward was discussed. The question was raised of how the judge at the current time can do more than raise an issue and how can capacity be determined.

A judicial perspective was shared. It was suggested that a party was unlikely to raise their own capacity. The other side may raise concerns and the issue of professional responsibilities needs to be considered.

2. ***How the issue is first identified? Role of party who may lack capacity and role of other party? PAPs and court forms – does that assist?***

Two areas of consideration were discussed. Firstly, pre-action: in lots of cases, it is clear that one party lacks capacity, and everything is put in place at the start. It was felt that boxes or questions probably won't make a difference, unless it is very clear, and a Litigation Friend is needed anyway. The problem is that you are asking for a subjective opinion, which does not take you very far.

Secondly, where the issue is raised in court itself. This could be by your own party, the other party, or the judge. It was felt that it is difficult to know when to raise the issue.

Professional duties were discussed. It was agreed that clearer guidance was needed. It was suggested that it would be helpful to bring the issue into the Overriding Objective. Rules putting the onus on representatives would be helpful and in similar in terms to the Mental Health Tribunal and Court of Protection.

3. ***What does the judge do with that information? What can the court do?***

It was felt that there should not be a distinction between the High Court and County Court in this respect. Both should have the same powers. The need for a single set of rules was raised - see *Baker Tilly v Makar* [2013] EWHC 759 (QB).

Proportionality and differences of scale between High Court and County Court was raised. In the County Court, there may be 30 or 40 cases in a housing list, listed before a Deputy District Judge (DDJ). It was suggested that there needs to be better judicial training on how to spot a case where orders for information to be produced and/or expert evidence is needed. Less experienced judges may err on the side of caution and adjourn the case.

As with the first session, the possibility of referring difficult cases to the Court of Protection was raised. The need for a pragmatic and proportionate solution was stressed.

4. ***What is the court ordering?***

Is the court ordering an informal assessment of capacity from the GP? On what instructions? Or is the GP being asked to disclose medical records? In COP, there would be an order for disclosure, then the appointment of a Single Joint Expert.

The expertise of COP judges was discussed. These judges are involved in litigation issues and other issues and make such decisions on a daily basis.

5. ***Having identified an issue, what should be done?***

It was felt that the court is not set up to play an inquisitorial role, then switch to an adversarial role. The question remains how to empower the court to be able to take on an inquisitorial role.

6. ***What evidence can the court obtain/order – is it a paper exercise to start?***

It was agreed that the method of assessing capacity needs to be clear. The question was raised as to what the relevance of capacity is in a case in which the court has little discretion, e.g. some possession claims. The answer to this was that it is an Article 6 issue. The question of proportionality remains.

Medical evidence is needed. The need for better evidence was raised in *Hinduja v Hinduja & Ors* [2020] EWHC 1533 (Ch).

An example was raised from a judge hearing a wardship application. The applicant wanted the court to exercise its inherent jurisdiction. The woman turned up and it seemed likely there were issues about capacity. If a wardship order is made, it kills the care proceedings. The decision was no order in wardship but conveyed concerns back to the judge in care proceedings.

7. ***Training and guidance for judges and professional bodies.***

The importance of trust was expressed. It must be assumed that all judges act judicially and will not ignore issues of capacity or vulnerability but will stop proceedings and raise the need to investigate. It was not suggested that any judge who thinks a party may lack capacity would not look into the issue further.

8. ***Third parties helping the court?***

Suggestions included the court having powers to refer to another judge for a determination, or to refer to the COP for specialist representation. The COP has structures in place such as the Approved Legal Representative (ALR) system.

It was suggested that a clear duty on the representative should be included in the CPR.

9. **What about the costs of the hearing to determine capacity?**

Costs were raised briefly at the end of the session. It was agreed that costs need to be further considered. One suggestion was whether costs can be covered by the general principles 'costs in the cause'.

It was suggested that the conflict between duties to the court and duties to the client, although clear on paper, is very difficult in practice.

The conduct of hearings:
Morning session chair: HHJ Karen Walden-Smith
Afternoon session chair: Daniel Clarke
Rapporteur: Rebecca Scott

Three broad themes were explored:

1. Participation:

a) What role should the party's legal representatives play?

The view was expressed that it felt perilous with a client of doubtful capacity. The Bar Standards Board (BSB) states the representative must draw concerns to the Court's attention. There is a problem if the client does not agree, as you are then acting contrary to their instructions, and it can lead to a breakdown of the client relationship if there is a finding of capacity. The advocate should set out to the court the established legal principles and the client's wishes and feelings. It was felt that their role is to present rather than advocate. The BSB guidance states advocates should raise capacity with the client and then with the court.

