Neutral Citation Number: [2012] EWCA Civ 397

Case No: B3/2011/0782

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM QUEEN'S BENCH DIVISION**
**MANCHESTER DISTRICT REGISTRY**
**MR JUSTICE SILBER**
**BY020529**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2012

**Before:**

**LORD JUSTICE WARD**
**LORD JUSTICE LEWISON**
and
**SIR MARK POTTER**

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**Between:**

| | |
|---|---|
| **Joanne Dunhill (a Protected Party by her Litigation Friend Paul Tasker)** | Appellant |
| **- and -** | |
| **Shaun Burgin** | Respondent |

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**Marc Willems** (instructed by Potter Rees Solicitors) for the appellant
**James Rowley QC** (instructed by Keoghs LLP) for the respondent

Hearing date: 30th November 2011

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# Judgment Approved by the court for handing down (subject to editorial corrections)

## LORD JUSTICE WARD:

*The issue in this case*

1. The claimant, Mrs Joanne Dunhill, was the victim of a road traffic accident in which she suffered severe brain damage. No-one seems to have considered at the time whether not she was a patient within the meaning of the Civil Procedure Rules and consequently whether she had to have a litigation friend to conduct proceedings on her behalf. Instead a straightforward claim for a very modest amount of damages for personal injuries was made and her claim compromised at the door of the court in the sum of £12,500. As the proceedings were constituted, there was no need to obtain the approval of the court to that compromise of her claim. Much later those now advising her realised that she is, and contend that at all material times she was, incapable of managing and administering her property and affairs and so she applied to set aside the compromise for want of approval by the court. The court was required to answer preliminary issues, settled after a convoluted process, the nub of the dispute being:

> "whether in considering the issue of capacity historically rather than prospectively, should the court:
>
> (a) confine itself to examining the decisions in fact required of the claimant in this action; or
>
> (b) expand its consideration to include decisions which might have been required if the litigation had been conducted differently."

On 7th March 2011 Silber J. held that:

> "The court should confine itself fundamentally to examining the decisions in fact required of the claimant in this action. It should not expand its considerations to include decisions which might have been required if the litigation had been conducted differently."

This is Mrs Dunhill's appeal against that ruling.

*A little more of the background*

2. This accident occurred on 25th June 1999 when the claimant was walking across the road at a roundabout in Doncaster and was knocked down by a motorcycle driven by the defendant Mr Shaun Burgin. She was then thirty eight years of age. She sustained a severe traumatic brain injury as a result of which she suffered, against a background of pre-existing psychological vulnerability, significant cognitive, emotional and subsequent psychiatric symptoms. She underwent a change of personality. There is a substantially increased risk of her developing epilepsy. She now requires structured assistance such as sheltered therapeutic employment and on-going case management and support to enable her to function at a reasonable level. There is a substantial risk of severe deterioration in her mental health unless she receives appropriate support and supervision.

3. She brought her claim in the Sheffield County Court on 7th May 2002. The particulars of special damage claimed modest travel expenses and £1885.80 for the cost of care limited to £4.50 per hour for ten hours a day for six months and £4.50 per hour for one hour for two years.

4. Her case was listed for hearing at the Sheffield County Court on the issue of liability on 7th January 2003. She was represented by counsel and a representative of her solicitors was present. So was her mental health advocate, whose role was not to advise her but to ensure that she understood what was said to her and to act as a mouthpiece for her. She was also supported by her son's girlfriend, but her son, who was to be a witness on her behalf was not present. Due to his non-attendance counsel advised they might have to apply for an adjournment but that the judge might be unwilling to allow it. Instead she entered into negotiations with the defendant and the claim was eventually settled, as I have said, in the sum of £12,500. Were a claim now to be brought on her behalf, her special damages would on her case exceed £2 million, the defendant acknowledging that the claim is worth at least about £800,000.

