

Claim No: TLQ/10/0438

**Neutral Citation Number: [2011] EWHC 822 (QB)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice,  
The Strand,  
London WC2A 2LL

Tuesday, 8<sup>th</sup> February, 2011

BEFORE:

**MR JUSTICE BURNETT**

BETWEEN:

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**V**

Claimant

**- and -**

**R**

Defendant

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MR HILLIER appeared on behalf of the Claimant

MR BALDOCK appeared on behalf of the Defendant

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**Approved Judgment**  
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(Official Shorthand Writers to the Court)

Tuesday, 8<sup>th</sup> February, 2011

## J U D G M E N T

MR JUSTICE BURNETT:

1. This is the trial of a preliminary issue to determine whether the claimant, V, has capacity to continue to conduct this litigation. If she does not have capacity, it is proposed that her mother, P, should be appointed V's litigation friend. The question of capacity is to be judged by reference to the tests laid down in the Mental Capacity Act 2005.
2. The claimant, V, was born in 1985. In 2006 she was crossing Burdett Road, Limehouse, when she was knocked down by a vehicle driven by the defendant. She sustained serious injury. There was a rupture of the left side of the diaphragm, multiple rib fractures with pneumothorax, together with fractures of the second cervical vertebra, left humerus, left sacroiliac joint and left wrist. But it was the closed head injury suffered by the claimant which has given rise to concern about her capacity to conduct this litigation.
3. These proceedings were issued on 25<sup>th</sup> August 2009. Liability had never been in dispute and was formally conceded in the defence served on 18<sup>th</sup> September 2009. Master Leslie entered judgment for the claimant on 15<sup>th</sup> October and gave preliminary directions for the assessment of damages. At a case management conference on 15<sup>th</sup> March 2010 directions were given for the exchange of expert evidence and other matters necessary to achieve a trial on damages. Amongst the directions given were these:

“(2) The Claimant to have permission to rely on expert evidence in the following fields from the following experts:

- Mr Osborne – Consultant Orthopaedic Surgeon
- Mr Sommerlad – Plastic Surgeon
- Dr Barrie – Neurologist
- Dr Leng – Neuropsychologist
- Professor Ron – Professor in Neuropsychiatry
- a General Surgeon (to deal with the chest and abdominal injuries)
- a Care Expert/Occupational Therapist.

(3) The Claimant serve any report she intends to rely on from a General Surgeon and/or Care Expert/Occupational Therapist by 30<sup>th</sup> April 2010.

(4) The Defendant to have permission to rely on expert evidence in the field of neuropsychology and any other expert evidence in fields at paragraph 2 above...

(5) Experts in like fields to discuss and attempt to agree issues and serve statements...

(7) The Claimant to serve an updated schedule of all heads of loss and damage...

(8) The Defendant to serve a counter schedule, if so advised..."

4. In due course, a trial window was identified for this week. Expert evidence was obtained by both parties and exchanged pursuant to Master Leslie's order. The claimant has served a schedule, which I am told pleads the claim at about £1.7 million plus general damages. The service of a counter schedule is, as I understand it, on hold. We have seen from the order made by Master Leslie that the claimant's neuropsychiatrist is Professor Maria Ron, and Dr Nicholas Leng is her neuropsychologist. In due course, the defendant obtained evidence from Dr David Sumners, consultant psychiatrist, and Dr Nigel Walton, neuropsychologist. Those experts considered two aspects relating to the question of capacity. First, whether the claimant will be capable of managing her own financial affairs following receipt of a substantial sum, whether by lump sum, periodical payments, or both. All experts agree that, as a result of her impulsive nature, the claimant will be unable to manage her own financial affairs. Secondly, they also considered whether she is able to make decisions necessary for the future conduct of this litigation. A summary of those experts' opinions on that topic is this: by the narrowest of margins, Professor Ron believes V is not able to make those decisions. Dr Sumners, by a similar margin, believes that she is. Dr Walton is of the same view as Dr Sumners. Dr Leng has wavered in his view, as it appears to me from the reports. As he has acquired more information, he has come to the conclusion that the claimant may have a residual ability to deal with her legal affairs.
5. The claimant has conducted her own litigation hitherto with the substantial assistance of her mother, who is of the view that her daughter lacks the necessary capacity. The report of Professor Ron that expresses the view that the claimant lacks litigation capacity is dated 29<sup>th</sup> April 2010. That is a supplementary report. Dr Sumners' report expressing the contrary view is dated 1<sup>st</sup> October 2010. There is a short joint report from both experts of 3<sup>rd</sup> November 2010.
6. The application to have the claimant declared a protected party was issued on 12<sup>th</sup> July 2010. On 4<sup>th</sup> August Master Leslie adjourned the application to a judge. On 17<sup>th</sup> November the matter came before Macduff J for directions. He directed that the issue be resolved in a hearing this week. He gave permission for the parties to call Professor Ron and Dr Sumners to give oral evidence, and also to rely on the written evidence of Dr Leng and Dr Walton. The question of financial capacity, which as I have indicated is not in contention, is being dealt with by way of an application to the Court of Protection.
7. In addition to hearing from the two experts, P has given oral evidence on this issue, having provided a short written statement in advance. The claimant herself did not