The question was raised: *should it go into the Overriding Objective?*
It was stated that this issue arises all the time in the COP and Mental Health Tribunal. There were lots of clients that wanted to be discharged from detention under the Mental Health Act, you had a duty to act on the client's instructions, and in their best interests, and you also had a duty to the Court. Guidance can't cover every situation, and there was a real risk of the relationship with the client breaking down. This is why it was so helpful to represent lay clients through the Official Solicitor acting as a Litigation Friend to ensure the wishes and feelings of the lay person are represented.
There was a difference between capacity and wishes and feelings. There was no "one size fits all" and it was decided case by case. A separate legal representative for the capacity hearing can be instructed to preserve the client/solicitor relationship. There was a pilot along the ALR route discussed, to bring in a separation from the substantive proceedings. It was felt that this was important and likely to be smoother.

There was a divergence of views from delegates practicing in the area of personal injury. It was felt that those representatives were advocating, and it was often part of the substantive claim and part of the injury. Questions raised included: could PI be kept separate? What if there were conflicting decisions?
There were increased costs consequences for a defendant if a claimant lacks capacity (for example, having to pay for the deputyship costs). Another concern expressed was the possibility of a medical report obtained later in substantive proceedings being different: which would take precedence? It was put forward that a discrete report could be obtained dealing only with capacity.

b) What role, if any, should other parties play?

The view was put forward that other parties can have a view but none of them were helpful apart

from a clinical view. Civil courts can't access medical evidence without cost. The only way you can do that is by getting independent expert evidence. In mental health tribunals a nurse or psychiatrist makes a short capacity report. We could look at the structures in different courts and see how we could adapt them to the civil courts. The funding may not be there, but it doesn't stop us from asking for it.

It may possibly require primary legislation, but the issue of capacity could be referred to the COP when it arose in civil cases. There was the question of proportionality in smaller cases.

The lack of data on numbers of cases was raised: this is important when designing solutions.

In the Mental Health Tribunal, there is a court visitor or public guardian funded by the Ministry of Justice that assesses capacity. It is issue specific. The volumes of requests for these reports are increasing and there are concerns over the numbers of court visitors to do this.

Other parties may have an interest, but the question is whether that interest is legitimate. It was felt they shouldn't be involved for reasons of privacy and privilege, medical information, and other sensitivities. Other views were expressed that other parties could have a legitimate interest and there had been case law on this. The use of the *Beddoe* hearings in Trust litigation was raised as a possible way forward.[3] This jurisdiction had been long established. These were a separate action in front of a different judge for directions, and the release of documents to the other party could be controlled so they were not given access to privileged documents. *Beddoe* hearings function well and are a separate standalone determination.

It was felt there should be a wide amount of judicial discretion to allow the procedure to fit the circumstances of the case. It can be a standalone procedure or part of a procedure. Delegates were drawn to flexibility and a menu of options. People should be clear on the findings of a capacity hearing and on what it will decide.

The question of what is proportionate and achievable in a realistic time period was raised. In possession cases, for example, it can be an unfairness to housing associations if they are not allowed to put forward evidence as there may be evidence of fact (for example the tenant has been able to manage the tenancy in a reasonable way). It was important to focus on the fact that capacity is time specific, the hearing is on the capacity to litigate these current proceedings at this time. It can be reviewed throughout the proceedings and can change during the course of proceedings.

2. Privacy and anonymity:

a) When and to what extent should the public be excluded from such hearings?

Delegates leaned towards the public being excluded from these hearings as there did not appear to be a legitimate interest. *Beddoe* hearings are private. The information is not just confidential, but also sensitive. There are rules in place regarding allowing information to third parties; this allows court management, and the judge can't see any other aspect of the case. There is an extra strong justification because it is done at a time when the party may lack capacity. Thought needs to be given to the derogation from the principle of open justice.

[3] A 'Beddoe hearing' is a hearing of an application brought by a Trustee wishing to bring or defend a claim in their capacity as Trustee. The court can give directions to authorise the Trustee to do so, and to provide that the costs of such action will be borne by the Trust fund, see *Re: Beddoe, Downes v Cottam* [1893] 1 Ch 547.

The hearing could be treated similarly to an approval hearing in personal injury cases, its private and sensitive matters but should be open to public scrutiny. In approval cases, the general rule is that they are heard in public. They can move between the two.

b) When or/and to what extent should anonymity or reporting restrictions apply?

This could be done on a case-by-case basis. There can be a trimmed down judgement as to why the decision was made, or it can be anonymised, and/or redacted. It was felt that we do not want to be bringing in secrecy, or restricting the protected party's rights to talk about what has happened if they feel aggrieved.

