Neutral Citation Number: [2012] EWHC 1990 (Cop)

Case No: COP11950943

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2012

Before :

MR JUSTICE BODEY

- -

Re SK

For the Council: Miss Victoria Butler-Cole
For the 1st Respondent (SK, by his Litigation Friend, the Official Solicitor): Mr David Lock QC and Mr Joseph O"Brien.
For the 2nd Respondent, JK: Mr Andrew Bagchi.
The Primary Care Trust was not represented.
For the 1st Applicant for Joinder, CK, brother of SK: Mr Conrad Hallin
For the 2nd Applicant for Joinder ("the QB defendant"): Miss Fenella Morris QC.

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APPROVED JUDGMENT

*[**Judges Note:** To avoid delay and to save what would otherwise effectively be public funds, this Judgment has been finalised by my Clerk and myself. It may be regarded as definitive and no further transcript need be obtained. Permission is given to report it, but only in this anonymised form.]*

Mr Justice Bodey :

(a) Introductory.

1. This is an application by the parties to certain Queen"s Bench personal injury proceedings who seek in effect to be joined in these Court of Protection proceedings. The subject of both sets of proceedings is SK, a mentally incapacitated adult aged 55. The issue which arises one way or another in both sets of proceedings is as to his care, accommodation and rehabilitation. The two applicants for joinder to these proceedings are (a) CK, aged 52, brother of SK and (b) GA Group PLC, a bus company whose bus struck SK in November 2008, causing him severe lasting brain and physical injuries. That company is the defendant ("D") in the Queen's Bench proceedings.

2. In these proceedings, SK has been found by interim declaration to lack the capacity both to litigate and to take almost all best interests decisions for himself. He is represented by the Official Solicitor as his Litigation Friend. In the pre-existing Queen"s Bench proceedings, SK is represented by his brother CK as his Litigation Friend. He (SK) seeks damages through CK against D arising out of the accident in November 2008. There has been a Judgment against D in the Queen"s Bench proceedings with 40% contributory negligence on the part of SK. Since SK is likely to require full time care for the rest of his life, the quantum of damages even at 60% will be substantial.

3. For the purpose of this hearing I have read relevant parts of the bundles herein, including expert reports of a single joint expert Dr Kent and (de bene esse) of a Mr Gentleman and a Dr Todd; together with a statement of CK"s solicitor Francesca Mayes dated 26.4.12, a statement of D"s solicitor Christopher Smith dated 17.5.12, and statements of CK dated 12.9.11 and 3.7.12. I have read the written presentations of all Counsel including e-mails to my Clerk from Mr Hallin for CK and Miss Morris

QC for D both dated 3rd July, 2012, after the hearing was concluded, both of which e-mails I have taken into account.

(b) Background.

4. By way of much simplified background, the above accident was not first in which SK had been involved. Running through the papers are many references to his excessive use of alcohol for long periods and in December 2006, he fell, banged his head and sustained a severe brain injury with profound frontal lobe damage. He had previously worked as a foreman in the construction industry, but did not work much between that accident and his second accident in November 2008. By the time of that second accident, he had been discharged from hospital and was living at home with his elderly mother RK, now aged 84. Since the second accident he has been unable to work and has required full time residential professional care.

5. Between December 2007 and August 2008 (both dates approximate) SK had been in a relationship with a woman, JK. They had remained friends after August 2008 when their relationship broke down and, following the accident, she was concerned for him. She visited him very frequently, often taking SK. It is her case that their relationship so re-kindled that after a while SK proposed to her. On 17.11.10 they went through a ceremony of marriage. There is a live issue pending before me in this court between JK and CK as to whether SK had the capacity to enter into a contract of marriage. She says he did; CK says he did not.

6. In February 2011, D's insurers made an interim payment of £100,000. In the same month, JK took SK out for the day but did not return him to „the Placement", where he had been and has been placed since November 2009. There is much background and factual argument about this episode, which I need not go into today. The short point is that it led to the urgent issue of these Court of Protection proceedings, essentially to enforce SK"s restoration to „the Placement". The proceedings have been ongoing since. The issue of SK's care, accommodation, and rehabilitation was directed by the DJ to be heard by me in November 2011. On that occasion, however, following extensive discussions at court, the parties came to an agreement that SK should be placed at a particular neuro-disabilities unit, which was thought to meet all his complex multiple needs. Unhappily, after full assessments

were undertaken, that unit declined to take SK. That was essentially because of his very difficult and challenging behaviours, including on occasions (amongst many other physical, psychological and emotional problems) his anger, aggression, and disinhibition. The same issue of his accommodation (etc.) was therefore re-listed before me in May 2012. However, the hearing had to be postponed, partly for want of a sufficient time estimate and partly by reason of the then recently issued applications by CK and D for consolidation and joinder which are the subject of this hearing.

(c) The parties.