give evidence. She did not produce a statement dealing with any issues relevant to capacity. I enquired of Mr Hillier, who appears for the claimant, how the application came to be made. He explains that because the issue had been raised in the expert evidence, those who instruct him were bound to ventilate the matter before the court. That said, Mr Hillier told me that the claimant was aware of the application and had not disagreed with it being made. The claimant was in fact in court throughout the whole of the evidence and the argument. Mr Baldock, who appears for the defendant, described the application as paradoxical, because technically the application is being made by and on the implicit instructions of the claimant when its purpose is to establish that she cannot give such instructions. However, Mr Hillier made clear that the claimant's position in this matter is one of acquiescence rather than positive instruction. For that reason, he and those who instruct him considered whether the Official Solicitor should be involved independently in these proceedings to protect the claimant's position. Their considered view was that such involvement was not necessary. I endorse that conclusion. Although not bound to do so, the defendant has taken a full part in the determination of this preliminary issue, both by deploying evidence and advancing argument. The evidence and arguments were directed towards supporting the proposition that, for the purposes of the 2005 Act, the claimant retains full capacity. All relevant issues have been fully ventilated, as it seems to me, in the course of the hearing. There is no danger that the claimant's interests have been in any way overlooked.

#### The law

8. The question of capacity is governed by the Mental Capacity Act 2005. Sections 2 and 3 provide as follows:

“2. People who lack capacity

(1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter whether the impairment or disturbance is permanent or temporary.

(3) A lack of capacity cannot be established merely by reference to—

(a) a person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

(4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

(5) No power which a person (“D”) may exercise under this Act—

(a) in relation to a person who lacks capacity, or

(b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.

(6) ...

### 3. Inability to make decisions

(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—

(a) deciding one way or another, or

(b) failing to make the decision.”

9. Section 1 of the 2005 Act identifies a number of principles which apply for the purposes of the Act, including those set out in sections 2 and 3. Section 1 reads:

“1. The principles

(1) The following principles apply for the purposes of this Act.

(2) A person must be assumed to have capacity unless it is established that he lacks capacity.

(3) A person is not to be treated as unable to make a decision unless all

practicable steps to help him to do so have been taken without success.

(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.”

10. It is common ground in these proceedings that the claimant suffers from an impairment or disturbance in the functioning of the mind or brain. The question is whether she is unable to make decisions for herself in connection with the litigation. In considering that broad question, the statutory scheme requires the presumption of capacity to be displaced on the balance of probabilities. The principles in section 1 distinguish capacity to make a decision from the wisdom of a decision made. The principles also require that all practicable steps are taken to help the person concerned make the relevant decision. The underlying policy of the Act is to avoid concluding that incapacity is established unless, after careful enquiry, it is necessary to do so. That is underpinned by the various cautions found in the Act relating to age, appearance and behaviour, by the requirement to convey information in a way appropriate to the individual's circumstances, and by the recognition that retention of information for but a short period may be sufficient for the purposes of establishing capacity. The underlying policy of the Act is unsurprising and reflects the earlier common law approach very substantially, given that the finding of incapacity in any environment substantially curtails the individual's right of action. In the context of litigation, a finding of incapacity curtails the right of unimpeded access to the law.
11. CPR Part 21 (which I need not read) describes a person who lacks capacity to conduct proceedings as a “protected party”. A claim made or on behalf of a protected party may not be compromised without court approval. A protected party must conduct proceedings through a litigation friend.

