



**The Forum of Complex Injury Solicitors
(FOCIS)**

Response to

**Civil Justice Council's Consultation Paper:
"Procedure for Determining Mental Capacity
in Civil Proceedings"**

About Us

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims, including group actions. Some of our members also act as Deputies principally for those who lack capacity to manage their own finances and affairs. The objectives of FOCIS are to:-

1. Promote high standards of representation of claimant personal injury and medical negligence clients,
2. Share knowledge and information among members of the Forum,
3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,
4. Use members' expertise to promote improvements to the legal process and to inform debate,
5. Develop fellowship among members.

See further www.focis.org.uk.

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 24 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Eight of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hugh James
Atherton Godfrey	Irwin Mitchell
Ashtons	Jones Maidment Wilson
Balfour Manson	Kingsley Napley
Bolt Burdon Kemp	Leigh Day
Dean Wilson	Moore Barlow
Digby Brown	Osbornes
Fieldfisher	Prince Evans
Fletchers	Serious Law
Freeths	Slater & Gordon Lawyers
Hodge Jones & Allen	Stewarts
	Thompsons NI

FOCIS has been the name since 2007 of the organisation formerly known as the Richard Grand Society (founded in 1997 based on the concept of the American 'Inner Circle of Advocates' which had been formed in 1972 by Arizona and San Francisco Attorney Richard Grand).

FOCIS members act for seriously injured claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members' experience, practices and procedures. We will defer to others to respond on the impact relating to other classes of case.

Reply

FOCIS welcomes the opportunity to respond to the Civil Justice Council's consultation paper.

Consultation questions

1) Do you agree that other parties to the litigation do not generally have any legitimate interest in the outcome of the determination of a party's current litigation capacity?

Yes notwithstanding that the Defendant may have a significant financial interest in the outcome.

2) Do you agree that the approach to the issue should be inquisitorial, with the court ultimately responsible for deciding what evidence it needs to determine the issue?

Yes although the inquisition should be by an independent party. The success of the inquisition will depend on (1) the quality of the person/s appointed to conduct the inquisition (2) the quality of the information provided (3) their resources. We are keen to avoid decisions being delayed and/or challenged potentially leading to an adversarial battle with further delays.

3) Is clearer guidance needed as to the duty on legal representatives to raise with the court an issue as to the litigation capacity of their own client?

No not in the limited context of specialist Claimant firms pursuing complex compensation claims almost invariably with medical expert opinion or at least medical records as to the Claimant's likely litigation capacity. Capacity can fluctuate and so sometimes it will be appropriate for our Members to raise with the court the need for a capacity review usually with proposals

4) What level of belief or evidence should trigger such a duty?

In the very large majority of such cases FOCIS Members assess a Claimant's litigation capacity prior to issuing court proceedings. As a consequence, the duty to raise the issue of capacity with the court rarely arises and almost invariably where post issuing there is fresh evidence as to the Claimant's litigation capacity which persuades our Member to reassess and the reassessment is disputed by the Claimant or his family. The reassessment might follow Part 35 expert evidence for example from a neuropsychologist or Neuropsychiatrist or other evidence for example irrational and inconsistent instructions from the Claimant. The reassessment might be either for finding capacity where before it was considered capacity was absent or alternatively

(and in practice more frequently) for finding capacity was lacking. Our Members' assessments of capacity are based on all available evidence and seek to balance the proper assumption of capacity against the need for the Claimant to have safeguards particularly those within CPR 21. Our Members are likely to adopt a cautious approach and so appoint a Litigation Friend where the balance of evidence identifies at least a real risk of incapacity. This cautious approach probably reflects the considerable prejudice to the Claimant if ultimately litigation capacity is wrongly assumed. It may also reflect the potential financial risk to our Members if they act for 3 or 4 or more years under a CFA with the Claimant and which ultimately is invalidated.

5) Is clearer guidance needed as to the duty on legal representatives to raise with the court an issue as to the litigation capacity of another party to the proceedings who is unrepresented?