*The legal background*

5. It is common ground that the issue of capacity has to be considered in the light of the law on mental capacity in force on 7th January 2003 which was before the Mental Capacity Act 2005 was enacted. Thus the relevant provisions of CPR Part 21 then in force provided as follows:

> "**Rule 21.1 Scope of this Part**
>
> (1) This Part –
>
> (a) contains special provisions which apply in proceedings involving … patients; …
>
> (2) In this Part –
>
> (a) …
>
> (b) '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.
>
> **Rule 21.2 Requirement for litigation friend in proceedings by or against children and patients**
>
> 21.2-(1) a patient must have a litigation friend to conduct proceedings on his behalf.
>
> **Rule 21.3 Stage of proceedings at which a litigation friend becomes necessary**
>
> (1) …
>
> (2) …

(3) If a party becomes a patient during proceedings, no party may take any step in the proceedings without the permission of the court until the patient has a litigation friend.

(4) Any step taken before a patient has a litigation friend shall be of no effect, unless the court otherwise orders.

...

**Rule 21.10 Compromise etc by or on behalf of a child or patient**

(a) where a claim is made –

(a) by or on behalf of a ... patient; or

(b) against a ... patient,

no settlement, compromise or payment and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf or against the ... patient, without the approval of the court."

6. The facts of our case are indistinguishable from the facts in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, [2003] 1 WLR 1511. Silber J. extracted these principles from that decision:

(1) From the judgment of Kennedy L.J.:

"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 [*White v Fell* (unreported) 12th November 1987), 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."

(2) From the judgment of Chadwick L.J.:

"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. ...

> 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. ...
>
> 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. ...
>
> 75. For the purposes of Order 80 – and, now, CPR Pt 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 Civil Procedure Rules, a litigation friend)."

(3) My Lord, Potter L.J., agreed with both judgments.

7. The next material decision of this Court is *Bailey v Warren* [2006] EWCA Civ 51. There the essential facts differed from the case before us only in as much as the compromise sought to be set aside was an agreement reached between the solicitors for the parties before the claim had been issued that damages would be reduced by 50% contributory negligence. A claim for damages was then brought by the claimant without a litigation friend and judgment was entered in accordance with the compromise for damages to be assessed subject to the 50% reduction for contributory negligence. The issue then arose whether the claimant had been a patient at any material time. The trial judge found that the claimant was a patient as at the date when judgment was entered giving effect to that compromise but that he was not a patient when the agreement was made. Accepting, per *Masterman-Lister*, that the test of mental capacity was issue-specific and that it had to be applied in relation to the particular transaction in respect of which the question falls to be decided, the court was split. Hallett L.J. held:

> "74. ... the issue was the issue of liability and the piece of business done was the compromise of the issue of liability not the conduct of the whole of the litigation."

8. Arden L.J.'s approach was:

> "123. It seems to me that the right approach must be to ask as a matter of common sense whether the individual steps formed part of a larger sequence of events which should be seen as one, or whether they were in fact self-contained steps which were not connected with each other.
>
> 124. ... the relevant transaction for the purposes of a compromise made at a time when legal proceedings are in contemplation should be treated in the same way as a compromise made in the course of those proceedings. ... The logical time for solicitors to consider the capacity of their client to litigate must surely be before the letter before action is sent not after it is sent and immediately before the proceedings are issued. In that event they could find that the client had no capacity to bring the proceedings that he had threatened without the intervention of a litigation friend. ... an individual can only properly evaluate an offer to settle a claim if he has some idea of what would follow from his rejection. So the individual must therefore have some capacity to understand what might happen in the course of the contemplated litigation. So some at least of the issues involved in the decision to litigate are also involved in the decision to compromise a claim which would otherwise have to be litigated. ... there is no doubt that where a compromise is made in the course of litigation the test is whether the individual has capacity to conduct those proceedings ...
>
> 125. ... I prefer the conclusion that the appropriate test in this case is whether the client had capacity to start proceedings. That would include the question whether he would have capacity for the purposes of an offer of compromise. I would add that, in my judgment, where a client seeks damages for personal injury because he has suffered a brain injury, capacity is a question that ought in general routinely to be considered by those representing him.
>
> 126. The assessment of capacity to conduct proceedings depends to some extent on the nature of the proceedings in contemplation. I can only indicate some of the matters to be considered in accessing a client's capacity. The client would need to understand how the proceedings were to be funded. He would need to know about the chances of not succeeding and about the risk of an adverse order as to costs. He would need to have capacity to make the sort of decisions that are likely to arise in litigation. Capacity to conduct such proceedings would