7. The parties to the Court of Protection proceedings are as follows: (i) the Applicant is the Local Authority ("LA") which has statutory responsibilities for SK and is represented by Miss Butler-Cole; (ii) the 1st Respondent is SK (acting by the Official Solicitor as his Litigation Friend) who is represented by Mr Lock QC and Mr O"Brien; (iii) the 2nd Respondent is JK, who is represented by Mr Bagchi; and (iv) the 3rd Respondent is the relevant Primary Care Trust ("PCT"). The PCT has not been represented at this hearing, although I am told that on all material issues it is taking the same line as the local authority.

8. Further to the above parties, in April 2011, CK was permitted by a District Judge to attend Court of Protection hearings as an "interested party" and he (CK) has done so up until this hearing as a litigant in person. He has however been represented at this hearing by Mr Hallin. There is an issue about the effect in law of the expression "interested party" and I shall revert to it. CK has had access to the many medical reports and other documentation generated in the Court of Protection proceedings but says that, at the behest of the Official Solicitor, he has not disclosed them to those who now represent him.

9. SK"s mother RK is not to a party to the proceedings, presumably in deference to her age; but it seems generally accepted that CK knows and expresses her views. The ability of RK to be able to continue to visit SK regularly has been and is regarded as a very important consideration in the search for a suitable care regime for SK, as being very much in his best interests. She (RK) has no transport of her own and has to travel to see him by bus, which complicates the process of identifying a home with a rehabilitation regime which will best meet all his complex needs.

10. In the Queen"s Bench proceedings there are just the two parties: (i) SK as Claimant, acting through CK as his Litigation Friend and (ii) D (the Defendant bus company) represented at this hearing by Miss Morris Q.C.

(d) The similar issue.

11. The very similar issue which arises in both sets of proceedings is this. In the Court of Protection proceedings, it is as to the sort of home in which SK should now be placed and with what rehabilitation regime. All those responsible for his welfare are in agreement that he needs to move on from „the Placement", but it has proved very difficult to find an appropriate alternative placement for him. In the Queen"s Bench proceedings, the issue is as to the quantification of SK"s damages arising from the 2008 accident, which will include amongst other things the cost of his past and future care, accommodation, treatment and rehabilitation regime.

12. More particularly, the underlying issue is this. Those responsible for SK at „the Placement", including particularly Dr Grace (his treating consultant neuro-psychiatrist) are of the view that he should now move into a specialist neoro-disability centre where there would be some rehabilitation, ("modest rehabilitation") but not an intense rehabilitation regime ("intensive rehabilitation"). It is thought that an intensive regime would be too much for SK and would do him psychologically more harm than good. The single joint expert appointed in the Court of Protection proceedings, Dr Kent (consultant in neurological rehabilitation) shares that view; as do LA, PCT and the Official Solicitor; and as also does Dr Todd (consultant neurosurgeon and spinal surgeon) D"s expert in the Queen"s Bench proceedings. An assessment of SK on this basis would be measured in terms of weeks only and would take place at the recommended Unit, SS.

13. In the Queen"s Bench proceedings, on the other hand, CK (as Litigation Friend of SK) has obtained the opinion of an expert Mr Gentleman (honorary consultant neurosurgeon and clinical director of a brain injury rehabilitation service) who considers that there could well be significant benefits for SK in his being placed in a home providing intensive rehabilitation. Mr. Gentleman advises that there should be an assessment of SK in such a home for a period of 1-2 years. He considers that this

could well lead ultimately to SK"s showing sufficient improvement as to be able to be cared for in the community. All the experts concerned, I might add, are regarded as eminent in their fields. Based on Mr Gentleman"s opinion, CK hopes to avoid his brother becoming „institutionalised" and is anxious that Mr Gentleman"s reports should be formally in evidence (I have read them all „de bene esse") within the Court of Protection proceedings. SK"s wife JK agrees with CK on this point and wants intensive rehabilitation attempted.

(e) The formulation of the applications by CK and the D to participate in the Court of Protection proceedings.

14. The respective applications of CK and D to consolidate the 2 sets of proceedings have had a chequered history and were only definitively formulated during Counsels" oral submissions at this hearing. For a reason which appears at paragraph 24 below, I need to set this out in a little detail.

15. The first such application by those instructed by CK, dated 20.4.12, was expressed to be made by CK, acting in his capacity as SK"s litigation friend in the Queen"s Bench proceedings, and was for consolidation of the 2 sets of proceedings. In the event, that application was not pursued and has effectively been abandoned. On 18.5.12 those instructed by CK issued a second application, this time nominally by SK acting through him (CK) as his (SK"s) Queen"s Bench Litigation Friend, seeking that SK himself be joined in the Court of Protection proceedings. This brought understandable objection from the Official Solicitor that such joinder would be impossible / improper, since SK was and is already (through him, the Official Solicitor) a party to the Court of Protection proceedings. It is a point of principle not to say common sense that a party cannot appear by two representatives in the same process: Hardy and Lane Ltd v Chiltern 1928 KB 663 at 700: Lewis v Daily Telegraph 1964 2QB 601 at 619. It is also the case here that the two representatives of SK would be pulling in different directions. As I have said, the Official Solicitor, having carefully considered Mr Gentleman"s reports, accepts the expert view that only modest rehabilitation should be afforded to SK, whilst CK supports intensive rehabilitation. It was subsequently acknowledged by those instructed by CK that this second application was misconceived.