#### The decisions to be made

12. The claim is almost ready for the hearing of an assessment of damages. The claimant's evidence has been disclosed and the schedule of loss served. No doubt because of the delay resulting from this application, some further updating evidence will be obtained by both parties. I say “no doubt” without encouraging the parties unnecessarily to do so. Following advice from the claimant's solicitors and counsel, formal instructions for the service of any further evidence will be required. That, however, as it seems to me, is not really the critical issue in these

proceedings. There will inevitably be discussions relating to settlement. Decisions are likely to be necessary in that connection. In the usual way, the claimant's solicitors and counsel will give advice on any offers made by the defendant and the structure of those offers. Decisions about whether to accept or reject any offer will be called for. Within the ambit of such discussions and advice will fall three inter-related issues: (1) the global value of the claim via consideration of the individual components; (2) the question of provisional damages which were pleaded by way of amendment on 8<sup>th</sup> June 2010 to cater for the risk of epilepsy; and (3) periodical payments. An important context of the discussions and decision making will be the common understanding that the claimant will not have unfettered access to whatever money becomes available.

### The medical evidence

13. There is no dispute that the claimant suffered a head injury in the course of the accident. Her Glasgow Coma score was only 3 out of 15 on admission to hospital. She suffered from post-traumatic amnesia. The precise length of that post-traumatic amnesia is unclear. That is because the treatment she was receiving and drugs that were being administered may have contributed to what appears to be amnesia. Professor Ron and Dr Sumners agree that the claimant suffered a traumatic brain injury. Professor Ron describes it as "severe", whilst Dr Sumners believes that it is better described as "moderate". The nature and extent of that injury and its consequences are matters that will be at the heart of the medical evidence, if called, at the assessment of damages. Both those experts, and indeed the clinical psychologists, have noted depression as being a consistent feature of the claimant's symptomology. Whether that is directly attributable to the brain injury, indirectly attributable to it, or independent of it, is in issue between all those experts. What, however, is not in issue is that the depression was caused by the accident. It is not uncommon in cases of this nature for there to be disagreement about the extent to which the identified symptoms result from the brain injury itself or from psychological dysfunction. I should note that a CT scan undertaken close to the time of the original accident demonstrated no obvious brain damage, and a recent MRI scan (the report of which is before me) showed no abnormalities. The clinical neuropsychologists subjected the claimant to the usual battery of tests to determine her cognitive functioning. Dr Walton found no deficit in cognitive functioning, whereas Dr Leng found "mild impairment". Neither considers this a major area of disagreement between them. Dr Leng observes that it is not unusual to obtain a good performance on tests in the office but for performance to be rather worse in real life. Dr Walton does not agree with that – see the joint report of 4<sup>th</sup> August 2010. Those too are matters that may fall for determination at the assessment of damages.
14. Without, I trust, over-simplifying the essence of the underlying medical differences in this case, they might be summarised in this way. The claimant's experts consider that most of her difficulties relate to brain injury rather than psychological dysfunction. Such recovery as can be expected from the original brain injury has occurred. Therefore, the scope for improvement in the claimant's overall condition is limited. By contrast, the defendant's experts strike the balance between the two causes differently. In consequence, they consider that there is much more scope for

future improvement.

15. In her substantial report on condition and prognosis dated 28<sup>th</sup> January 2010, Professor Ron noted a report contained in a letter in the treating notes from Dr Gabi Parker. That referred to an assessment which had been made in July 2008 and described the claimant thus:

“She is distractible, has difficulty in following complex conversations and instructions, forgets to do things, is impulsive, has difficulty initiating actions and with basic self care. She also has dysregulation of body functions (sleep, hunger and temperature) and binges on food. Overall cognitive abilities are fine but attention (switching attention between tasks) is impaired. She struggles to attend to new information and becomes stuck moving from one task to another.”

16. At that time Dr Parker is noted as supporting the claimant in her attempt to obtain retirement from her job with the Independent Police Complaints Commission on medical grounds. At the time of the accident the claimant was working for the IPCC in a clerical capacity. In her own statement relating to the litigation generally she indicates that she hoped to progress to being a case worker. She returned to work in January 2008. Her statement indicates that she worked for four hours a day for three days a week. Her job was in the post room and it entailed logging incoming post. The statement suggests that she increased her hours and may have added part-time work on another day. The job also changed from merely logging post to prioritising the post. At all events, the claimant found the whole experience very difficult, and she stopped work in June 2008 and was in due course medically retired.