Hearings are listed in public, but anonymity can be given. There can be reporting restrictions and no identifiers stated. There is a balance to be struck between the private interest and public interest of open justice.

3. Challenges to determinations:

a) Where the court determines that a party does not have capacity, what form should his/her right to challenge the determination take? What issues arise?

There was consensus that there was not a justification for removing the ability to challenge a decision. The COP has a standardised appeal process that could be followed, but this is quite lengthy and puts lawyers in a tricky position pending appeal. Another advantage to the COP is non-means tested legal aid. The group could not see the purpose of a review by another judge and felt it had to be an appeal. There could possibly be a panel system in place with a panel solicitor.

b) Should other parties have any right to challenge a determination and, if so, in what circumstances?

There was debate over whether or not other parties have an Article 6 right. They would be affected by a stay. It was felt that the solution was to fund it properly rather than give a right of dispute. The other party may have a legitimate interest in challenging the decision. One delegates experience was that the courts frequently received applications to come off the record as they cannot take instructions from their client. In these cases, the solicitor may take the view that they cannot act and throw the ball back to the court. It was felt that this may flow from whether they had the right to attend the original hearing on capacity.

Professional conduct:
Chair: Sophy Miles
Rapporteur: Catherine Hose

1. Is it clear for advisers, solicitors and barristers when they have a duty to raise the issue of their own client's capacity?

One view shared was that the duty is clear, but that what is not clear is that all realise that they have this duty, and what it entails.

A Litigation Friend shared that they felt there was no strong guidance as to the duty of Solicitors to their clients. They have raised this in response to the Solicitors Regulation Authority (SRA) but suggested that much more robust guidance is needed.

An example was given of a case where the client had a brain tumour, as well as being bipolar, but not responding to medication until well into the proceedings. The Protected Party ('PP') had not instructed their Solicitors properly and was subject to lasting power of attorney. The other side's solicitor also had health issues that were ignored. The Solicitor's conduct increased litigation, which increased costs

and ultimately the case has been overthrown. The Solicitor was a consultant Solicitor who was not supervised appropriately, and the SRA has taken no action. The SRA guidance is unclear about what a capacity assessment within those proceedings involves.

It was suggested that there is an increasing problem with lack of appropriate supervision for consultant solicitors who are not as experienced and not being mentored, trained, or supervised as thoroughly, especially with increased remote working. Further guidance and wider support in the profession was recommended.

There was a discussion about the existing SRA guidance and practice notes about working with vulnerable clients. Some delegates responded that they do not always have the time to digest the existing guidance and practice notes, as well as the updates. Some delegates found the guidance useful, as it gives specific advice on legal tests, covers assessing capacity, techniques, obtaining medical reports and expert opinions. Others suggested that the guidance may need to be revised and refreshed; for example, it could be updated to deal with changing practices in the industry.

The variation in different types of cases in civil litigation was highlighted. It was suggested that capacity can be easier to assess in PI than other cases, as there is often already some medical evidence or opinion.

Delegates felt that where the onus is on the solicitor to assess without medical evidence, the guidance is not sufficient.

It was stressed that guidance needs to be observed. Some delegates were unsure whether all solicitors are aware of the guidance. There are pressures, especially when you are not being paid for that work. Solicitors must weigh up spending the time carrying out the capacity assessment and doing all the pre-funding work.

The question of enforceability of guidance was also raised. The SRA guidance appears to suggest that a duty to the client overrides any other duty, including to the court.

2. Is it clear for advisers, solicitors, and barristers when they have a duty to raise the issue of another party's capacity?

An example was shared of a case where a question about the other side's capacity was raised, and there was medical evidence supporting that. The other side's lawyers said that the individual did have capacity. It was queried, but the other party's solicitor said that they were in a better position to assess capacity than the medical professionals. The delegate who shared this example felt that the duty to the court trumps duty to the client but raised that litigators do not always act on that.

One delegate suggested that they do not think that, as a third party, an individual should be able to investigate the other side's mental capacity. The other party does not always have all the information. In PI, in situations where the issue of capacity arises, it would be raised at a case management conference (CMC).

3. Is there scope for different practices depending on the type of case?

There is such a huge range of cases with different power dynamics. Are we comparing apples with pears?

There is a difference between cases where both parties are represented and cases where one party is a litigant in person (LiP). In categories such as housing, there are a number of anecdotal stories where the most vulnerable parties have not been protected. One of the challenges is an absence of data. This work started in housing, where there is a clear problem, but has widened. Delegates were

encouraged to share their experience of other areas where this issue arises.

The need for data on how it impacts on different areas of practice was highlighted.