16. The penultimate application by CK was in a written Skeleton Argument by Mr. Hallin which sought that he (CK) be joined as a Respondent in the Court of Protection proceedings, but expressly on the basis "….that he is only instructing us to advance his [CK"s] opinion insofar as it reflects his views as litigation friend *in the personal injury proceedings.*" [Emphasis as original]. Later the Skeleton referred to CK"s instructions being „…only to advance his [CK"s] point of view as to SK"s best interests as it pertains to the personal injury proceedings precisely *because* he is the litigation friend in those proceedings". [Emphasis again as original]. That formulation of CK"s application rightly brought a similar objection from the Official Solicitor that it would still amount in effect to representation of SK in the Court of Protection proceedings by two voices.

17. The final position on behalf of CK came to be advanced verbally by Mr Hallin in his oral submissions. It is that he (CK) be joined to the Court of Protection proceedings simply as the brother of SK and thus as a person with a real interest in ensuring that SK"s best interest are met by decisions made in the Court of Protection proceedings. The Official Solicitor"s immediate response to the application when put that way was that he could not and would not object to the joinder sought.

18. As for D, its application to the Court of Protection is dated 17.5.12 and seeks the consolidation of the two sets of proceedings, with D being joined as a party to the Court of Protection proceedings. That application too has been modified as the arguments have developed. The final position of D as put by Miss Morris QC is that, as an alternative to full consolidation, the best way forward would be: (a) for the Court of Protection to crystallise a discrete issue as to „where should SK be accommodated and cared for and with what level of rehabilitation?" and (b) for D to be entitled to be heard on that issue and to participate generally alongside the parties to the Court of Protection proceedings. For convenience, I will refer to that proposal as „joinder". Once that issue had been determined by a single High Court Judge sitting in the Court of Protection, probably myself, the two sets of proceedings would continue on their own separate ways. It is common ground that a single hearing by a High Court Judge (as distinct from full consolidation of the two sets of proceedings) would be procedurally and jurisdictionally perfectly acceptable.

(f) What options regarding accommodation and rehabilitation for SK are before the court?

19. The question of what D could (as it was put) „bring to the table" by its participation in the Court of Protection process led to a discussion at the hearing as to whether the court is or is not limited in its choice about SK 's best interests by the decisions of LA and PCT as to what they can and will pay out for SK in satisfaction of their statutory duties towards him. This was in the context of the extent to which D"s participation might or might not be helpful regarding the availability of funding. The argument of Miss Butler-Cole for LA is to the effect that the court is restricted to what the two statutory authorities can and will afford. If they do not offer a choice, there is no choice. She relies in this respect on A v A Health Authority and another 2002 Fam 213 [Munby J]; Holmes-Moorhouse v Richmond upon Thames London Borough Council 2009 1 WLR 413 [HL]; and A Local Authority v PB and P 2011 EWHC 502 Court of Protection [Charles J].

20. I do not doubt the proposition that, where the only candidates for funding are the statutory authorities, the Court of Protection (being unable to take a judicial review type approach) is largely restricted to the option(s) which the two statutory authorities put forward. However, since I am concerned with SK"s best interests, I thought it right to ask the parties to reconsider between themselves whether that approach is logical and applicable when, as here, an incapacitated individual has a judgment in his favour against an insured tortfeasor (even with sizeable contributory negligence). In such circumstances, there is a known third source of potential funding available which could assist in enabling the court"s best interests decision regarding SK to be put into effect. The agreement which the parties then reached (including D, if joined to the Court of Protection proceedings) was recorded in a Memorandum which reads that: "…the Court of Protection should make a health and welfare decision concerning SK between all options where there is a reasonable prospect of funding for that option being secured from any accessible funding source (including the PCT, LA or a damages claim)". That then is the context in which the Court of Protection will take its decision as to SK"s best interests, leaving it for negotiations as between those who represent the funding options (and/or for an application to the

Queen's Bench Division against D on SK's behalf for, presumably, interim damages) as to whether that decision can or cannot be put into effect in practice.

(g) Is CK already a party?

21. I now need to revert to the issue mentioned above as to the existing status of CK in the Court of Protection proceedings. By an order of the District Judge dated 19.4.11, CK is designated as "… an interested party in these proceedings in his capacity as brother of SK and he has permission to attend all further hearings and shall be given notice of the time, date and venue of all further hearings." This formulation is ambiguous as to whether or not it constituted CK a party. It is common ground that a person is either joined or not, there being no such thing as a „halfway house". Although there have been differing submissions on this, my judgment is that the District Judge was neither intending to make nor succeeded in making CK a party. Otherwise it would have been unnecessary for the order to give CK permission to attend further hearings, as that would have followed automatically from his party status. Accordingly, I approach CK's application at this hearing on the basis that he is not yet a party and needs to be joined as such if he is fully to participate in the Court of Protection proceedings.

(h) Summary of the parties' cases about joinder.