> include the capacity to give proper instructions for and to approve the particulars of claim, and to approve a compromise. For a client to have capacity to approve a compromise, he would need insight into the compromise, an ability to instruct his solicitors to advise him on it, and an understanding of their advice and an ability to weigh their advice. So far as Mr Bailey was concerned, the receipt of damages could have a substantial impact upon him. He would need to know what he was giving up and what would happen if he refused to accept the offer of compromise."

My view was:

> "177. ... I consider that the answer is provided by the terms of Part 21 itself and the several references in the rules ...to the purpose to be served by having a litigation friend, namely having someone able properly to conduct the proceedings on behalf of the patient. That is the capacity which the patient lacks. Thus the enquiry should be focused on the capacity to conduct the proceedings as Arden L.J. describes in paragraph 126. This it seems to me is totally consistent with *Masterman-Lister*.
>
> 178. If, as it seems to me, the relevant capacity is capacity to conduct proceedings, then the client must be able to understand all aspects of those proceedings and take an informed decision, with the help of such explanation as he is given, which bears upon them. It cannot be judged piecemeal. If he has the ability to understand what is meant by a 50/50 split of liability but lacks the capacity to understand the concept of damages which results from that division of liability, then he lacks true capacity to conduct the proceedings. ... all of this makes much more sense ... where one is considering the capacity to conduct the proceedings at the moment when they are instituted and thereafter during their continuance and it makes less sense to consider the matter in the run up to the litigation even if litigation is a possible outcome in default of a fully successful settlement of the claim."

*The preliminary issue*

9. It was against that background that the preliminary issue was eventually formulated in the case now before us. The declaration the claimant had sought was that "the claimant did not have capacity at the time of the purported settlement of this matter on 7th January 2003" and the supporting witness statement filed by her solicitor expressed concern that "she did not have capacity to agree terms of compromise of her claim and therefore that the court should have had the opportunity to approve any settlement proposed." Mr James Rowley Q.C., for the respondent, submits that the focus, sharpened as it was by the defendant's attempt at clarification, was all on matters relating to the settlement on 7th January and not at all on any other aspects of running the litigation such as giving instructions or any of the other facts and matters

going to the claimant's capacity to litigate the proceedings more generally. Eventually on 19th April 2010 Hickinbottom J. directed that a preliminary issue in relation to the issue of capacity be listed for hearing, ordering that:

> "Without fettering the trial judge's ability to rephrase the preliminary issue, the following wording is proposed:-
>
> > "Did the compromise and consent judgment made/entered on 7th January 2003 … require court approval?""

That was framed in very wide terms.

10. At a pre-trial review held shortly before the trial of this preliminary issue, the claimant characterised the issue in a Case Summary in this way:

> "1.9. The claimant asserts that the test to determine the issue of capacity is a broad test of whether the claimant has capacity to conduct the proceedings whereas the defendant adopts a narrow test of whether the claimant is able to understand the transaction in point which was the settlement of her case for £12,500 in the light of the litigation risks at the time."