No there is very rarely an unrepresented Party to proceedings in the context of our Members' claims. We anticipate that the existing guidance for legal representatives reflects the primary duty to the court and that the issue should be raised whenever on the balance of all credible evidence there is a real risk that the unrepresented party lacks litigation capacity.

6) What level of belief or evidence should trigger such a duty?

Where in the considered opinion of the legal representative the balance of credible evidence indicates there is a real risk that the unrepresented party lacks litigation capacity.

7) Should other parties to proceedings have a general duty to raise with the court an issue as to the litigation capacity of a party to the proceedings who is unrepresented:

a. In all cases?

Yes where the test at 6. is satisfied

b. In some cases (e.g. where the other party is a public body, insurer etc.)?

N/A

8) If so, what level of belief or evidence should trigger such a duty?

See 6 above

9) Should the Pre-Action Protocols be amended to require parties to identify issues of potential lack of litigation capacity at the pre-action stage?

For the reasons set out above, we doubt this will make any significant difference in the narrow context of our Members' claims. However, we do see that generally this may be desirable particularly where there may be consideration of an interim payment for a party of uncertain litigation capacity.

10) Should key court forms (claim forms, acknowledgments of service and defence forms) be amended to include questions about whether another party may lack litigation capacity?

Yes- but limited by reference to the test set out at 6. The Directions Questionnaire has provision for information about vulnerable parties and more recently the Claim Form seeks the same information. Provision could be extended within these and/or other key court forms as to any concerns about capacity to litigate and/or financial capacity.

11) Should there be any particular sanction(s) for a clear failure by another party to raise the issue?

We anticipate that particular sanctions may be appropriate in relation to a litigant in person and are content to leave this to others but not otherwise as legal representatives are well aware that sanctions may apply for failures to assist the court and further 'particular' sanctions may be unfair and unnecessarily restrict judicial discretion.

12) Do you have any examples of issues you have faced in practice when you have had to decide whether a client or another party was being 'difficult' or whether they might lack litigation capacity? If so, can you explain how these were dealt with.

In our experience such situations are very rare. In one case an unrepresented Defendant appeared unable to deal with the obligations of disclosure or understand the implication of a settlement proposal and costs consequences. The 2nd Defendant was not willing to indemnify or agree with that party an apportioned settlement. A hearing was applied for and judgement was entered against the 2nd defendant. The 1st defendant lacked capacity (but no costs were expended proving this or discontinuing proceedings) the proceedings were stayed against the 1st Defendant by Tomlin order and a Bullock costs order against Defendant 2.

13) Do you think any of the following should be involved in the investigation of an unrepresented party's litigation capacity:

a. The court? **Yes. Where the test at 6 is made out the court should instigate investigations but not carry out the investigation itself not least because there are unlikely to be sufficient resources.**

b. Other parties and/or their legal representatives? **Yes to a limited extent by legal representatives in the context of the duty owed by them to the court to ensure relevant issues are brought to the judge's attention..**

c. The Official Solicitor (Harbin v Masterman enquiry)? **Only if the OS were given additional resources which seems unlikely. Even if resourced, the OS would have to tread very carefully and not go beyond assisting those protected parties or beneficiaries to assert their position.**

d. Litigation friend (interim declaration of incapacity)? **No. There are substantial hurdles which would make this risky for them and unlikely to be a reliable solution including the possible exposure of the litigation friend to legal costs and the likely lack of expertise for this purpose of most litigation friends.**

e. Other (please specify)? **Yes third parties with suitable expertise to investigate litigation capacity such as Charities (Headway or Child Brain Injury Trust for example) Court of Protection Panel Member Deputies or CABs to assist the unrepresented Party or Litigation Friend and which should receive appropriate funding for such purpose.**

14) Do you have any comments to make in relation to your answers to the previous question? **Our Members' experience is almost invariably through acting for individuals whose litigation capacity is not clear and so would have investigated this at the outset and for reasons set out above. Where the issue of another Party's litigation capacity comes before the court we envisage the Judge may instigate the investigation of that Party's capacity (in circumstances we set out above) and which should mean reference of the Party to a suitable independent third party which has appropriate expertise. We identify Headway and CBiT as Charities which maintain lists of solicitors with experience of brain injury and also the Court of Protection's list of Deputy Panel Members as possible third parties. Suitable funding would have to be available. The other Parties in the litigation would assist the court as appropriate for example raising the issue of that Party's litigation capacity and identifying possible third parties.**