17. Professor Ron referred to the claimant’s impulsivity. In paragraph 72 of her report she identified the difficulties that the claimant had encountered in managing money, and then later in paragraph 92 of the same report states:

“It is my view that she lacks capacity to manage her financial affairs.”

That report did not consider independently the claimant’s ability to conduct litigation. That was dealt with in the supplementary report (to which I have already referred) dated 29<sup>th</sup> April. On that topic Professor Ron said as follows:

“This assessment is based on my interview of V on 12<sup>th</sup> January 2010 and the documents made available to me that are listed in my two reports.

1. The Mental Capacity Act (MCA) requires that a two-stage test is applied for assessing mental capacity to make a particular decision. The first question to be asked is whether there is or might there be an impairment of, or disturbance in, the functioning of the person’s mind or brain. In V’s case there is no doubt that she has a disturbance in her brain function that has resulted from the traumatic brain injury she



sustained in 2006. The brain injury has resulted in severe cognitive and behavioural difficulties that impair her ability to manage the day-to-day demands of life. Given that the accident occurred more than three years, the damage has to be considered permanent, with only minor fluctuations caused by fatigue and/or depression.

2. The second question asks whether the impairment or disturbance mean, or might mean, that the person is unable to make the particular decision at the time that is needed. The ‘decisions’ to be considered here are her ability to give instructions and to conduct legal proceedings and her ability to deal with financial matters.

3. In order to answer this second question, the MCA requires ascertaining whether the person is able to: 1) understand the information relevant to the decision; 2) retain this information; 3) use or weigh the information as part of the process of making the decision and 4) communicate the decision.

4. Litigation capacity. It is my view that V is able to understand the relevant information involved in the litigation (1) and that she is also able to communicate her decisions (4), but her cognitive deficits have impaired her ability to retain complex information (such as that required for conducting litigation) (2) and that she will not be able to use or weigh this information appropriately in order to make this decision. It is, therefore, my view that in the balance of probability V lacks capacity to give instructions and to conduct legal proceedings in relation to the litigation related to her injury. She is capable to attend court.”

She went on to deal with financial capacity.

18. In summary, therefore, Professor Ron considered that the claimant is unable to use or weigh information as part of the decision-making process. That is a reference to section 3(1)(c) of the 2005 Act. Professor Ron did not raise any question relating to section 3(1)(a) or (d), i.e. understanding information and communicating a decision. However, she thought that there was impaired ability to retain information, but not an inability to retain information.
19. Dr Sumners in his report of 1<sup>st</sup> October 2010 noted that the claimant lacks confidence and defers to her mother, even in respect of matters that she can well answer herself. In paragraphs 12.3 to 12.6 of the report he said this:

“12.3 I also asked V some questions relating to capacity.

12.4 With regard to general knowledge, her answers were often appropriate but she displayed considerable impulsivity. For example when asked about how she would act if she found a new electrical appliance did not work she said that she would ‘bin it’. This corresponded to a real event when she found that her new toaster did

not operate and she did not think of taking it back because ‘it didn’t work, chuck it’. She further commented ‘I act on my first thought rather than thinking things through.’ This was also true in considering a question about how she would respond to taking £1,000 she had won in a competition immediately or £5,000 if she was prepared to delay. She indicated that she would just take the £1,000 and was not prepared to weigh up issues such as whether she needed the money immediately in the context of how much she might have. I tried to get her to think about this but she said that it would make no difference. At this point she told me about how she had ‘deceived my parents about money’. £5,000 had become available in an account and she said that if she had kept it she thought a year later she might have had £6,000. However, she drew out the money and spent it all.

12.5. With regard to the litigation, V was aware that liability had been accepted in full. However, she did not know that her solicitor could not make decisions on her behalf rather than putting options to her. She did indicate however that she would ask for her parents’ advice and said to her mother ‘everything goes through you.’ In contrast to her thinking about accepting or delaying prize money, she was able to weigh up issues about undertaking repairs to domestic objects appropriately.

