

Capacity or Not?



The issue of mental capacity can arise when a person has suffered from a brain injury, stroke or mental illness due to an accident or clinical negligence that was not their fault.

What is mental capacity?

To answer this question, we must look at the Mental Capacity Act 2005 (MCA 2005). The MCA 2005 applies to people over the age of 16 and is designed to protect those individuals who lack the mental capacity to make particular decisions about themselves.

Section 1 (2) states, "*A person must be assumed to have capacity unless it is established that he lacks capacity.*"

Section 2 "*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.*"

How is mental capacity assessed?

The MCA 2005 says a person is unable to make a decision if they cannot:

- understand the information relevant to the decision
- retain that information
- use or weigh up that information as part of the process of making the decision

The person's doctor or another medical professional, such as a psychiatrist, can assess their mental capacity.

Mental capacity in personal injury/clinical negligence claims

Lawyers have a duty to assess their client's capacity to provide instructions at the outset of a claim. If it is found that there is an issue with capacity, then it needs to be dealt with quickly, and the appropriate medical expert opinion must be sought.

It is, therefore, essential to meet with the client personally to make this initial assessment, and if there are concerns, then it is just as necessary to get to know their support network and understand their needs. So, for example, you may have no worries about your client providing instructions during the life of the case, but there would be concerns as to whether that client can manage a large amount of money or, perhaps, an interim payment. So again, capacity is issue-specific and needs to be reviewed regularly.

What if my client lacks capacity?

If the client is found to lack the capacity to instruct a solicitor to pursue a personal injury/clinical negligence claim, then they are deemed to be a protected party.

The protected party must then be supported by a litigation friend. The litigation friend will conduct the proceedings and make decisions in the client's best interests. Any Litigation Friend must be deemed suitable under the law and procedural rules governing claims of this nature. If no such appropriate person is available, then the Court of Protection will appoint a deputy to act on behalf of the client.

Additional support

If necessary, a support worker (sometimes referred to as a Case Manager in Clinical Negligence claims) can be appointed when clients need help with their daily lives. The support worker can be appointed from the beginning of the claim and throughout the claim process. The support worker provides assistance to allow those clients to live more independently and support them to reach their potential by providing both physical and emotional support. They establish and coordinate with a team of medical experts to help with all aspects of the client's daily life, including physiotherapists, psychiatrists, occupational therapists, and speech and language experts.

Settlement

On the successful conclusion of the claim, the client will be awarded compensation subject to approval by the Court. Part of the compensation will cover the client's future care needs. The type and value of such care will be determined by independent experts instructed during the life of the claim.

If the client is thought to lack the capacity to manage the award of damages, the Court of Protection may appoint a deputy to manage the same. A personal injury trust can also be set up to manage the client's

compensation.

How can we help?

At Lester Aldridge, we pride ourselves in putting our client's needs first and securing the best possible financial outcome to ensure that they can lead independent and fulfilling lives.

Our team has a wealth of experience in dealing with the issue of mental capacity in [personal injury/clinical negligence claims](#). Please speak to [David Healy](#), Partner and Head of PI at Lester Aldridge or [Melanie Lidstone-Land](#), Senior Associate at Lester Aldridge.