15) Should the civil courts have more clearly defined powers to order disclosure of relevant documents for the purpose of investigating litigation capacity? **No - not for this purpose as we envisage the appointment of a suitable independent third party who would be better suited and experienced. Capacity documentation would be classed as "relevant" if in dispute so would be disclosed in any event and directions would provide for service/exchange of expert evidence.**

16) If so, in what circumstances should such powers be exercised? **N/A**

17) Should the civil courts have powers to call for reports, similar to those of the Court of Protection, for the purpose of investigating and determining issues of litigation capacity? **Yes where the investigation is carried out and reports are commissioned by an independent third party and the Parties haven't already provided for this.**

18) Should there be a rule or presumption that other parties to the proceedings (and/or non-parties) cannot attend a hearing to determine a party's litigation capacity? **Yes**

19) Should the party be granted anonymity and/or should reporting restrictions be imposed in relation to the hearing? **Yes exceptionally where the risk of prejudice to the Party in the particular circumstances outweighs the general presumption of open reporting.**

20) What form should a party's right to challenge a determination that they lack capacity take, to ensure they are able to exercise that right effectively? **Through incorporation of that right in an order of the court and a Direction for investigation by a suitable third party independent of any legal representative of that party in similar manner to that envisaged at Answers 13 and 14 above. It is important to note that Capacity is issue/decision specific and can fluctuate over time and so proper allowance should be made for redetermination where appropriate for example in the wording of the order/direction for investigation. Having a right of appeal is unavoidable. We envisage a 2 stage process where permission to appeal is sought first to weed out hopeless appeals.**

21) Should a party's legal representatives be able to refer for review a determination on capacity which they consider to be obviously and seriously flawed? **Yes and including the party's fluctuating capacity.**

22) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that no steps may be taken in the proceedings without the permission of the court? **Yes but in expectation that in part through provision of a Central Fund for Parties without representation there would be speedy resolution.**

23) Do you agree that pending a hearing to determine a party's litigation capacity, the starting point should be that any existing orders in the proceedings should be stayed? **Yes.**

24) If so, do you think those starting points should be subject to a 'balance of harm' test? **Yes**

25) What factors should be included in such a test? **The likely time it will take for the determination of capacity, what prejudice other Parties may suffer if determination will take such time, what prejudice may be suffered by the party whose litigation is to be determined if steps/actions are taken prior to the determination. The court should have regard to whether some (likely the most pressing) steps/actions should be taken. The court should have regard to whether the Party's litigation capacity has previously been investigated, by whom, the evidence then gathered and the conclusions drawn. The court may decide to adopt those conclusions until rebutted (if at all).**

26) Have you experienced problems securing legal aid for clients who appear to lack litigation capacity? If so, please summarise the nature of the problem. **Legal Aid is not available at all for personal injury claims and although in theory is available to a limited degree for clinical negligence claims in practice is used rarely in part because of rules which severely restrict eligibility and which experts can be given instructions.**

27) Should legal aid regulations be amended to enable a solicitor who has reasonable grounds to believe a client to be financially eligible to sign legal aid application forms and obtain a legal aid certificate, limited to obtaining an expert report? **We don't believe that legal aid is either a practical or the most economical solution for our members cases. We would advocate for a separate central fund not subject to financial means assessment.**

28) Should non-means tested legal aid be available for the limited purpose of investigating and determining the litigation capacity of a party to civil proceedings?

a. In all cases?

b. In cases within the scope of civil legal aid, as set out in the Legal Aid Sentencing and Punishment of Offenders Act 2012?