12.6 With regard to financial matters and any settlement V commented ‘spend it as quickly as I could. I wouldn’t invest it.’ When I pressed her she could see the value of keeping money for the future but said she would not do so. She went on to say that she had had an interim payment and her family had told her not to touch this, but she had spent it very quickly. (P said that her daughter had got through £10,000 in a few weeks.) I asked her whether she would do the same again and she said ‘my brain doesn’t do sensible, it’s how I feel at the time. I’d do exactly the same again.’”

20. In the course of the report Dr Sumners referred to occupational therapy notes which were within the medical records. A review in March 2009 said this:

“V has engaged in work activities to increase her knowledge about the brain and the effects of injury as well as improve her general cognitive functioning through structured pen and paper tasks, group discussions and group based problem solving tasks. V has greatly enjoyed these tasks and shows improvement with her cognitive ability. V has been referred to Headway East London to act as a volunteer.”

Going on:

“A cognitive assessment was completed to assess V’s executive functioning. This assessment showed a good level of problem solving but highlighted V’s difficulty with impulsivity. V completed some aspects of the task before properly reading the instructions which

negatively impacted on the outcome of the assessment. Through further assessment it has been apparent that V's main difficulty is impulsivity and with prompting to slow down and think before acting V is able to complete complex cognitive tasks independently."

21. In connection with his own examination and observations Dr Sumners said this:

"I have noted V's tendency to impulsivity and her apparent inability to consider the consequences of her actions. This has led her to squander significant sums of money. In addition, during my interview with her I noted that she was unable to weigh up the consequences of her actions taking into account relevant information, even though she understood the issues involved. For example she said that she would take the offer of a sum of money won in a competition because she wanted it straight away. She would not consider whether she actually needed the money at the time or the virtue of delaying receipt in return for an extremely favourable larger sum. In my opinion, this response to formal questions in a consulting room corresponds to the impulsive and irresponsible behaviour which she shows and acknowledges in the real world, and is also described by P."

Finally, on the question of capacity he explained:

"16.14 During my interview with V I was very much struck by how well she was able to concentrate and remember things as we spoke. This was in spite of distress at times and indeed some tearfulness. I also noted that she often turned to her mother for reassurance, but nonetheless she seemed to be able to answer questions on her own. All this was in stark contrast to her performance on questions concerning capacity issues. In my opinion the determinant of her difficulty then was due to her impulsivity and inability to weigh up information relating to the issues in hand. She appeared to understand these issues but could not put them in the context of the outcome of her actions. She knew that she had, for example, squandered money in the past but indicated that she would do so again. She insisted that she would defer to her parents and always seek their advice concerning such decisions. However, she could not explain why it was that she had ignored such advice, for example in relation to an interim payment which she had squandered.

16.15 I conclude that V lacks capacity in terms of the Act in relation to decisions about her finances. In my opinion she should be referred to the Court of Protection for determination of status as a Protected Beneficiary.

16.16 In my opinion the issue with regard to the conduct of the litigation is much less clear. It seems to me that decisions about the litigation will be made in situations where her parents will be present

as will be her professional advisers. The issue would naturally come down to whether V could overcome her impulsivity sufficiently to be able to weigh up information and understand the consequences of any actions she might or might not take. My inclination is that within the constraints of the setting described, as opposed to what she might do in the outside world, she would probably be able to make appropriate decisions. Nonetheless I would accept that there could well be a range of opinion here and that the matter is finely balanced.”

It is apparent from the language used by Dr Sumners that his view is heavily influenced, indeed may in truth depend upon, the role to be played by the claimant’s parents, especially mother, and professional advisers in the decision-making process. In that, as it seems to me, he had an eye on the principle found in section 1(3) of the 2005 Act (to which I have already referred).

22. Professor Ron and Dr Sumners met to consider this issue. Their joint report is dated 3<sup>rd</sup> November 2010. Under the heading “Areas of agreement”, having stated that the claimant fulfilled the first part of the incapacity test, they went on to say this:

“We both agree that V lacks capacity to deal with financial matters. Although she is able to concentrate and to remember information, she will not be able to use or weigh this information appropriately in order to make the relevant financial decision. She has given ample evidence in the past of her inability to deal with financial matters and there are no reasons to believe that she has regained capacity.”

