



## The Court of Protection and Personal Injury Claims

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1. What happens when P brings proceedings for damages for personal injuries, those injuries being, substantially, acquired brain injuries, decisions have to be made on his behalf concerning his future care and rehabilitation, and claims have to be made for the funding of such care and rehabilitation in the personal injury claim? That issue was confronted by Bodey J in Re SK [2012] EW 1990.
2. The background facts were somewhat unusual. P was seriously injured in a road traffic accident in November 2008, causing severe brain and physical injuries. On 17<sup>th</sup> November 2010, P went through a ceremony of marriage with RK. At that time, P was residing at a neurodisability centre. In February 2011, RK took P out of the centre for the day and did not return him.
3. Thus, matters came before the Court of Protection and the Court of Protection had to decide where P should live and what care and rehabilitation he should receive. In those proceedings, P's litigation friend was the Official Solicitor.
4. Separately, P had started proceedings in the Queen's Bench Division for damages against D. In those proceedings, his brother, CK, was his litigation friend. In the usual way, CK, on behalf of P, instructed specialist personal injury solicitors to represent him.
5. P's brother (CK), his litigation friend in the Queen's Bench proceedings, was not a party to the Court of Protection proceedings, although in April 2011, CK had been permitted to attend those proceedings as an "*interested party*". As such, he had access to the Court of Protection medical reports and other documentation.
6. Then CK made an application that the Court of Protection and the Queen's Bench proceedings be consolidated. The reason for that was that in the Queen's Bench proceedings, CK, as P's litigation friend, was contending that P's reasonable needs would be met by intensive (and expensive) long term rehabilitation. The difficulty CK foresaw, however, was that in the Court of Protection proceedings the Official Solicitor, as P's litigation friend, was contending that P's best interests would be served by short term and non-intensive rehabilitation. This was a view supported by those treating P and by a single joint expert appointed by the Court of Protection. It was also a view shared by D's expert appointed in the Queen's Bench proceedings.

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7. CK, on the other hand, had expert evidence in the Queen's Bench proceedings that supported long term intensive rehabilitation. He wanted to put that forward as an option in the Court of Protection proceedings fearing, no doubt, that if the Court of Protection decided that it was in P's best interests only to have short term non-intensive rehabilitation, that would make a claim in the Queen's Bench proceedings that long term intensive rehabilitation was reasonably necessary rather difficult to sustain.
  8. D made its own application for the consolidation of the two sets of proceedings with D being joined as a party to the Court of Protection proceedings. It was soon realised that consolidation was not an option and both CK and D quickly modified their positions (CK several times).
  9. The final position of CK was that he be joined to the Court of Protection proceedings simply as P's brother and, therefore, as a person with a real interest in ensuring that P's best interests were met by decisions made in the Court of Protection. The Official Solicitor did not oppose that application and CK was duly joined. On the way, the court held that the order that had been made designating CK as an interested party had not had the effect of making CK a party and that there was, in fact, no halfway house between being joined as a party and not being a party. It would seem, therefore, that joining someone as an "*interested party*" is not the appropriate order to make and a person is either joined as a party or not.
  10. D's final position was that the Court of Protection should crystallise a discrete issue as to where P should be accommodated and cared for, and with what level of

rehabilitation and for D to be entitled to be heard on that issue and to participate generally alongside the parties to the Court of Protection proceedings (see paragraph 18 of the judgment). The judge referred to that proposal as "*joinder*". He then said:-

*"Once that issue had been determined by a single High Court Judge sitting in the Court of Protection... the two sets of proceedings would continue on their own separate ways."*

11. It is not entirely clear what was being proposed. The way the judgment then proceeds is to deal separately with D's application as if D had applied to be a party to the Court of Protection proceedings. That "*application*" was refused.
12. What appears to have been envisaged by D, however, is that in one hearing a High Court Judge, effectively sitting in the Court of Protection and the Queen's Bench Division should decide for the purposes of both sets of proceedings the issue as to where P should be accommodated and cared for, and with what level of rehabilitation. That would necessarily mean that D was involved in the determination in the Court of Protection proceedings as to what was in P's best interests.
13. The Official Solicitor and the local authority, which was also a party, strongly opposed D's application. The Official Solicitor submitted that the application was wrong in principle and in practice.
14. So far as principle is concerned, the Official Solicitor relied on Court of Protection Rules, Rule 75(1) that provides that "*any person with sufficient interest may apply to the court to be joined as a party to the proceedings*". The Official Solicitor argued that D did not



have a sufficient interest because the interest had to be a sufficient interest “*within the Court of Protection proceedings*” as distinct from a self interest, such as a commercial interest.

15. At paragraph 41 of the judgment, the judge accepted that submission. He accepted also that if the Court of Protection proceedings would effectively determine once and for all another person’s financial interests (in this case liability to pay for care and rehabilitation) then that would be a sufficient interest. He then went on to say:

*“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 Rule 75.”*

16. It would seem that it was essential for determining that issue against D that the Court of Protection decision as to P’s best interests would not effectively determine once and for all D’s financial liability. Technically speaking, that must be right as the question asked in each of the Court of Protection proceedings and the Queen’s Bench proceedings is different. In the Court of Protection proceedings, the Court is asked to take a decision on P’s behalf as to his best interests. In the Queen’s Bench proceedings, P makes a claim for compensation based on what he considers to be in his best interests (or have been determined as having been in his best interests) and the Queen’s Bench division proceedings then decides whether what P claims both arises from the injuries that D

has caused and is reasonably necessary to put P in the position he would have been in but for those injuries. Technically, therefore, the questions are different and the answers, in theory, could also be different.