22. In summary, the parties' positions are as follows.

(i) CK says that he should be joined, but not D. He says that in no circumstances should any problems likely to be created by joining D mean that he, CK, should not be joined, if he otherwise would be.

(ii) JK takes the view that the most appropriate course would be to join both CK and D, so that everything about SK's care accommodation and rehabilitation would be heard together.

(iii) D submits that either both CK and it (D) should be joined, or else neither should be, thereby creating complete segregation of the two sets of proceedings. Similarly, either all the evidence in the Queen's Bench proceedings should be considered within the Court of Protection proceedings, or none of it should be. Mr Bagchi for JK makes the point, however, that it would be difficult if not

impossible to achieve full segregation of the proceedings, since JK (who supports intensive rehabilitation) could and would call Mr Gentleman as her expert in these proceedings, assuming she got permission so to do. Therefore, one way or another, it is very likely that the intensive rehabilitation option would be before this court and Mr Gentleman would be in the position of bridging the two sets of proceedings, rendering him privy to information from each.

(iv) The Official Solicitor submits that CK should be joined, but only in his capacity as SK"s brother and not in any representative capacity; and only when he (CK) has made a formal application in that brotherly capacity, supported by an affidavit pursuant to R.75(3). The Official Solicitor submits that D should not on any account be joined.

(v) LA allies itself in all material respects, to the approach of the Official Solicitor.

CK's application for joinder.

23. For the reasons already mentioned, CK"s application for joinder could not succeed, when it was formulated to be by him (CK) in his capacity as the Queen"s Bench Litigation Friend of SK; nor when it was nominally made by SK himself, through CK. But once put simply as an application for a brother to be able to be heard and to participate generally in respect of decisions about his incapacitated brother, then there is nothing controversial about it. Practice Direction "B" to the Court of Protection Rules 2007 provides that close family members, including brothers and sisters, are likely to have an interest in being notified of Court of Protection proceedings, precisely so that they can apply for joinder if so minded; and under paragraph 5.49 of the Mental Capacity Act 2005 Code of Practice, a decision maker has to consult persons such as close relatives who are interested in the welfare of the incapacitated person. In my experience close family members are regularly joined in Court of Protection proceedings. I have read a 32 page statement by CK dated 12.9.11, not in fact in support of any application for joinder, which gives considerable detail about his (CK"s) extensive and close involvement with SK and about all the help and support which he has constantly provided to SK since the

accident. CK clearly cares for SK and wants to do his best for him. As a brother, he comes within the categories of person who would be likely to be joined; and he meets the requirements for joinder in the Rules referred to below.

24. The Official Solicitor"s draft order received by me after the hearing (along with the other parties" proposed draft orders, which I requested at the end of the hearing) provided for a dismissal of CK's application as advanced orally by Mr Hallin; but with a provision that if CK were to issue a formal application supported by an affidavit as required by R75(3), then those documents should be referred to me for consideration of CK"s joinder as a paper exercise. I regarded this approach as prolonging the uncertainty and, at this time of year, as risking yet more delay in taking necessary decisions about SK. I therefore made it known through my Clerk that I would accept such an affidavit by CK if it were with me before I delivered this Judgment. It was duly forwarded to me and is dated 3.7.12. It addresses and explains satisfactorily on its face a point raised by the Official Solicitor and LA against CK to the effect that the minutes of a meeting held in January 2012 record him (CK) as having agreed the modest rehabilitation route for SK. It was therefore suggested to me in submissions by the Official Solicitor, LA and D that this application for CK to be joined so as to support intensive rehabilitation and to call Mr Gentleman is in fact being driven by his lawyers, in a bid by them to ratchet up the Queen"s Bench damages claim, i.e. that they are „using" CK to advance a case in the Court of Protection with which he does not in truth agree. It was also suggested by the Official Solicitor and D that the „false starts" referred to at paragraph 14 above support the assertion that all this is just manipulation of the court process.

25. Mr Hallin mounted a vigorous response to these assertions, explaining that he and his instructing solicitors have had CK"s instructions for some time but that, not having had any disclosure to them of the minutes of the meeting of January 2012, they were unaware of the issue of an alleged change of mind by CK between that time and the present. It was clearly unfortunate in the event that CK had not had that advance disclosure and that CK"s own views were not reduced into a statement to support his application for joinder, it being merely supported by a short affidavit by his Solicitor. Mr Hallin also rejects the argument of the Official Solicitor that CK has a duty as Litigation Friend in the Queen's Bench proceedings "…to maximise SK"s damages".

He refers to Re E (Court of Protection) 1984 WLR 320 at 324, where Sir Robert Megarry said that: "... The main function of a next friend appears to be to carry on the litigation on behalf of the plaintiff and in his best interests. For this purpose the next friend must make all the decisions that the plaintiff would have made, had he been able." I accept Mr Hallin"s submission on this point. In my judgment, a Litigation Friend's duty is not to obtain the highest compensation for the incapacitated person at all costs, not if the circumstances are such that the incapacitated person"s interests would actually be best served by something less expensive than could otherwise justifiably be argued for.