In dealing with the question of litigation capacity, they said this:

“Dr Sumners and Professor Ron are of the opinion that the question of litigation capacity is a complex one in V’s case.

(a) Dr Sumners points out that decisions related to litigation will be made in situations where V’s parents and professional advisers will be present and arrives at the view that, within these constraints, V may be able to overcome her impulsivity and that she may be able to make appropriate decisions and, therefore, V has capacity to litigate. Dr Sumners makes the point that this is a finely balanced matter and that there could well be a range of opinion.

(b) Professor Ron has taken the view that V will experience difficulties using and weighing the necessary information to give instructions or to conduct legal proceedings, and therefore, on the balance of probability, that she lacks litigation capacity. Professor Ron agrees with Dr Sumners that this is a finely balanced matter and in arriving to her opinion she has given less weight to the ‘constraints’ (i.e. decisions related to litigation to be taken in the presence of close relatives and professional advisers) that had prompted Dr Sumners to

form the opinion that V has capacity to litigate.”

23. As is apparent from the joint report from which I have quoted, in addressing the question of financial capacity the experts state with clarity that the claimant “will not be able” to use or weigh relevant information. Their approach to the question of litigation capacity is rather more subtle, reflecting no doubt the difficulty of the issue and the fine balance to which each referred. In that joint report Dr Sumners suggested that the claimant “may be able” to overcome her impulsivity and then weigh up the information. Mr Hillier very properly questioned Dr Sumners about his use of the word “may” in the joint report with a view to seeking to persuade him that he did not believe that, on the balance of probabilities, she had litigation capacity. Professor Ron in the joint statement says that the claimant will “experience difficulties” in weighing up the information. That is the same language as she had used in her earlier report in discussing the problems that the claimant would experience in understanding information. Furthermore, in the joint report Professor Ron says that she has given less weight to the help and mediation that family and lawyers can provide in connection with the decision-making process.
24. In her oral evidence, Professor Ron emphasised on a number of occasions the fine balance in this case, indeed the real difficulty in coming to a settled conclusion on the matter. She explained that whilst retaining information would be difficult for the claimant, she would be able to do so for a sufficient time to make decisions. It was the weighing of that information that, in Professor Ron’s view, presented the real problems. On balance, she considered that the claimant would not be able to make the relevant decisions. I paraphrase by summarising it in this way. Professor Ron’s view was that the claimant would in reality be doing no more than agreeing to decisions or agreeing with decisions made by others. Dr Sumners explains that in using the language of “may” in his report he had not intended to depart from the concept of probability. He emphasised his concern about impulsivity in this case, but believed that it could be overcome with careful support in the way adverted to in, for example, the occupational therapy report from which he quoted in his report.
25. The opinions of Dr Leng and Dr Walton may be sufficiently explained by reference to their joint reports. In the first dated 4<sup>th</sup> August 2010 they agreed that the claimant could not manage her financial affairs. They did not at that stage deal with litigation capacity. In their second joint report dated 8<sup>th</sup> October 2010 that subject was confronted head-on. This is what they said:

“9. Capacity for legal affairs.

10. Dr Leng’s expressed opinion was that the patient lacked capacity to deal with her legal affairs. This was based upon information provided to him at the time of the assessment. However he since understands that she has been able to agree to a Trust Fund and to receive periodic payments. Therefore, she may have residual ability to deal with her legal affairs, at least to an extent.

11. Dr Walton remains of the view that if, as has been suggested by her mother, the Claimant understands her litigation and has made decisions in relation to accepting periodic as opposed to lump sum payment and has agreed to the setting up of a Trust, then she probably retains capacity in relation to her litigation.

12. Both experts agree that should the matter remain in issue, then it might be helpful for the Court to give consideration to instructing a suitable expert to express an opinion based upon a study of the patient's correspondence (e.g. letters, emails and transcripts of verbal interactions) with others, such as her legal advisers, which might demonstrate the ability or otherwise to operate her legal affairs with or without assistance... Both experts also agree that as good a test as any would be whether her legal advisors are able to get her to understand the questions they need to put to her, to provide adequate answers to those questions, to take instructions from her, and to make the decisions they require of her."

It is fair to say that Dr Leng did not in terms mention "legal affairs" in his earlier report, which was in context directed towards a discussion of capacity to conduct financial affairs.