17. D’s objection was that, in practice, if the Court of Protection decided that a certain regime was in P’s best interests, it was very unlikely that a Queen’s Bench Division judge would come to a different view. D, therefore, said that for CK to participate and advance the regime that he was advancing on behalf of P in the Queen’s Bench Division proceedings without D being there to put forward the opposing case, was a fundamental unfairness, would prejudice D’s position in the Queen’s Bench proceedings irretrievably and was in breach of D’s Article 6 rights.

18. If this part of the judgment is correct, then there would be, in effect, no circumstances when a Defendant in personal injury proceedings could participate in Court of Protection proceedings. The Court went on, however, separately to consider whether D’s joinder was desirable pursuant to Court of Protection Rules, Rule 73(2) that provides:

*“The court may order a person to be joined as a party if it considers that it is desirable to do so for the purpose of dealing with the application.”*

The Official Solicitor argued that D’s joinder would, in any event, be undesirable. The Official Solicitor argued that the work of the Court of Protection would be made more burdensome and slow by the addition of an extra party and that if P had capacity, then D would plainly have no right to a voice in any decisions that he might make as to his treatment regime and, therefore, to give D such a voice in these circumstances would



- be an unjustified discrimination against P as an incapacitated individual, contrary to Article 14.
19. The judge dismissed the latter argument on the basis that any such interference would be justified, *ex hypothesi*, by the need to respect D's Article 6 rights to a fair trial, if that was necessary. The judge, however, concluded, agreeing with the Official Solicitor, that D's joinder was undesirable. He put forward a number of reasons for that.
  20. One was what would happen if there were numerous defendants in the Queen's Bench proceedings, would they all be entitled to be joined? (The answer to that, perhaps, is that in the usual run of things, defendants have a common interest in issues of quantum and, therefore, no such separate representation would be sought or needed).
  21. The judge then stated that whereas in the Queen's Bench Division a decision is made on a once and for all basis, in the Court of Protection, decisions are made on a continuing basis and change as P's circumstances change. The judge hypothesised that if D was entitled to take part in these proceedings, why was D not entitled to be consulted in respect of all best interest meetings and hearings indefinitely until arrangements for P were settled.
  22. Finally, the judge held that D's joinder was not proportionate to the alleged mischief that the joinder was said to be necessary to prevent. That overcame his initial feeling that allowing D's application and deciding, in effect, the issues in the Court of Protection and the Queen's Bench proceedings concerning P's rehabilitation and care at one hearing, was a good one.
  23. Thus, D was left out in the cold. It remains to be seen whether D takes this matter further. Currently, however, the decision represents a significant barrier to defendants in personal injury proceedings taking any part in Court of Protection proceedings.
- Miscellaneous Matters**
24. During the course of the hearing, counsel for the local authority submitted that the only choices available to the Court of Protection on P's behalf were those put forward by the statutory authorities. At paragraph 20 of his judgment, the judge rejected that submission because of the fact that P was making a claim against an insured tortfeasor that would make available a separate potential source of funding. That led to an agreement between the parties (that included D if joined) that "*the Court of Protection should make a health and welfare decision concerning P 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)*".
  25. There is a danger for local authorities here. If the Court of Protection decided that a particular regime was in P's best interests and likely to be funded by an insurer but then P's claim is dismissed on liability grounds, the local authority might well be stuck with having to fund that regime.
  26. As a matter of case management, the judge directed that the reports that proposed modest rehabilitation (including, it is assumed, the Court of Protection reports) be disclosed to CL's expert for him to consider whether or not those proposals were reasonable.



27. Lastly, the judge made observations concerning the fact that P had a different litigation friend in the Court of Protection proceedings and in the Queen's Bench Division. He recorded the fact that D had made an application to remove CK as litigation friend in the Queen's Bench proceedings. He said, also, that where there were two sets of proceedings, if possible, it would generally make sense to have the same litigation friend in both such proceedings. He did not say who that should be.
28. It is very unusual for the Official Solicitor to be litigation friend in personal injury claims. Family members frequently take this role and give their time freely for P's benefit. CK was not P's litigation friend in the Court of Protection proceedings because of a conflict regarding the capacity to marry issue; it is, of course, much more usual for the Official Solicitor to be involved on P's behalf in such proceedings.
29. The fact that in different sets of proceedings, P, represented by different litigation friends, is advancing different cases as to what his care and rehabilitation regime should be is certainly odd. Indeed, it might be seen, in one sense, to be more than odd and an abuse of the court's process in different courts for a party to be advancing different cases.
30. The fact is, however, that the situation that arose in this case is quite unusual. Far more frequently, decisions as to what care or rehabilitation might be in P's best interests are taken by those who are responsible for P's care and rehabilitation without the involvement of the Court of Protection. The Court of Protection only became involved in this case because of JK's actions.
31. The Official Solicitor has limited resources and is not normally involved in personal injury proceedings. In those circumstances, were this situation to arise again, the more obvious solution would be for a person such as CK to be litigation friend in both sets of proceedings. That, however, would hardly have pleased D in this case.

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Simon has wide experience of private client work. He recently acted for Anthony Day in the Chancery 'division dispute that he had with the children of the late Sir Malcolm Arnold over the ownership of Sir Malcolm's manuscripts. The dispute centred on the question whether Sir Malcolm had given the manuscripts to his children when in a desperate state or later when he was a patient of the Court of Protection. Questions also arose as to the meaning of Sir Malcolm's will and a later written gift. He successfully obtained a revocation of a grant in *Lamothe v Lamothe* [2006] WTLR 1431 and opposed a daughter's claim to ownership of a flat in *Lalani v Crump* [2007] 8 EG 136 (CS). His membership of the Court of Protection team provides an added dimension of experience in all aspects of property and contractual issues.

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