26. CK's affidavit of 3.7.12 (ie post-dating the allegations made at the hearing against his solicitors) gives very clear explanations for the circumstances in which in January 2012 he was recorded as supporting modest rehabilitation; how he thought at the time that there was really nothing else on offer; how modest rehabilitation was the common view of the experts and the LA present at the meeting, by which he felt rather daunted; and why, having since investigated and visited the competing homes and learnt more about the amenities respectively available for SK and the terms on which SK could be taken on, he has come to change his mind and to support the intensive rehabilitation option. At this interlocutory stage at least, these strike me as a reasonable explanations by CK for what was put to me as being such a significant „volte face" by him that I should take it into account when deciding whether he should be joined. I also note, significantly, that CK"s recent affidavit is not the first time that he has supported greater rehabilitation for SK In paragraph 117 of his affidavit of 12th September, 2011 he (CK) spoke of his concern about the absence of rehabilitation at „the Placement" and wanted SK to be „...transferred to a more specific brain injury rehabilitation centre". He expressed the hope that SK could be assessed at what I will call the „The Centre", which offers intensive rehabilitation.

27. Bearing in mind the contents or both CK"s affidavits, I am not persuaded by the suggestions made about those instructed by CK that, in making this joinder application, they are manipulating him in a bid to maximise SK"s damages in the Queen"s Bench Division. I approach CK"s joinder application on the basis that he has a genuine wish to place what might be a viable option before the court, so as to ensure that the best possible outcome is achieved for his brother. In spite of the conceptual

complication of CK"s original applications being in his capacity as SK"s Queen's Bench Litigation Friend, I accept Mr Hallin"s submissions on the present evidence that CK's views as SK"s Litigation Friend are currently indistinguishable from his views as SK's brother. To cut a long story short, I shall therefore make an order joining CK to the Court of Protection proceedings.

(j) The more difficult issue of D's application for joinder.

D's arguments.

28. Miss Morris submits that it would be most unfair on D if the issue of SK"s best interests regarding accommodation, care and level of rehabilitation were to be decided at a hearing in the Court of Protection from which D were to be excluded, but in which CK were a fully participating party. CK would be able to seek what has been assumed would be expensive intensive rehabilitation for SK, but D would not be able to call Dr Todd"s evidence and argue for a modest regime of rehabilitation. Further, she says, CK has already been privy to information available within the Court of Protection proceedings which is not available to the D and it would entrench this unfair advantage further if his application for joinder were to be allowed but not D"s. On her case, it should be either complete segregation of the two sets of proceedings (CK „out" and D „out") or both CK and D „in": and of the two possibilities, she advocates for the latter.

29. Miss Morris says that when SK"s damages came to be assessed in the Queen"s Bench Division, it would be impossible in practice for D to argue its case, since any decision to declare lawful the more expensive regime would have been a declaration by a High Court Judge sitting in the Court of Protection. That judicial determination, she says, would give such a declaration a different status from other decisions taken by others, like medical practitioners, having responsibility for the welfare of SK. D and the Queen"s Bench Judge would in effect be faced with a „fait accompli" adversely affecting D in its pocket. How, she asks, could that be „Article 6 compliant"?

30. Miss Morris referred me to the Court of Protection Rules for joinder: (i) first, by R.75(1) that: "Any person with sufficient interest may apply to the court to be joined as a party to the proceedings" and (ii) second, by R.73(2) that: "The court may order a person to be joined as a party if it considers that it is desirable to do so for the purposes of dealing with the application". She says that the bar is thus set quite low, the key criteria being "sufficient interest" and "desirability". D, she says, does have a sufficient interest, namely to avoid being stuck with a Court of Protection declaration creating a „fait accompli" adversely affecting D in its pocket. Further, it would be "desirable" for the issue concerned to be decided at one hearing (she called it a "synthesised" hearing) to avoid the risk of inconsistent decisions being reached. Otherwise, she says, the Queen"s Bench assessment of damages could be either too high or too low.

The Official Solicitor's arguments.

31. The Official Solicitor, on the other hand (supported by LA) argues strongly against any joinder of D, or any other involvement of D in the Court of Protection process. He submits that the point is an important one of principle, with wide implications outside of this case. He says that the two sets of proceedings have different objectives and that in law, the issue (although superficially similar) is quite different. Unlike the Court of Protection proceedings, the Queen"s Bench action is not concerned with the incapacitated person"s best interests, but rather and merely with the quantification of his past factual and likely future loss: that is, whether any particular expenditure in dispute was in the past or would in the future be reasonable. Mr Lock submits that having a "sufficient interest" under R.75(1) in order to be able to apply to be joined, should be interpreted to mean a sufficient interest *within the Court of Protection proceedings* (as distinct from a self-interest, like a commercial interest) and that clearly the Defendant has no interest or motive in obtaining the best outcome for SK. Its interest is a purely financial, in trying to keep down the damages which it will have to pay. He gives, as an extreme example (although it is plainly not on all fours) the possibility of competing privately-run care homes applying to be joined to Court of Protection proceedings so as to be able to promote their respective commercial interests in securing a valuable contract to accommodate an incapacitated individual. Clearly such joinder would not be allowed, because they would not have a

sufficient or any interest in that person's best interests. It is for the same reason, he says, that tortfeasors and their insurers are conspicuous by their absence from the statutory list of consultees regarding best interests decisions.