26. The reference to periodic payments, lump sums and trust funds arose in this way. Dr Walton had a long interview with P to elicit from her her perceptions of the claimant's functioning. He made notes of her descriptions, and the summary of them appears in bullet form point in his report. Among the information given to him was this:

"She understands her litigation and that she is not able to take responsibility for any future award. She has agreed that a trust and periodic payments is a better option for her than a large lump sum."

27. The suggestion made in paragraph 12 of the neuropsychologists' joint report that information be provided concerning the claimant's dealings with those who advise her has not been taken up. There is no evidence before me from the claimant's legal advisers concerning their dealings with her at all. I have noted already that hitherto these proceedings have been conducted by the claimant herself. It is, to my mind, significant that the claimant has been able to provide detailed instructions which have allowed a careful 34-paragraph statement to be prepared in the assessment proceedings, which she signed on 15<sup>th</sup> January 2010. The significance is this. If there had been any apparent lack of capacity in the minds of those who have been dealing with the claimant in these proceedings, one would have expected evidence to that effect. It is not uncommon as a matter of experience, for questions of capacity to arise precisely because legal advisers are concerned that a party with whom they are dealing is failing to understand what is going on or give coherent instructions.

28. P, the claimant's mother, gave evidence both orally and in writing. She has produced a statement for the purposes of the proceedings generally, but in addition produced a short statement dated 21<sup>st</sup> December 2010 dealing with the question of capacity. As part of that statement she said this:

“4. I have been assisting V in making most of the decisions in her claim since the beginning. Although she has not had to do this yet, I don't believe she would be able to manage the litigation or properly make necessary decisions alone.

5. V and I have asked her solicitor to send copies of all letters to V to me. V doesn't even always bother to open the copy that she receives and if she does she would always bring it to me. If there is a form which the solicitor has asked her to sign she would also always check with me before signing it.

6. I have been asked to think about what V would do if she was asked by her solicitor to make a decision in the case and I was not available to advise her. I believe that V would just agree to whatever was being proposed or had been advised. She doesn't question or analyse issues or advice herself and, as discussed in a number of the medical reports, often acts impulsively.

7. V has never written to her solicitor. If she ever had a query about her case (which is rare) she may discuss it with me and would then leave it to me to discuss with her solicitor. Having said that she would ring the solicitor if I told her to – but not off her own bat.

8. V isn't able to concentrate long enough to read a long report or letter and I have to summarise such things for her. If a decision needs to be made (e.g. about a report) she will then ask me what I think she should do and will follow my advice. I simply don't think she is able to make an important decision for herself any more – this applies to the legal case and to other routine household things like recently when she had to make a decision about whether or not to pay for Sky TV, which decision I had to effectively make for her.

9. I do not believe V is capable of managing the litigation herself and I would be happy to act as her Litigation Friend.”

29. It is striking that in this statement P speaks of assisting her daughter and considers the position if her daughter were left to make decisions on her own. There is no suggestion that the claimant will ever be in that position. The clear understanding is that the claimant would, irrespective of the outcome of this application, continue to receive the help, support and advice of her parents, particularly her mother, and also of her legal advisers. In her oral evidence P said that the claimant had never questioned her views or the advice that she was giving. The reality, said P, was that she and not the claimant would make any material decision.

30. Insofar as the claimant's circumstances were dealt with in evidence, P confirmed that the claimant lives in her own flat. She also confirmed that whilst the claimant was back at work she managed to go to and fro, after the initial period, on public transport. She emphasised that a great deal of support was needed. P explained that the claimant has been much involved in the Headway Charity (which was referred to in the medical reports), where she undertook some voluntary work. In general terms, P explained that she accompanied her daughter on all hospital appointments, although the claimant could go to the GP on her own to deal with routine matters like repeat prescriptions. P explained the reference to periodical payments and trusts in Dr Walton's report. Advice had been received about how the money that might come by way of settlement or award should be handled. P told me that the claimant had, in essence, gone along with the suggestion that there should be a personal injury trust which restricted her access to the money. The claimant, I was told, understands that one way or another someone else will look after the money.

