

MENTAL CAPACITY IN CIVIL PROCEEDINGS – DISCUSSION PAPER

Purpose

1. This paper is to draw members' attention to the work of the Civil Justice Committee (CJC) in England and Wales on mental capacity in civil proceedings.

Background

2. The CJC published a report¹ on determining mental capacity in civil proceedings in November 2024. The report follows a review commissioned in 2022 over concern about the lack of clear rules for how courts decide whether a party in civil litigation lacks capacity to conduct proceedings.
3. A consultation took place between December 2023 and March 2024, with a seminar held in November 2024. The subsequent report made a range of recommendations in recognition that where someone lacks capacity and that this is not recognised, they may be wrongly forced to conduct litigation when they are unable to.

Civil Justice Committee Report

4. The report draws attention to the lack of consistent procedures in the courts and that the Civil Procedure Rules Part 21 should be made clearer. The recommendations are set out in annex 2 of the report.

Scottish Context

5. The Adults with Incapacity Act 2000 Act, section 1(6)² sets out the definition of incapacity.

¹ [CJC Procedure for Determining Mental Capacity in Civil Proceedings - Nov 2024](#)

² [Adults with Incapacity \(Scotland\) Act 2000](#)

(6) For the purposes of this Act, and unless the context otherwise requires—

“adult” means a person who has attained the age of 16 years;

“incapable” means incapable of—

- (a) acting; or
- (b) making decisions; or
- (c) communicating decisions; or
- (d) understanding decisions; or
- (e) retaining the memory of decisions,

as mentioned in any provision of this Act, by reason of mental disorder or of inability to communicate because of physical disability; but a person shall not fall within this definition by reason only of a lack or deficiency in a faculty of communication if that lack or deficiency can be made good by human or mechanical aid (whether of an interpretative nature or otherwise); and “incapacity” shall be construed accordingly.

6. In 2017, the Council approved rules for the appointment of a curator ad litem in family actions. Amendments were made to RCS, Chapter 49 and OCR 33 and 33A.³
7. The courts in Scotland may appoint a curator ad litem to safeguard the interests of a vulnerable adult in any type of civil action.
8. It should be noted that court rules relating to divorce and dissolution refer to a person being ineligible to use the simplified procedure, if they suffer from a “mental disorder” as defined in Mental Health (Care & Treatment) (Scotland) Act 2003, section 328.⁴ The definition in this Act is regarded as being outdated and featured in the Family law Committee’s consultation on the extension of simplified divorce.⁵

Recommendations

9. In light of the recommendations made by the CJC report and set out at Annex 1, members may wish to consider whether there is merit in the Council reviewing arrangements in Scotland and whether court rules could be drafted which would provide a consistent and clear framework for dealing with situations where there are mental capacity concerns.

SCJC Secretariat

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³ [Act of Sederunt \(Rules of the Court of Session 1994 and Sheriff Court Rules Amendment\) \(Curators ad litem\) 2017](#)

⁴ [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#)

⁵ [consultation-analysis---simplified-divorce.pdf](#)

Annex 1 - Recommendations of the CJC

Recommendations for consideration by the Civil Procedure Rules Committee:

(1) A clear procedure is needed for cases in which the court is required to determine a party's litigation capacity. This should be set out in CPR Part 21 and/or in a Practice Direction, to provide a clear, accessible, and authoritative source to which parties, legal representatives and judges can turn.

(2) Consideration should be given to making a provision for the appointment of a litigation friend prior to a claim being issued, so that during a period when negotiations are proceeding and evidence being obtained, legal representatives can be assured that a person who may lack litigation capacity has their interests properly protected and that they can rely on instructions given.

The principles on which such a procedure should be based:

(3) It is not possible to devise a single procedure that will be appropriate in every case. Rather, the rules and/or Practice Direction should aim to set out the relevant principles and provide a range of tools the court can use to investigate and determine the issue. These can be used as appropriate in the particular circumstances of the case, in accordance with the overriding objective including, taking into account, in particular:

- a. The fundamental importance of the issue of litigation capacity;
- b. The need to protect the interests of the party whose capacity is in doubt, including their interests in the relation to the substantive proceedings and their right to privacy, confidentiality, and legal privilege, pending determination of the issue at a time when they may have limited ability to protect their own interests;
- c. The interests of all other parties to the substantive proceedings;
- d. The principle of proportionality.

(4) The 'starting position' must be that the determination of a party's current litigation capacity is essentially a matter of case management, the purpose of which is to further the overriding objective, so as to enable cases to be dealt with justly and at proportionate cost, and to ensure that parties are on an equal footing, and can participate fully in proceedings, so far as practicable.

(5) In such a determination, given that the issue of litigation capacity is first and foremost an issue as between the party and the court, and the court is bound by the ECHR to consider how to secure the party's rights under Article 6, it is operating in a quasi-inquisitorial way. This means that other parties to the substantive claim will have no general right to participate in the process by which a person's current litigation capacity is determined. However, there may be circumstances in which the other parties should be given an opportunity to be heard.

(6) The court's quasi-inquisitorial role means that the court is responsible for ensuring it has the necessary information to determine the issue. But it will need to delegate the majority of the work involved to the parties, their representatives and/or third parties. Any issue as to a party's current litigation capacity should, where possible, be identified, investigated and determined as a preliminary issue at the earliest opportunity, subject to exceptions where the substantive proceedings are likely to involve determination of some of the same issues.

(7) The presumption of capacity is an important principle. But, where there are good reasons to suspect that a party might lack capacity to conduct proceedings, the presumption should not be used to avoid proper investigation and determination. This applies even where it may be difficult to gather the necessary evidence.

(8) It should be made clear in the CPR / relevant practice directions, that the parties' duty to assist the court in furthering the overriding objective includes a duty to assist in identifying and determining any issue as to the litigation capacity of any party.