Not applicable

29) Do you have any experience of issues arising in relation to payment of costs of investigating and determining litigation capacity by the party's insurers or other third-party funding? **Our experience is that our assertions of litigation incapacity are frequently challenged by insurers so costs issues are commonplace within those claims. However, where properly evidenced, Insurers rarely successfully challenge litigation incapacity and accordingly are responsible for payments of costs following a successful outcome for the Claimant. Where a claim does not succeed disbursements incurred for such purpose are generally paid by After The Event insurers provided prior approval is given.**

30) Where it is necessary to investigate and determine a party's litigation capacity and the party does not have the benefit of legal aid (or other funding) to pay these costs, should the court have the power to require another party to the proceedings with sufficient resources to pay these costs upfront:

a) In all cases; **No**

b) When the other party is the Claimant; **No**

c) When the other party is a public authority; **Our preference would be for a central fund and in suitable cases the Defendant should pay.**

d) When the other party has a source of third-party funding; **No**

Or,

e) Should the rules remain as they are (with the court able to order/invite such an undertaking in appropriate cases). **The court has or should have the power to make a costs order against other parties on determination of the issues between the parties and which should include those relating to determination of litigation capacity. Funding should be through a central fund which could be re-imbursed following any such costs order.**

31) Should a central fund of last resort be created, to fund the investigation and determination of litigation capacity issues where there is no other feasible source of funding? **In our view the central fund should be the primary source of funding. At least in relation to incapacity through brain injury we anticipate there will be many Headway and CBiT panel solicitors who would be prepared to act for reduced rates.**

32) On what principles should the costs of a determination be decided? **In the first place the Judge would order costs to be paid from the central fund to reflect a prescribed fee for the solicitor and with disbursements in addition. There may be provision to exceed the prescribed fees in exceptional cases. On conclusion of the issues between the parties the Judge might make an order for a party to reimburse the central fund and would be expected to treat such costs as in the case.**

33) Do you have experience of issues relating to the procedure for determination of litigation capacity in the civil courts not referred to above? **No**

34) Do you have any other suggestions for changes that would improve the way the civil courts deal with parties who lack capacity?

We consider there are five improvements which should be made in the context of pursuing compensation claims on behalf of those whose litigation capacity is impaired:

a/ the costs currently attributed to the Litigation Friend should be treated as those of the Protected Party. At the very least there should be a rebuttable presumption that the Litigation Friend's costs liability will be reimbursed absent wrong doing on their part. The existing provisions for the Litigation Friend to be personally responsible impose an unfair and unwelcome liability and significantly discourages litigation friends from acting;

b/ there should also be a rebuttable presumption that the solicitor acting for a Protected Party can and should rely on the reasonable instructions from a Litigation Friend that have been provided with informed consent. In doing so the solicitor should be entitled to be paid for the work relating to following those instructions in the same way as they would when acting for a client with full capacity.

c/ the costs both as between Parties and those of the Protected Party should be determined/approved by the same judge at the same time as seems to be provided for in CPR 25.10. Currently within the District Registries there is a most unhelpful separation of these assessments: following the assessment of costs between Parties, assessment of the Protected Party's costs are commonly dispatched by the Costs District Judges to the SCCO. In our strong view the District Judges should assess both within the same detailed assessment procedure;

d/ we agree with the recommendation of the CJC at paragraph 3.26 of its Costs review of May 2023 that CPR 46.14 should be amended. We contend there is already discretion for the court to deal with the incidence of the costs of approval of inter partes costs settlements as part and parcel of the inter-related issue of the deduction of any residual balance of costs from a protected party's damages. However, the fact that a working assumption on behalf of some courts is that there is or may be no such power reinforces the need for a rule change to make it clear that judges do have that discretion. As a matter of principle there is no material difference between the costs of the damages approval hearing and that of any consequent approval on an inter partes costs settlement. They are a by-product of the long-standing principal that you "take your victim as you find him", plus in a significant proportion of such claims the mental incapacity is itself part of the damages that the claim relates to.

e/ we also agree with the recommendation of the CJC at paragraph 3.27 of its Costs review of May 2023 that the process of assessing and approving protected party costs

pursuant to CPR 46.14 should be revised to make it more efficient for both the parties and the court. We would welcome engagement with the CJC and/or CPRC on how such process improvements could be achieved.