#### Discussion and conclusion

31. Mr Baldock, who appears for the defendant, suggested that I should approach the evidence of P with particular caution, in just the same way as the authorities suggest that one should be cautious of evidence given by a litigant on his or her own behalf in an application relating to capacity. I do not consider that the analogy drawn by Mr Baldock is apt. All experts who provide opinions on this type of issue do so relying in part on the accounts of individuals, usually close family members, which speak of the practical impact of the injuries in question. P has spoken at length to the experts in this case. The practical evidence of those who live on a day-to-day basis with a claimant's disabilities can be illuminating of this issue, just as such evidence can be illuminating on so many issues that arise in serious injury cases. Mr Baldock did not seek to challenge P's evidence, but rather in a measured and sensitive way to demonstrate that her evidence did not, in reality, provide significant support for the proposition that her daughter lacked litigation capacity. I have already observed that P's witness statement largely considered a hypothesis that will not occur, namely her daughter being left alone to make important decisions, or left only with the benefit of legal advice and no family support. I accept the factual account given by P, in summary that the claimant defers to her and agrees with her. However, there is nothing in the evidence which suggests that she or the legal team have sought to determine whether, with sensitive, careful and structured advice and discussion, the claimant can be assisted to make a decision which is, in truth, hers. That is the process adverted to in a different context in the medical evidence quoted by Dr Sumners. The reality is that the decisions made hitherto in this litigation, save for the agreement that any award needs protecting, have been relatively routine. The medical evidence paints a picture of a young lady without significant cognitive impairment but with impulsivity. There are, as it seems to me, insights in the background medical material which suggest that in a structured environment that impulsivity is capable of being managed. Dr Leng's opinion as set out in the joint report lends, if I may say so respectfully, only peripheral support for the contention that the claimant lacks litigation capacity. The fine balance of which Professor Ron and Dr Sumners spoke was apparent from the way in which they each gave their evidence. Neither was dogmatic and each seemed reluctant to disagree with



the other. It seemed to me that each might easily have come to the opposite view.

32. There are many indications in the evidence which suggest that the claimant can, in general terms, manage to make decisions appropriately, albeit with help. I have mentioned the lack of cognitive impairment, but, in particular, have in mind her return to work for 6 months in 2008, her independent travel, and her independent living as well. The question is whether, on the balance of probabilities, the evidence presented on this issue has satisfied me that the presumption of capacity should be displaced. For reasons to which I have already noted, I do not consider that the evidence of P carries the matter far enough. I respect her opinion that when the time comes her daughter will find it impossible to do other than follow her advice and that of the lawyers. But I am not satisfied that the opinion is sufficiently founded in past experience of attempting to determine whether the claimant herself can make significant decisions, for it to add much weight in the context of this application.
33. Professor Ron's opinion is based on all the information available to her, long experience and great expertise. So too is Dr Sumner's opinion. It is significant, to my mind, that Professor Ron's considered language in the joint report suggested that the claimant would experience difficulties using and weighing up necessary information to take decisions. She went on to say that "Therefore, on the balance of probabilities, she lacks litigation capacity." However, the second proposition does not follow from the first. Even during her oral evidence it appeared to me that Professor Ron was equating the balance of probabilities in this context with difficulties in achieving a particular outcome rather than asking the question: is the claimant unable to achieve the outcome, on the balance of probabilities? In her oral evidence Professor Ron spoke of the balance of probabilities on a number of occasions, and in re-examination she confirmed that, on the balance of probabilities, there would be an inability to make a decision. However, in the joint report Professor Ron explicitly stated that she was giving less weight to the assistance that would be available to the claimant than was Dr Sumners in coming to his conclusion, yet that matter is something which properly should be accorded weight.
34. Having heard Professor Ron, and in particular having regard to the fact that in her written and oral evidence she was trying to convey medical conclusions in legal language, I consider that the joint report contained her considered views. Those were that the claimant would have difficulties rather than a straightforward inability to weigh the evidence and make relevant decisions. It seems to me that those difficulties are capable of being ameliorated, if not entirely overcome, by the careful and structured support that the statute contemplates. In the end, it seemed to me that there was very little between Dr Sumners and Professor Ron, even in the language they used in their reports.
35. Taking all of the evidence into account, I am not satisfied, on the balance of probabilities, that the claimant is unable to use and weigh information as part of the process of making litigation decisions. It is therefore inappropriate to declare that she lacks capacity. In the circumstances the application must be dismissed.