11. The defendant felt rather aggrieved at that portrayal. He countered with his skeleton argument for the trial which put down the marker about the lack of identification of wider aspects of the litigation which might be argued to have been problematic for the claimant saying:

> "28. The defendant has from the outset asked his expert witnesses … to focus on the actual decision and the actual explanation given. While the test for capacity relates to the actual litigation as whole rather than any one specific decision, again the court will not speculate in respect of past matters when it can know if the evidence is placed before it. The claimant was legally aided and had no funding worries or decision to take on that score. There is no other decision or difficulty which confronted the claimant during the course of the litigation in respect of which it is pleaded that she had difficulty or lacked capacity. The decision whether or not to compromise was clearly the most difficult decision she had to take in the course of her claim in 2002-3. If the claimant cannot prove lack of capacity in respect of that most difficult decision to compromise, there is no other identifiable decision to form grounds for finding any lack of general litigation capacity."

12. Not surprisingly Silber J. was anxious to refine the issue he had to decide and asked for help on the first day of the hearing. Mr Rowley put a draft before the court and that was agreed on Day 2 as follows:

> "1. The parties agree that the legal test in respect of capacity to litigate is issue-specific and relates to the capacity to conduct the proceedings.
>
> 2. In order to decide if the consent order made on 7th January 2003 might be set aside on the grounds of lack of capacity, the fundamental question is whether, in considering the issue of capacity historically rather than prospectively, should the court:
>
> (a) confine itself to examining the decisions in fact required of the claimant in this action; or
>
> (b) expand its considerations to include decisions which might have been required if the litigation had been conducted differently?
>
> 3. If 2(a) is correct:
>
> (a) the practical issue in this case is agreed to be confined to whether the claimant had capacity to enter the compromise agreement on 7th January 2003. Is the presumption that the claimant had capacity rebutted on the evidence?
>
> (b) If the answer to question 3(a) is in the negative, the compromise is unimpeachable (but go to question 5).
>
> (c) If the answer to question 3(a) is yes, go to question 5.
>
> 4. If 2(b) is correct, the defendant concedes lack of capacity; and go to question 5.
>
> 5. The issue of the application of CPR 21.10(1) to the facts of this case is to be adjourned."

13. In his skeleton argument prepared for this appeal, Mr Rowley explains the development of the preliminary issue in this way:

> "18. In the light of the way the pleadings and early part of the hearing developed, the Court can now appreciate more easily why the preliminary issues 2 and 3 were formulated as they were. It was becoming clear that there was to be an Aristotelian battle of *potentiality* versus *actuality*. The Claimant was going to pray in aid of lack of capacity a list of *potential* problems on the hoof without [1] evidence that they had ever troubled the litigation or [2] ever having identified a detailed list of relevant aspects."

14. In the closing oral argument the judge, attempting to clarify the really critical issue, put to Mr Rowley that it was whether "the question of capacity has to take into account decisions which *might* have been required" to which Mr Rowley responded, "Absolutely. That point is at the heart of this case." At p.3G of the transcript we see:

> "Mr Justice Silber: ... Your point, as far as I see it, when you are looking at capacity, particularly if you are doing it historically, you are looking at all acts that have been done and saying, "Did they have capacity to do each of those acts?"
>
> Mr Rowley: My Lord, yes, it is as simple as that. ..."

So it seems to me the judge had well in mind what the defendant's case was.

*The judgment*

15. That the judge correctly identified the difference between the parties is shown by his summary of their respective cases:

> "19. The case for the claimant is first that she needed to have capacity to conduct proceedings on her own behalf and second that according to Mr Willems, this entailed a capacity to deal with all matters, and to take all actual and *potential* decisions relating to the action, up to and including a decision whether or not to settle. So the claimant's case is that capacity is required of her not merely to make the decisions actually required of the claimant but also in respect of any decision which might have been required of her but which was not required of her.
>
> 20. Mr Rowley for the defendant stresses that in this case, capacity is considered retrospectively. He submits that means the court will not speculate where the real position can be discovered and that this should be the focus of the court's enquiry. In other words, the court must look at the actual way in which the litigation progressed and the matters which actually required the claimant's decision, which by agreement in this case on this application was the decision to settle on 7th January 2003."