4. ***Are there any circumstances when it would be beneficial to have guidance, or a practice note on where they may be a duty to raise the issue re other party's capacity? Concerns re the other sides representatives' lack of consideration of capacity for their own client?***

Soft guidance was proposed. If you think that the other party lacks capacity, you owe a duty to your client, but what are your duties where it is the other party who lacks capacity but that would adversely impact on your client.

It was felt that there was a need for very clear guidance or a code that states a solicitor needs to raise it. It could then be a staged process, but it cannot simply not be addressed.

A case example was given where an adversarial barrister had evidence of their client's serious mental health issue but seemed to have no legal duty to disclose this to the court. There needs to be robust guidance regarding the duty to raise issues.

It was felt that it would be very helpful to have some guidance. There are different approaches with cases between different practices and firms.at the earliest opportunity, because if orders are made and then it is discovered that the other party lacks capacity, then time and money has been wasted.

5. ***Issues around duty to the court/danger of it being raised as a tactic in litigation.***

Concerns about solicitors misinterpreting capacity and the possibility of it being used as a tactic were raised.

Some delegates had experience of this. Examples included a reduction in the amount of damages that the Claimant could be liable to pay if someone is found to lack capacity, as well as delaying tactics, especially when the case is particularly adversarial.

It was suggested that one way to nip it in the bud is, when there is a pre-action protocol (PAP), if there is some tick on a form that then alerts others that capacity is an issue. If it then becomes an issue because this was not disclosed, there can be costs sanction against the parties and/or representatives if they fail to raise issues they knew about.

There is a CJC working group looking at PAPs. One of the things being considered is whether it is a requirement to flag if one party is vulnerable.

It was suggested that 'capacity/vulnerability' could be adopted as a generic term, but the need to take care to ensure that this is not taken too far was raised.

6. ***How do you deal with it if your client says they have capacity? Who is the person determining that point? Is it a certain level of person in a firm to make that decision?***

It was suggested that, in the Court system, there should be someone in the Court to identify where, for example, an issue in capacity has been flagged on a form (through box-ticking). This should at least alert the Judge, so they can ask direct questions such as: 'Why have you ticked the box?' and/or 'Why are you concerned?'

7. ***Is there a requirement on social landlords to alert the court/ to notify the court*****?**

One delegate said no. If it is rent arears, there is a PAP, but there is no requirement to consider capacity. If landlord is a public body, they must consider Equality Act and proportionality, but there are often errors and a lack of understanding. Only rent and mortgage cases have a PAP – there is no PAP in possession for non-rent cases, for example ASB.[4]

An example was shared of a case where a social landlord issued a claim for possession on rent arears. The defendant did not attend the hearing and an outright possession order made. Landlord had not alerted the Judge to the reason that the defendant did not pay the rent. The defendant believed she didn't have a liability as she was the Queen, she owned the housing association, and she owned the town.

8. What issues arise in practice? (in addition to any above)

Sometimes it is not obvious that someone lacks capacity. Someone can present as articulate and rational but there is no joined up thinking, especially in cases where an individual has suffered a brain injury. The solicitor is not equipped to make that decision, especially when seeing client remotely. Remote working is more common where firms have wider geographical areas.

If there is an onus on the solicitor and an expectation on lawyers to pick up on the issues, then further training is needed. It was stressed that consideration also needs to be given to how this would practically work.

There was a question raised about how a Litigant in Person would know about any guidance.

In PI cases, there is a medical report and so that will often be the evidence. Other areas do not have that evidence. In PI cases, parties are often very sensible, and there is a willingness to get people the best care. This seems to be a different approach to litigation.

There was a question raised about whether a GP can determine capacity. There is usually a charge for medical evidence. There needs to be clarity about where the evidence is coming from.

There needs to be some redress against solicitors who do not comply with the guidance. This applies in cases where a vulnerable client is surrounded by lawyers who do not think they need to consider capacity. Case examples have been discussed in this session where there was poor conduct from lawyers who increased costs. The stakes are so high in terms of fees to those adversely affected.

There was a suggestion that there could be some generic guidance alongside specific guidance to be adopted for different scenarios.

It was agreed that data is useful. A question was raised about whether the SRA have an ethics committee that would have any data about calls that they have received.

9. How to deal with the issue of distinguishing between a difficult, uncooperative client and incapacitous one?

Experience was shared from the COP. Individuals can present as very difficult, but it is necessary to take time to see the individual and provide the information to them in the best way possible, whether that be through pictures, podcasts, repeating information etc.

[4] This is a reported comment made during the seminar however please see the Pre-Action Protocol for Possession Claims by Social Landlords, which applies to both rent arrears cases and other cases, and contains an express requirement to consider capacity (para 1.5(b)(i)).