32. Further, the Official Solicitor submits that far from being „desirable" for D to be joined, it would be positively undesirable. It would burden and slow up the task of the Court of Protection by the addition of an extra party, which would be likely to bring with it additional case-management decisions, such as about experts and matters of disclosure. It is easy, for example (and speaking generally) to envisage circumstances in which a best interests decision as to care and accommodation might be significantly influenced by social, personal or even intimate information about family members, which would be confidential to them and inappropriate to disclose to the tortfeasor"s advisers, but without which those advisors would be unable properly to understand the issues informing the best interests decision. The personal circumstances of a person like RK or JK could be a case in point.

33. A decision in favour of joining D would also, the Official Solicitor says, create an undesirable precedent by way of suggesting that whenever there are parallel proceedings in another Court or Tribunal raising points similar to those arising in Court of Protection proceedings, there can or should be a joinder application to the Court of Protection for everything to be decided at once. That again would slow down and burden the Court of Protection with satellite issues. "Where…" asks the Official Solicitor "…would it end?". Miss Morris disputes the relevance of this „floodgates" argument, saying that this case turns on its own special facts, largely because of the dual role of CK as SK's Litigation Friend in the Queen's Bench proceedings and as brother in the Court of Protection proceedings.

34. Last, Mr Lock relies on Art 14 of the ECHR. If SK were a capacitated individual, D would manifestly have no right to a voice in any decisions which he made about such things as his treatment regime. D would be stuck with such decisions, subject to its ability to submit to at the quantum hearing that they were such as to exceed SK"s reasonable needs; or did not meet his duty to mitigate his damages; or were not caused by any negligence for which D was liable. So, Mr Lock argues, it

would discriminate against SK, as an incapacitated individual, if D were allowed a voice about his best interests in the Court of Protection proceedings.

(k) Discussion.

35. Dealing as a discrete issue with this last point, I can say at once that I do not find it persuasive. If I were to direct a "synthesised" hearing then (whilst it would indeed mean a different approach to D's involvement in decision taking as between a capacitated individual and an incapacitated one) that would be because, on this hypothesis, I would have been persuaded of the unfairness of D"s being excluded from a Court of Protection best interests hearing in which the claimant's Litigation Friend in the Queen's Bench proceedings were able to participate as brother and to seek an expensive rehabilitation regime. In such circumstances, the asserted discrimination as regards the incapacitated individual would in my judgment have to yield to the fact (again strictly on this hypothesis) that there would be no other way for D to receive fairness within the overall legal process.

36. As for the generality of the competing arguments, at first sight there is clearly great attraction to the way in which Miss Morris puts her case. That is from the point of view of saving costs and of avoiding duplication by having one hearing to answer the question "where should SK live and with what level of rehabilitation?" In general terms, both the Overriding Objective and common sense require good reasons to decline a single hearing to resolve similar or connected issues. Additionally, it could be convenient for D to be fully „engaged" in the Court of Protection process if it produced ready answers to questions about the availability of possible funding. There have indeed been times when I have found myself thinking "... why not just get on with it, hear everyone and take the required decision, so that all the arguments about unfairness to D are resolved?".

37. On the other hand, there are sometimes circumstances in which an attractive pragmatic approach has to yield for good reason to a more legalistic one. Here, the key point in my view is that the underlying issue in the two sets of proceedings, however similar, is not the same. The jurisdiction of the Court of Protection is as to best interests and that of the Queen's Bench is compensatory. The tests to be applied, although very similar („best interests" as against „reasonable needs") are not the same.

As Pill LJ said in Sowden v Lodge 2005 1WLR 2129 CA, at 2144: "…The judge's good intentions with respect to the claimant"s welfare are not of course in question and neither, in my view, is the perceptiveness with which he approached the medical evidence, but there is a difference between what a Claimant can establish as reasonable in the circumstances and what a judge objectively concludes is in the best interests of the claimant". A defendant not having been a party to the Court of Protection process would not be bound, at a Queen"s Bench hearing as to quantum, by any Court of Protection declaration as to the injured person"s best interests. Here, the Queen's Bench Judge would be bound to hear whatever expert evidence D had permission to call in those proceedings, presumably Dr Todd, to say that SK"s reasonable needs would be met by modest rehabilitation.