16. The judge's conclusion was this:

> "50. I therefore conclude in relation to issue 2, that when the court is considering if the consent order might be set aside on grounds of lack of capacity, the fundamental question for the court when considering this issue of capacity historically, is confined to examining the decisions in fact required of the claimant in the action as drafted."

17. He began the discussion leading to that conclusion by saying:

> "41. I should stress that in *Bailey*, the majority's comments were looking at matters prospectively as Arden LJ referred to "*the proceedings in contemplation*" and Ward LJ was dealing with "*the capacity to conduct proceedings*" at the moment when they are instituted. Another reason why *Bailey* is not of relevance is [that] the reason why the Court of Appeal

> disagreed with the judge is that he did not consider capacity as at November 2000 which was when the compromise was made ..."

18. Then he gave four reasons for coming to his conclusion. His first was that when the court was carrying out the retrospective exercise there was no reason why the court should have to consider other transactions which might have been carried out but which had not been carried out.

> "Otherwise it would mean that if a party had full capacity to agree all steps which were taken in a particular piece of litigation, those steps could be set aside just because there is another step which could conceivably have been taken but which was not taken and was beyond the capacity of the litigant. This would mean that the court would set aside for lack of capacity steps in the litigation which a person was capable of entering into. I do not consider that to be the law. "

19. His second reason was that the authorities in relation to whether capacity was rebutted in a previous transaction stress that the focus on the issue of capacity must be on what the person concerned actually did and not what he or she might have done. The cases relied on concerned deeds and wills and so forth.

20. The third reason was that if Mr Willems' approach was to be applied it would have serious and potentially undesirable consequences in other branches of the law in which capacity has also to be considered, for example in giving consent to medical treatment and in disposing of assets by a will.

21. Finally he accepted Mr Rowley's submission based on *Masterman-Lister* and emphasised Kennedy L.J.'s reference in paragraph [27] of his judgment to "the particular transaction" and Chadwick L.J.'s reference in [58] to "*the transaction which is to be effected*". Silber J. continued:

> "To my mind, those citations show that capacity is determined retrospectively by looking at the actual proceedings which, in the present case, were for general damages with the limited special damages set out in the schedule of loss accompanying the particulars of claim ..."

*Discussion*

22. Although the question was not as sharply focused in *Masterman-Lister* and in *Bailey* as in this case, all three cases raise the same broad issue, namely, whether a previous compromise/order could be set aside for want of capacity. In *Masterman-Lister* Kennedy L.J. accepted at [17] that:

> "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 (e.g. significant head injury) ..."

The judgments are instructive for their clarification of how that question of capacity should be decided. Of importance was the "issue-specific nature of the test" and "the requirement to consider the question of capacity in relation to a particular transaction (its nature and complexity) in respect of which decisions as to capacity fall to be made" – Kennedy L.J. at [27]. To like effect is the judgment of Chadwick L.J. at, for example [58], where he agrees that "the mental capacity required by the law is capacity in relation to the transaction which is to be effected." That is the essential principle established by that case. One should not, however, overlook how the facts were decided. The particular issue was whether the plaintiff had been a patient at any time between the time of his accident on 8th September 1980 and the date of the hearing before Wright J. in 2002. The criticism that the judge failed to apply the proper principles to the facts was rejected. Wright J.'s conclusions after examining the medical evidence and the evidence of the claimant's day to day behaviour was this:

> "The evidence of the last 20 years enables me to arrive with confidence at certain conclusions. ..."

It is, therefore, quite obvious that the court did not focus on any particular point in time but looked at the whole picture in order to decide whether or not the claimant's disabilities rendered him incapable of managing his property and affairs.