Family members of people who lack capacity can also be very difficult, you are not only dealing with the 'potential protected party'. It can be very hard to distinguish a lack of capacity from being uncooperative. The importance of training and understanding was reiterated.

In terms of charging the file, a privately paying client may not want the assessment and they may then question the bill.

A case example was given: a decision was made that a client lacked capacity based on the way they were acting. The lawyer was not convinced and so explained to the client what the process was if the client was found to lack capacity. The client then agreed that they did have capacity.

10. Does cultural background impact on whether someone perceives capacity?

It is different and more difficult when a cultural issue is not understood. There was a question raised about to what extent this is covered in training. All practitioners work under enormous pressure, and understanding such issues takes a lot of time and skills. It was felt that cultural difference can be misunderstood and impact on someone else's perception of whether a person has capacity.

One delegate shared their experience where individuals' cultural and regional differences have impacted on others' perception of their client's capacity.

In summary, the main themes that emerged from this session were:

- A general consensus was that there is such a huge range of cases with different power dynamics. There should be scope for different practices depending on the type of case.
- People's views vary depending on what area of law they are practicing. For example, PI cases tended to think that the guidance was sufficient, potentially because there was often always medical evidence that can assist. Where the onus was on lawyers to assess capacity, some delegates felt it was not sufficient.
- Guidance could be updated / refreshed to reflect changing working practise and changes within the profession.
- The guidance on duties is not clear to LiPs or other individuals within the case (litigation friends or other professionals who have concerns) i.e. where they have concerns about how a lawyer is treating a potential protected party.
- There were questions over how the guidance is enforced when it hasn't been followed. It is not necessarily enforced by regulators.
- Potential sanctions against a party / representative who is using capacity as a tactic in their case.
- Changing working practices (less experienced consultant solicitors, remote working so there isn't the colleague to discuss ideas with, lack of proper supervision) can contribute to capacity issues either not being acted on or not fully considered. This included the fact that sometimes working with vulnerable people or those potentially lacking capacity is hard and time consuming, so practitioners may not have time to take the case and do this work.
- Is there enough training for lawyers to identify issues and should there be something within continuing professional development about it?

- Question over whether a practitioner's duty to their client trumps or is trumped by their duty to the court to alert them to any concerns about capacity about their client. The benefits of identifying and dealing with any capacity issues as early as possible were discussed.
- The role of PAPs in flagging if there is a potential capacity issue, so that a Judge could at least be prompted to ask the question.

Funding and costs:
Chair: Alex Ruck-Keene KC (Hon)
Rapporteur: Sophy Miles

The discussion begun by identifying whether there are any 'quick wins' – for example being able to sign a legal aid application when a client lacks capacity. There are equivalents, for example in Mental Health cases where the Solicitor can sign the legal aid form. An accredited legal representative (ALR) can also complete a legal aid form, however it was acknowledged that there are other difficulties in the ALR scheme which make it unattractive and time consuming.

1. Could legal aid be granted on a limited basis – just to investigate capacity?

One respondent remarked that it is very difficult to get evidence for means tested legal aid, and a lot of people without capacity are not eligible for legal aid. They receive a lot of referrals from the Official Solicitor where the client is not eligible for legal aid, but the other side may pay the initial costs.

It was suggested that the process of application needs to be simpler for practitioners.

The scope to have an interim non-means tested legal aid limited to assessing capacity was discussed. It could be a clause like in financial remedies, or a loan to be repaid. This seems to go hand in hand with Part 21. All the costs would be in relation to the capacity investigation.

It was agreed that this would need to be separate to the substantive proceedings, and strictly limited to the issue of investigating capacity.

2. Is increasing legal aid right in principle and what is the business case?

It was acknowledged that it is unlikely that there will be an extension of legal aid. The discussion turned to changes that could require tweaks to the current system.

One attendee raised discussion from another breakout session about having a number of options available for any judge dealing with litigation capacity. The Court of Protection specialises in this area. They wondered about having a separate application to the COP with a separate case number to ensure confidentiality. There is a pool of ALRs who could be used if legal aid access was simplified. A one-off application could be made to the COP, with an ALR instructed to report to the judge.

One attendee raised possible delays of satellite litigation. Rather than referring permanently to the COP, it could be listed in front of a COP ticketed judge in the County Court.

3. What reasons are there for the determination of capacity to be non-means tested?

If capacity is a separate issue that needs to be ring-fenced for legal aid purposes, what reasons are there for it to be non-means tested?

One delegate suggested the extent of delays, if there was uncertainty or bizarre decisions in litigation, and the need for a fair trial. Another delegate agreed, suggesting that there is a real risk of exploitation of those in court other than with their own volition. Non-means tested legal aid seems the only way to preserve fairness of proceedings.