38. If intensive rehabilitation were to be held by the Court of Protection to be in SK"s best interests and if (and assuming) that those responsible for SK's next move of care home could not arrange such intensive rehabilitation without securing the resources to do so, then there would pretty obviously be an approach to D's insurers for (interim) funding. D's insurers would be free to agree or to refuse. If they agreed, there would be no problem. If they refused, then those responsible for furthering SK"s best interests would no doubt set up a prompt hearing before the Queen's Bench Judge, or Master, who would decide the issue on all the evidence before him. That evidence would or might well be different from that before the Court of Protection. Social issues which could affect a best interests decision might well not be relevant, or as relevant, to the quantification of damages by way of an interim or final award. Conversely, there might well be issues relevant in the quantification of damages which would not be relevant to a best interests decision: for example (as here) the possible impact of SK"s previous injury in 2006 on the causation of his brain damage, and / or the possible causative effect of his long term excessive alcohol use. Whilst the Judge or Master would of course pay regard to the declaration of the Court of Protection, he would not be bound by it and would decide the issue before him according to applicable principles relating to the assessment of damages. The two decisions might or might not be the same. Either way, D would not in my view have been treated unfairly by its absence from the Court of Protection proceedings. This is not the sort of situation where the party seeking joinder is ipso facto bound to pay damages as a direct consequence of the outcome of the proceedings in which he asks

to be joined. If the circumstances here were like that, which they are not, then the argument would be unanswerable, which it is not, that there would be an injustice if that party were unable to have his case heard at the decisive hearing, as for example occurred in Gurtner v Circuit 1968 2 WLR 668 CA: (MIB joined to action for damages, as having direct legal and pecuniary interest in outcome: natural justice).

39. The result of such a hearing in the Queen"s Bench Division as I have just been mentioning, namely the award (or not) of presumably interim damages, would of course determine whether or not the declaration of the Court of Protection as to SK"s best interests could in fact be funded and put into effect. Whilst it is correct to say that this approach could amount to two hearings to resolve a similar factual / expert issue, such a situation (if it ever actually occurred here) would in my judgment be preferable to setting up a single "synthesised" hearing, with all the disadvantages of an additional party running its own commercial interests, namely to keep down the damages. As I asked rhetorically during submissions, what if there were multiple defendants in parallel Queen's Bench proceedings? Would they all be entitled to be joined to the Court of Protection proceedings so as to avoid the asserted unfairness of their not being engaged in the process (including disclosure, attendance of their expert at meetings and so on) and their not being heard at the best interests hearing? The answer is surely not. The demands on the resources of the Court of Protection in terms of time, judges and funding are enough already, without the potential of a party or parties being joined when there exists another process in which their particular interests can and would be heard and protected according to law.

40. There is another problem about a single "synthesised" hearing. A Queen's Bench decision on quantum is essentially like a snapshot in its approach, even if it is by way of only an interim award. On the other hand, it is in the nature of the Court of Protection jurisdiction that it is ongoing and reviewable according to how things are going on the ground. If a defendant in Queen"s Bench proceedings participated at a particular Court of Protection best interests hearing, so as to achieve the perceived advantage of everything being decided „in the round", then by what exactly would that defendant be bound? At what point would that defendant be entitled fairly to say "… I am no longer bound, because the circumstances have changed"? Difficult satellite issues are quite foreseeable along those lines. Further, once having started to

participate in the best interests process, the defendant would logically have a legitimate interest in being consulted on all best interests meetings and hearings indefinitely, until the arrangements for the incapacitated person were settled. It might well feel such a legitimate interest in having its own medical expert(s) in attendance at best interest meetings, even perhaps about quite modest changes in respect of the incapacitated individual's care or rehabilitation regime. It is entirely foreseeable that there would be problems of increasingly costly and delayed decision-taking about the welfare of the incapacitated individual, if a Queen"s Bench defendant"s pecuniary interests were permitted to be locked into the best interests decision making process, unless there were no other way to avoid injustice.

41. Turning to the application of the relevant Court of Protection Rules for joinder, R.73 and R.75 (above) should in my view be considered together, as together they govern decisions about joinder. R.75 requires that an applicant for joinder has "sufficient interest". Reading that in the context of R.73, I accept the submission of the Official Solicitor that it should be interpreted to mean „a sufficient interest in the proceedings" as distinct from some commercial interest of the applicant"s own. Such an interest in the proceedings would however exist if circumstances arose where the financial liability (or perhaps some other liability) of the applicant seeking joinder would effectively be determined once and for all in the Court of Protection proceedings. That is precisely because that applicant would then have a „sufficient interest" (although I find it difficult to envisage how in practice that could arise). Leaving aside that possibility and the possibility of an application made by some bona fide interest group (where different considerations may apply) an applicant for joinder who or which does not have an interest in the ascertainment of the incapacitated person"s best interests is unlikely to be a „person with sufficient interest" for the purpose of R.75. That essentially is the difference here between CK and D.