(9) Although the duty on other parties and their representatives exists whether the party whose capacity is in issue is represented or unrepresented:

a. It will rarely be triggered in relation to a represented party, as it can generally be assumed that the party's representatives are complying with their own duties.

b. Where another party or their representative has relevant information that they suspect is not known to the representatives of the party whose capacity is in issue, the duty will usually be discharged by passing that information to the party's representatives. Only rarely would it be necessary or appropriate to raise the issue directly with the court.

(10) There should be a single, clear formulation of the threshold for triggering the duty of parties (under the overriding objective) and legal representatives (under their professional obligations) to raise an issue as to a party's litigation capacity.

(11) The threshold should be one of "reasonable grounds to believe that the party may lack litigation capacity".

(12) Any concern about a party's litigation capacity should be raised at the earliest possible stage and it is recommended that:

a. The issue of a party's possible lack of litigation capacity is highlighted in the relevant Pre Action Protocols. This will help to ensure that appropriate steps are taken at an early stage to determine whether or not a party has litigation capacity, and whether a litigation friend is needed.

b. Court guidance is made available to parties bringing or defending claims to direct their attention to the issue of litigation capacity, and to enable the party to raise concerns with the court.

(13) A party or legal representative (or other relevant person, e.g. family member) should be permitted to raise the issue with the court without a formal application.

Medical Evidence:

(14) Any Practice Direction should include guidance for judges as to when medical evidence will be required (including specifically commissioned expert reports) to enable the court to adopt a proportionate approach to the determination the issue of litigation capacity.

Delegation of the investigation:

(15) Where investigation of a party's litigation capacity is necessary, a Practice Direction should also contain guidance for judges setting out the court's options in terms of delegating the work of such investigation. This may include a combination of existing options and consideration of the creation of further options, as set out above.

Orders for disclosure:

(16) There should be:

- a. A clear power (either by way of clarification as to the scope of existing powers or, if necessary, by the creation of a new power) for the court to order disclosure of relevant documents from third parties where it is necessary and proportionate to do so.
- b. Guidance as to the exercise of such a power, balancing the importance of correctly determining a party's litigation capacity against other factors, including the party's rights to privacy and confidentiality and the likely impact on important relationships with medical and other professionals who may be required to give disclosure. The relevant professional and patient representative bodies should be consulted on the contents of such guidance.

(17) In all cases where a hearing is listed, the court should expressly consider whether and to what extent it is necessary and proportionate to order that all or part of the hearing be held in private, subject to anonymity and/or reporting restrictions orders.

(18) The power to hold the hearing in private should include the power to exclude other parties to the substantive proceedings from all or part of the hearing.

(19) Once the court has decided that a determination of a party's litigation capacity is needed, there should be a presumption that, pending that determination:

- a. No steps may be taken in the case without the permission of the court; and
- b. The court will stay any orders previously made in the proceedings, subject to the court's power to make alternative provision (on its own motion or on the application of either party).

(20) In deciding whether to give permission for specific steps to be taken and/or whether to impose a stay on the enforcement of existing orders, the court should apply a 'balance of harm' test, similar to that set out in s.33 of the Family Law Act 1996.

Recommendations for consideration by the relevant professional regulatory bodies – BSB, SRA, CILEx,

Law Society:

(21) It should be made clear in the relevant professional guidance, that legal representatives' duties to the court includes a duty to assist in identifying and determining any issue as to the litigation capacity of another party, as well as their own client.

(22) Although the duty on other parties and their representatives exists whether the party whose capacity is in issue is represented or unrepresented:

Civil Justice Council

a. It will rarely be triggered in relation to a represented party, as it can generally be assumed that the party's representatives are complying with their own duties.

b. Where another party or their representative has relevant information that they suspect is not known to the representatives of the party whose capacity is in issue, the duty will usually be discharged by passing that information to the party's representatives. Only rarely would it be necessary or appropriate to raise the issue directly with the court.

(23) There should be a single, clear formulation of the threshold for triggering the duty of parties (under the overriding objective) and legal representatives (under their professional obligations) to raise an issue as to a party's litigation capacity.

(24) The threshold should be one of "reasonable grounds to believe that the party may lack litigation capacity".

(25) Clearer professional ethical guidance is required setting out the circumstances in which legal representatives have a duty to raise with the court:

- a. any issue that arises as to the litigation capacity of their own client; and
- b. any issue that arises as to the litigation capacity of another party.

(24) Professional guidance should make clear the nature of legal representatives' role at a hearing to determine the issue of a party's litigation capacity.

Recommendations for consideration by the Ministry of Justice and the Legal Aid Agency:

(25) Non-means tested legal aid should be made available for cases within the scope of legal aid, limited to the investigation and determination of a party's litigation capacity.

(26) Legal aid regulations should be amended to make provision for providers to sign legal aid forms to apply for legal aid for the purpose of investigating the issue of capacity.

(27) A 'fund of last resort' is established by Government to ensure that the court can fulfil its function of managing cases to ensure access to justice for litigants who may lack the capacity to conduct their own litigation.

Recommendations for consideration by the Judicial College:

(28) A new judicial Working Group on litigation capacity should be established, or an existing judicial Working Group commissioned to produce clearer judicial guidance.

(29) The Judicial College should review judicial training materials on capacity issues, building on recent revisions to the Equal Treatment Bench Book. Regular face-to-face training is essential to ensure that judges have the knowledge and skills to deal properly with issues of litigation capacity.

Recommendation for HMCTS:

(30) Data should be collected by HMCTS on the numbers of adults in civil cases who act through a litigation friend.

For the CJC to monitor:

(31) The Civil Justice Council should review the progress of recommendations made in this report after a suitable period of time has passed.