A delegate also raised the Human Rights Act and Public Sector Equality Duty.

It was noted that this is the only step in proceedings that, unless it is resolved, puts a stop on the proceedings, and impacts on all parties. Reasons in favour of the determination being non-means tested include avoiding delay and cost, unblocking the impasse, and resolving the issue of consent of the Potential Protected Party ('PPP'). A statutory charge could apply at end.

4. Third party input. What about where the court needs to get an expert report?

One delegate raised the question of what happens if the relevant public body from whom the report would be commissioned is bringing the claim. The pressure GPs are under was also discussed, as were the variable rates charged for reports, and the variable quality of reports.

In medical negligence cases, there tends to already be medical evidence.

The variation in resources across different areas of the country was raised.

One delegate shared their experience working at a local authority. The legal team at a local authority would often help to get the process going for completing a COP3 form but this has funding complications for the local authority. One delegate raised the possibility of getting a private client solicitor who is not involved in the case to assist so there is some independence.

It was acknowledged that litigation and issue specific capacity is not just a medical issue but the value of expertise to the court was highlighted. The importance of training was stressed.

5. Role of information?

One delegate raised the range of costs for a report (from £150 to several thousands). In most cases any report should be at a low cost. Proportionality is important.

One delegate noted that regulated roles in a Solicitors' firm are common. Although Solicitors are not medical practitioners, there could be a designated regulated role within a law firm, similar to a safeguarding lead in a school. It was suggested that this may give confidence to the judiciary.

6. How to ensure expert reports are funded where legal aid is not an issue for parties?

One delegate suggested that this is a role of the Official Solicitor. If the issue is restricted only to litigation capacity, it does not seem fair to ask another party to pay the cost.

The counterpoint was that the benefit for the other party is that otherwise they may not be able to progress their case. It was felt that this may be true if the other party is the Claimant, but it would be different if the other party was a Defendant who had been dragged into the issue.

One delegate cautioned against unintended consequences and clogging the court up with applications.

The possibility of a central fund rather than legal aid was raised. A litigation capacity report would be a discrete piece of work to get the case off the ground. This would enable it to be used by those without a legal aid contract. The risk of satellite litigation over who pays was raised.

One delegate asked whether there would be a lack of experts if a central fund needed fixed rates. One delegate suggested having a fixed fee but staged to account for complex cases. Mental Health legal aid is graduated but some cannot sustain firms on that level, so firms need not to be taking too much of a risk. It was suggested that an hourly rate with guidance would be helpful.

The variation in Section 49 reports [in the Court of Protection] was raised. They are currently taking about 16 weeks.

Sometimes the solicitor can reach a view on capacity, sometimes the judge needs information from a medical and/or social care professional. There are lots of commercial organisations doing capacity assessments. The rates charged by these organisations should be considered.

The following questions were raised: could the court direct that a public body is reimbursed out of public funds? Would it need to be imported into the Senior Courts Act for a judge to direct a short report on capacity? What if a report is sought from the defendant?

It was suggested that any notion of a fact-find would be unworkable. The report needs to be paid for so that practitioners will complete it whoever the client is. It was suggested that it would be helpful to have an expectation of an hourly rate that would make it viable for health or social care professionals to complete this work. It was also noted that a report will not always be determinative.

7. Costs:

Delegates were asked to consider the scenario where there has been a hearing to decide if a Protected Party ('PP') has capacity. They are found to have capacity and have always asserted that they have capacity. The question was asked who should pay for the assessment of capacity.

It seems unfair for PPP to ever have to pay in those circumstances but what they were doing that caused concerns should be examined. A delegate noted that the court has the inherent jurisdiction to make awards for unreasonable behaviour/conduct.

Another delegate suggested a general rule of no order for costs where the court has the discretion to depart.

The question what happens where there is no money, no legal aid and two litigants in person was raised. It was suggested that the 'menu of options' could be made use of. For example, the court could make a referral specifically to an ALR or equivalent with a limited disclosure order, with a non-means tested pot of funds or some sort of central funds.

An attendee highlighted integration mediation. They have been involved in discussions about integrated mediation and the issue of capacity has not been raised.

The final point made in this session highlighted MOJ's limited funding.

Final session:

Chair: HHJ Karen Walden-Smith
Panel: Diane Astin, Rebecca Scott, Catherine Hose and Sophy Miles.

The panel consisted of rapporteurs from each of the breakout sessions. Diane Astin provided an overview of the sessions on the role of the court, Rebecca Scott on the conduct of hearings, Catherine Hose on professional conduct, and Sophy Miles on funding and costs.