42. By R.73, the court may join a new party if it considers that it is "…desirable to do so for the purpose of dealing with the application." The clear import of that wording is that the joinder of such an applicant would be to enable the court better to deal with the substantive application (for example, by its being able to take into account and test the views of a close relative who knew the incapacitated person and was familiar with his wishes, feelings and preferences before he became

incapacitated). Here the substantive application (the level of SK"s rehabilitation regime) would not be dealt with better with the participation of D, since the two sides of the issue (intensive rehabilitation or modest rehabilitation) are well-evidenced anyway by the competing experts, assuming that CK is to have permission to call Mr Gentleman as his expert (and if CK did not get that permission, then D"s reason for applying for joinder would largely go, as the only expert evidence then would favour modest rehabilitation, which is what D supports). Save with one possible exception, D would add nothing to the debate about SK"s best interests. The one exception is about funding, where D"s participation might be of assistance. However there is nothing in this respect which the Court of Protection could order or enforce as against D and so it would ultimately come down to the willingness or otherwise of D"s insurers to be forthcoming. If they were unwilling to engage co-operatively, that would be the end of it, subject to an interim damages application to the Queen"s Bench Division. If, on the other hand, they were willing to engage co-operatively, as they said through Miss Morris they would be, then they could do so voluntarily without the need to be directly engaged in the Court of Protection process.

43. The word "desirable" necessarily imports a judicial discretion as regards balancing the pros and cons of the particular joinder sought in the particular circumstances of the case. Here, I conclude that the advantages of the single "synthesised" hearing approach are of less weight than the disadvantages which I have identified above; or to put it another way, that the joinder of D into the Court of Protection process is not proportionate, having regard to the alleged mischief which joinder is said to be necessary to prevent. In these circumstances (vigorously and enticingly although D"s case is put by Miss Morris) I do not accede to it.

(l) Conclusion.

44. In the result, for the reasons I have explained, I conclude that the right course is to accept the thrust of the submissions of the Official Solicitor and to reject those of D. So in the overall result, the application of CK for joinder will be granted and the application of D will be refused.

(m) Miscellaneous Points.

45. First, there would obviously be nothing to stop D"s solicitors seeking to protect D"s interests by writing round to all the parties in the Court of Protection proceedings to make it clear (if the other parties have not already have got the point): (i) that they do not accept the reasonableness of any expenditure for SK based on intensive rehabilitation; (ii) that they would be taking that point at any hearing about the quantum of damages: and (iii) that therefore, any step taken in that direction by those responsible for his welfare would be taken at risk.

46. Second, as I understand it, Mr Gentleman has never yet been asked give his opinion on the modest rehabilitation option being put forward by, amongst others, Dr Kent. In my view, this is unfortunate. It may be that a modus vivendi could be reached between the experts which would reduce the need for the sort of titanic adversarial struggle which has taken place before me at this hearing and which would lead to a swifter conclusion as to the all-important question as to where SK should next be placed. I did direct by an order made as a paper exercise dated 16th May 2012 that the parties were to act as collaboratively as they felt they properly could in preparing for this application; but, for reasons that do not matter, I am not convinced that this has happened. So I propose to direct (and I do not think this is controversial) that Mr Gentleman should have disclosed to him the reports of those who support the modest rehabilitation option and that, before more money and effort is spent on this case, he be asked whether, and if so how strongly, he disagrees with their present views. CK and JK would have to be responsible for his fee for this opinion, as no other party wishes him to be engaged. This will be timed to happen after SK has spent 6-8 weeks in the hospital to which he has recently been taken for a review of his medication and of the behaviour management techniques which are used with him.

47. Third, I record that there are in fact before me no estimates of the comparative costs of modest rehabilitation as compared with intensive rehabilitation. That fact would have been sufficient in itself to have justified the conclusion that D"s application for joinder is premature and should be either rejected or adjourned, since it is predicated on the assumed basis of an intensive rehabilitation regime being more expensive than a modest one. It has been assumed throughout this hearing that this is indeed the case, although the point is not a foregone conclusion. It depends in part on the other facilities which are available at the competing neuro-disability units and / or

on the pure chance of which of the two competing homes charges the more. The fees of a particular home may for example depend on the quality of the area where it is situated, being unconnected with the quality of the service or facilities which it offers. Be that as it may, I have approached my decision on the basis (in D"s favour) of an intuitive assumption that an intensive rehabilitation regime would probably cost more than a modest one.

48. Fourth, I observe that the difficulties here, both legal and practical, have been compounded by the fact of SK"s Litigation Friend being different in the two sets of proceedings. This has meant differently held opinions on his behalf regarding his best interests within the respective proceedings and has added weight to D"s perceived sense of grievance that CK"s dual or bridging role puts it (D) at a significantly unfair disadvantage. It is the fact that D has recently issued a Summons to remove CK as Litigation Friend in the Queen's Bench proceedings, which CK is vigorously defending. That is of course a matter for that court. It does not follow though, even if CK were actually to be removed (and I am saying nothing about the apparent merits of the application) that the Official Solicitor would necessarily agree to act for SK in those proceedings, since his department is well known to be a remedy of last resort. It is also the case that CK could not have been SK's Litigation Friend in these proceedings, because he would have been hopelessly conflicted with JK on the issue of SK"s capacity to marry. So these are not straightforward issues. Nevertheless, it must be right to say that, where there are known to be parallel proceedings, it would be helpful if some „joined up" attention were given early on (and I am not implying that it was not given here) to the potential difficulties which may arise from having different Litigation Friends as between the two sets of proceedings. Where possible and unless otherwise contra-indicated, it would generally make sense to have the same Litigation Friend in both such proceedings.