23. In *Bailey* the issue was again widely framed, namely had the claimant at any time from the accident been a patient within the meaning of CPR and if so, when and for what periods? There was no real contest before Holland J. that the claimant was then a patient but the judge also found that he was a patient as at 4th December 2001 when the judgment was entered giving effect to the compromise of liability on a 50/50 basis but that he was not a patient in November 2000 when, before the claim was brought, that compromise was agreed. The question which divided us was the identification of the specific issue and the particular transaction being effected. As already set out above, Hallett L.J. was of the view that the issue was the issue of liability and the transaction was the compromise of that issue, not the conduct of the whole of the litigation. Arden L.J. and I were of the view that the relevant capacity was the capacity to conduct proceedings. Although Hallett L.J. did consider the facts the majority did not need to do so because, although accepting that a compromise made by an individual who was subsequently proved to have been a patient at the time of the compromise would be of no binding effect unless the approval of the court was obtained, here the court would approve the compromise and for that reason the appeal was dismissed.

24. In my judgment Silber J. fell into error, perhaps misled by the narrow focus of the issues as they had been defined, in treating the relevant transaction as the actual compromise negotiated outside court leading to the consent order made on 7th January 2003. The proper question, as settled by *Masterman-Lister* and *Bailey,* was whether the claimant had the necessary capacity to conduct the proceedings or, to put it another way, the capacity to litigate. In concentrating on the compromise, Silber J. failed to observe Arden L.J.'s reason for disagreeing with Hallett L.J. in *Bailey*. For Hallett L.J. the question of capacity had to be related to the compromise. Taking the opposite view Arden L.J. said at [122]:

> "... Obviously, where the transaction is self-contained and clearly separate from other matters, it is easy to determine the issue to which capacity should be related. Examples would include the making of a gift or the making of a will. It may not be so easy, however, to determine the issue to which capacity should be related where the transaction is multi-faceted, and a choice exists as to whether to break the transaction down into its component parts, to which capacity is related seriatim, or to treat the transaction as a single indivisible whole. A will may consist of a series of gifts but on the authorities the question of capacity is assessed in relation to the will as a whole. A person making a will is not making a series of separate decisions as to gifts but is making a decision as to the nature and effect of the claims of all the persons who might have claims upon him. Thus the gifts are interdependent and connected. Likewise this court in the *Masterman-Lister* case considered that litigation down to the administration of any award of damages was to be treated as a single transaction and not as a series of individual steps. Kennedy LJ regarded this conclusion as one of common sense (para. 27).
>
> 123. It seems to me that the right approach must be to ask as a matter of common sense whether the individual steps formed part of a larger sequence of events which should be seen as one, or whether they were in fact self-contained steps which were not connected with each other.
>
> 124. There are a number of reasons why, in my judgment, the relevant transaction for the purposes of a compromise made at a time when legal proceedings are in contemplation should be treated in the same way as a compromise made in the course of those proceedings."

Since the compromise is not a self-contained transaction but inseparably part and parcel of the proceedings as a whole, the question is not the narrow one of whether she had capacity to enter into that compromise but the broad one whether she had the capacity to conduct those proceedings.

25. Rejecting the idea that the compromise is self-contained and separate from other aspects of the conduct of litigation, explains why, in my judgment, the judge's second reason is also wrong. Of course the issue of capacity to enter into a deed or to make a will concentrates on what the person concerned actually did but that is because they are self-contained transactions and the spotlight is naturally focused upon the particular event. The same reasoning leads to me to disagree with the judge's third reason: consent to medical treatment is consent to a particular transaction to be judged on its merits. Capacity to litigate involves the capacity to understand a large variety of issues that arise between deciding to issue the claim up to the point of judgment. The same test for capacity may apply: the vital question is to identify the transaction which is being impugned.

26. I am not sure I quite understand the judge's first reason. If a claimant was incapable of managing and administering his property and affairs but nonetheless brought a claim without having a litigation friend to conduct the proceedings on his behalf then any steps taken before he has a litigation friend shall be of no effect but the court has power to order otherwise: see CPR 21.3(4). If the claimant is found to be a patient at the time any compromise was made by or on her behalf, then the compromise must be given the court's approval in order to be valid (CPR 21.10) and if it is concluded that the claimant was in fact a patient at the time the proceedings were commenced then the court could nonetheless allow the preceding steps which ought to have been taken with the assistance of the litigation friend to stand but still refuse to approve the settlement.