HHJ Karen Walden-Smith thanked delegates for their participation throughout the day, the working group have learned a lot. She encouraged delegates to respond to the consultation paper. She stressed that perfection should not be allowed to be a bar to progress and reiterated the points made in the first panel session on learning from other jurisdictions. She highlighted a number of common themes which emerged in each session, including early identification, guidance, and issues with regard to the nature of the hearing.

Annex A: Seminar Programme

Seminar

Procedure for Determining Mental Capacity in Civil Proceedings

Friday 1 March 2024

Friends House, London NW1 2BJ and Online

1000-1030 **Registration, networking, refreshments**
Location: Sarah Fell meeting room & East Corridor

1030-1130 **Welcome: Sir Geoffrey Vos, Master of the Rolls and chair of the Civil Justice Council**
Followed by first panel session: Civil Justice Council Procedure for Determining Mental Capacity in Civil Proceedings Working Group members
Location: Sarah Fell meeting room

1130-1230 **First Breakout sessions:**

1. **The role of the court - identifying and investigating issues of incapacity**
   Facilitators: Diane Astin, Susan Hardie, Alex Ruck Keene KC (Hon), and DJ Michelle Temple.
   Location: Sarah Fell meeting room
2. **The conduct of hearings to determine capacity**
   Facilitators: Daniel Clarke, Rebecca Scott, HHJ Karen Walden-Smith
   Location: Hilda Clark Suite
3. **Professional conduct issues**
   Facilitators: Catherine Hose and Sophy Miles
   Location: Marjorie Sykes meeting room

1230-1330 **Networking and lunch**
Location: East Corridor

1330-1430 **Second breakout sessions**

4. **The role of the court - identifying and investigating issues of incapacity**
   Facilitators: Diane Astin and HHJ Karen Walden-Smith
   Location: Marjorie Sykes meeting room
5. **The conduct of hearings to determine capacity**
   Facilitators: Daniel Clarke, Susan Hardie, Rebecca Scott, DJ Michelle Temple
   Location: Hilda Clark Suite
6. **Funding and costs**
   Facilitators: Catherine Hose, Sophy Miles, Alex Ruck Keene KC (Hon)
   Location: Sarah Fell meeting room

1430-1450 **Refreshments**
Location: East corridor

1450-1530 **Second Panel Session and close**
Location: Sarah Fell meeting room

Annex B: Delegates List

Full Name	Job Title	Organisation
Sam Allan	Secretary to the Civil Justice Council	Civil Justice Council
Diane Astin	Solicitor, Senior Lecturer	Brunel University
Rebecca Blackwood	Senior Associate	Browne Jacobson
Yvonne Booth	Associate and Lead Lawyer Costs	Keoghs LLP
Beverley Bowery	Project Lead NE Health & Justice Hub	HMCTS (Seconded to Ministry of Justice)
Rosie Brown	Solicitor	Trowers & Hamlins
Peter Causton	Barrister	7 Harrington Street
Timothy Cave	Solicitor	East Greenwich Legal Advice Clinic
Gillian Margaret Charnock-Neal	District Judge	Judiciary
Daniel Clarke	Barrister	Doughty Street Chambers
Edward Cleary	Legal Director	DWF Law LLP
Emma Coleman	Principal Research Officer	HMCTS
Susan Connolly	Senior Policy Adviser	Ministry of Justice
Benjamin Conroy	Chartered Legal Executive	Conroys Solicitors LLP
Marie Coombes	CEO	We Restore Calm
Adam Luke Cotterill	Lawyer	-
Laura Coyle	Solicitor and Partner	Turpin Miller
Lesley Crane	UX Consultant	Knowing How
Nicola Critchley	Partner	DWF Law LLP
Olivia Crowther	Managing Director and Senior Solicitor	Wiltshire Law Centre
Ian Curtis-Nye	CPRC Member / Partner	Civil Procedure Rule Committee Lyons Davidson
Roger Davis	Corporate Affairs Lawyer	Kennedys
Howard Dean	Partner	Keoghs LLP
Allison Dias	District Judge	Judiciary
Sophie Donegal	Solicitor	Hyde
Gemma Eason	Practice Development Lawyer - COP and Public Law	Irwin Mitchell LLP
Charlotte Emmett	Associate Professor	Northumbria University
Libby Ferrie	Partner	Keoghs LLP
Ellen Forsyth	Paralegal	Hodge Jones & Allen Solicitors
Lilian France	Student	University of London
Alexandra Fusco	Senior Knowledge Lawyer	Clyde & Co
John Gallagher	Solicitor	Shelter
Joshua Gammage	Assistant Secretary to the Civil Justice Council	Civil Justice Council
Samantha Gargaro	Associate Professor	Birmingham City University
Katherine Gee	Institutional Fixed Income Sales	Former Litigation Friend
Judy Gibson	District Judge, Nominated Judge of the Court of Protection	Judiciary
Joan Goulbourn	Senior Policy Adviser	Ministry of Justice
Sophie Gowans	Deputy Secretary to the Family Justice Council	Family Justice Council
Fiona Hamilton-Wood	Corporate Affairs Lawyer	Kennedys

Susan Hardie	Senior Lawyer, Civil Litigation	Office of the Official Solicitor & Public Trustee
Kian Hearnshaw	Policy Officer	CILEX
Polly Herbert	Partner - Solicitor	Fletchers Solicitors
Grace Hodges	Deputy Private Secretary to the Master of the Rolls	Judicial Office
Lucy Hollands	Senior Associate Solicitor	Debenhams Ottaway
Jenny Holt	Consultant Solicitor	Austen Jones Solicitors
Catherine Hose	Lead Solicitor	Shelter
Crystal Hung	Lawyer	Government Legal Department
Denzil Johnson	Student	University of the West of Scotland
Lynne Johnson	Professional Development Lawyer	Irwin Mitchell LLP
Mary Kadzirange	Mental Capacity Act Lead	West Yorkshire Integrated Care Board
Craig Keenan	Solicitor/Partner	The Community Law Partnership
Rebecca Keeves	Barrister, Deputy District Judge	Cornwall Street Barristers
Alistair Kinley	Director of Policy & Government Affairs	Clyde & Co
Nicola Mackintosh	Sole Director	Mackintosh Law
Najmus Madarbux	Development Manager	Legal Aid Agency
Stephen Martineau	Research Fellow	King's College London
Siobhan McGrath	Judge	First-tier Tribunal (Property Chamber)
Katherine McQuail	Chancery Master	HMCTS
Howard Michael	Partner	Keoghs LLP
Sophy Miles	Barrister	Doughty Street Chambers
Anna Moore	Partner	Leigh Day
Stuart Moore	Head of Mental Capacity Policy	Ministry of Justice
Louise Morgan	Knowledge Development Lawyer	Stewarts
Victoria Woodbridge	Chair of the Professional Negligence Bar Association	Crown Office Chambers
Jasmine Murphy	Barrister	Gatehouse Chambers Personal Injury Bar Association
Kate Pasfield	Director of Legal Aid Policy	LAPG
Lindsey Poole	Director	Advice Services Alliance
Emma Porter	Technical Claims Consultant	RSA
Freya Prentice	Business Support to the Civil Justice Council	Civil Justice Council
Sue Prince	Professor	University of Exeter
Gemma Quinn	Senior Associate	Clyde & Co
Jonathan Rackham	Specialist Legal Practitioner for (Autism - Asperger's)	Independent
Ana Ramos	Legal Affairs Assistant	Association of Personal Injury Lawyers
Rizvan Rasul	Costs Lawyer	Hill Dickinson LLP
David Rees	Barrister	5 Stone Buildings
Graham Robinson	Circuit Judge	Judiciary
Alex Ruck Keene	Barrister	39 Essex Chambers
Afiya Rufaro	Social Worker	NHS
Rebecca Scott	Director of Legal Services	RCJ Advice
Selin Sen	Paralegal / Legal Assistant	Miles & Partners LLP
Amy Shaw	Deputy Secretary to the Civil Justice Council	Civil Justice Council

Larry Shaw	Chartered Legal Executive	Freelance Legal Consultant
Karen Shuman	Chief Chancery Master	Ministry of Justice
Ben Smoker	Partner	Keoghs LLP
Jennifer Sole	Partner	Curzon Green Solicitors Employment Lawyers' Association
David Stephenson	Policy Adviser	Law Society
Kirsty Stuart	Senior Associate Chair of Mental Health and Disability	Irwin Mitchell LLP Law Society
Lisa Sullivan	Master of the King's Bench Division	High Court of Justice
Rachel Jane Swinburne	Solicitor and Panel Deputy	Clarke Mairs Law Limited
Michelle Temple	District Judge	Judiciary
James Tindal	Specialist Civil Circuit Judge	Judiciary
Kerry Underwood	Chair	Underwoods Solicitors Law Abroad Limited
Elaine Vignoli	Deputy District Judge	Judiciary
Karen Walden-Smith	Designated Civil Judge	Judiciary
Natasha Waller	Court Administrative Officer	Court of Protection
Jonathan Watson	Technical Claims Manager	Direct Line Group
Sandra Wheeler	Solicitor	Devonshires Claims
Leigh White	Consultant	Leigh White
Ann Wilson	Attorney	Manderley
David Withers	Partner	Irwin Mitchell LLP & APIL
Reem Yassin	Trainee Solicitor	Leigh Day