27. Turning to the "precise issue" which the judge identified at [41] of whether the court must "confine itself solely to examining what was in fact required of the claimant in a claim against the defendant" as opposed to what "might have been required if the litigation against the defendant had been conducted differently", the first point to make is that we are considering whether the *litigation* would have been conducted differently. Here the previous authorities do have some help. In *Masterman-Lister* Chadwick L.J. said, with emphasis added by me:

> "75. For the purposes of RSC 80 – and, now, CPR Pt 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*. ...
>
> 76. That approach seems to me consistent with the approach adopted by this Court in *Kirby v Leather* [1965] 2 QB 367 ... , In upholding the trial judge's decision that the plaintiff was of unsound mind – so as to prevent the relevant period of limitation from running against him – Lord Denning MR said at p. 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 *Bailey* Arden L.J. said, again with emphasis added by me:

> "112. The *Masterman-Lister* case establishes a number of important propositions. In particular it establishes that for the purposes of the definition of "patient" in the CPR, the "property and affairs" against which the person's capacity has to be assessed is the specific transaction of *commencing* the litigation

> in question. ... Moreover, when that litigation is a claim for personal injuries of a substantial amount, the capacity in question is limited to capacity to make decisions *likely to be necessary* in the course of the litigation (per Chadwick LJ at para. 75). ...
>
> 126. The assessment of capacity to conduct proceedings depends to some extent on the nature of the proceedings in contemplation. I can only indicate some of the matters to be considered in accessing a client's capacity. The client would need to understand how the proceedings were to be funded. He would need to know about the chances of not succeeding and about the risk of an adverse order as to costs. He would need to have capacity to make the sort of decisions *that are likely to arise in litigation*. Capacity to conduct such proceedings would include the *capacity to give proper instructions for and to approve the particulars of claim*, and to approve a compromise. For a client to have capacity to approve a compromise, he would need insight into the compromise, an ability to instruct his solicitors to advise him on it, and an understanding of their advice and an ability to weigh their advice. So far as Mr Bailey was concerned, the receipt of damages could have a substantial impact upon him. He would need to know *what he was giving up* and what would happen if he refused to accept the offer of compromise."

28. In his skeleton argument Mr Rowley concedes that if the judge had "decided the pure legal issue at issue 2 in the claimant's favour (and allowed *potentiality* to be the touchstone), the defendant had already conceded (see his concession at Point 4) that the claimant lacked capacity. There was no need for him to consider the claimant's capacity or any of the facts further if he found for the claimant on the preliminary point of law." That concession, rightly made, arises out of the huge disparity between the sum accepted in compromise of her claim and what potentially could be recovered which, subject to contributory negligence, would be between £800,000 and more than £2 million.

29. With proper advice (proper explanation from legal advisers being a part of Chadwick L.J.'s test in [75] of his judgment) this claim would never have been advanced for the limited sums pleaded. Since capacity to conduct proceedings includes, per Arden L.J. at [126], the capacity to give proper instructions for and to approve the particulars of claim, the claimant lacked that capacity. For her to have capacity to approve a compromise she needed to know, again per Arden L.J. at [126], what she was giving up and, as is conceded, she did not have the faintest idea that she was giving up a minor fortune without which her mental disabilities were likely to increase. If the litigation had been conducted properly, it would have been conducted differently. Given that scale of award and the claimant's limited understanding of the implications arising from a claim of that size, a litigation friend should and would have been appointed for her if not when the proceedings commenced, as I believe should have been the case, then at least certainly when the compromise was under discussion. Had

she been recognised to be a patient, the compromise she in fact entered into would never have been approved by the court.

30. Consequently I would allow this appeal.

**Lord Justice Lewison:**

31. I agree.

**Sir Mark Potter:**

32. I also agree.