



Personal Injury and Medical Law Teams Case Note

Bailey v Warren [2006] EWCA Civ 51, Court of Appeal [Ward, Arden, Hallett LJ]

The summary in Lawtel is somewhat inaccurate and misleading and suffers from trying to reduce three disparate and detailed judgments on a number of important issues into a few general propositions.

Facts: The Claimant suffered severe head injuries in a road traffic accident in May 1998. He was crossing a four lane dual carriageway in Stockport with a friend when he was struck by the Defendant's car. The D maintained that he was driving at about 30 to 35 mph and that he never saw either pedestrian; that they simply stepped out from the central reservation just as he was moving back into the nearside lane having overtaken another vehicle. Despite this, D, on advice, pleaded guilty to an offence of driving without due care and attention. Both pedestrians had been drinking and neither had any recollection of the accident; the D's own recall was scant.

The Claimant suffered frontal and temporal lobe brain damage. He made a good physical recovery such that he was able to return to light duties at work in October 1998 but his injuries resulted in permanent cognitive dysfunction upon the extent and severity of which the experts disagreed. In February 1999 he returned to his former duties as a machine operator but the following month developed post traumatic epilepsy and no longer works.

C had always lived at home with his family. In June 1998 he contacted and instructed solicitors to obtain legal aid. A letter of claim was sent in March 1999 and an offer to settle liability at 50% was made in March 2000 at which time quantum had not been investigated fully. Counsel advised in strong terms that this offer should be accepted. The Claimant was informed of the offer when at work a month later and having consulted with his family, instructed his step-brother to speak to his solicitors giving his approval to this compromise. At no time had anyone thought to question whether or not he required the intervention of a litigation friend. His advisers were heavily influenced by the views of a Consultant in Rehabilitation Medicine who continued to monitor and treat the Claimant and described his recovery as "excellent".

Liability was duly agreed on a 50/50 basis in November 2000 and on 4 December 2001 judgment was entered for the Claimant for 50% of the full value of his damages to be determined. His fellow pedestrian also compromised her liability claim at 50%.

In January 2003 Professor Neary, neurologist expressed the view that the C had the mental age of 12 or 13 and lacked mental capacity. The court ordered an application be made for a litigation friend to be appointed. A new firm of solicitors, very

experienced in head injury claims, took over conduct of the case and they and counsel had concerns about C's capacity, the quality of investigation by his previous solicitors and the level of settlement achieved.**

A litigation friend was appointed and the District Judge ordered that the C serve applications to set aside judgment with two issues to be determined:

- i) has the C at any time from the accident been a patient within the meaning of CPR and if so, when and for what periods?
- ii) As a matter of law, what effect does the agreement as to liability between the C and the D have in these proceedings?

Holland J heard evidence from the C and his father and also considered the medical evidence which was conflicting on material issues. The evidence showed that initially the C was slow with difficulties in recall and orientation but had no obvious executive difficulties. He had a diminished sense of smell and increased irritability was noted. He saw Professor Neary in January 2000 in respect of his fits who at that stage expressed no view as to his capacity. In February 2002 C's mother died – previously she had been instrumental in organizing his life. In October 2002 his treating rehabilitation physician considered that he had made a very good recovering but was suffering from some residual cognitive difficulties and post traumatic epilepsy.

When next seen by Professor Neary, there had been a deterioration: C was noted to have dizziness, reduced sense of smell and taste, tinnitus, double vision, epilepsy, poor concentration and memory, poor communication and cluster headaches. He was fully capable of all daily activities and could do domestic activities and basic shopping. However he was thought to be unsafe in the kitchen because of a poor sense of smell and bad memory. His judgment was impaired and he was very disorganized in his daily activities. His own family felt that he was incapable of living on his own and was incapable of managing his financial affairs.

Professor Neary considered that C was suffering 'front lobe syndrome' manifesting itself in 'cognitive breakdown' and 'behavioural disorder', that he was "pathologically dependent on his family", and that he had been incapable of managing his own affairs both in 2004 and 2002

There was a dispute between the psychologists as to whether or not C lacked capacity in 2002: the neuropsychologist felt that he did not; the clinical psychologist considered that he did, relying in part upon the fact that C had contacted his solicitor from time to time enquiring as to the progress of his claim. The psychiatrist relied upon by the C felt that the improvement was "more apparent than real" and that C's family and colleagues had cushioned him from "the harsh realities of life". The D's neuropsychiatrist considered that any organic personality disorder was mild and questioned whether bereavement accounted for C's deterioration after 2 years of improvement immediately post-accident. He concluded that C had capacity in 2000 and probably did in 2004 as well.

Holland J considered Masterman-Lister v Jewell [2003] 3 All ER 162 and the decision of Boreham J in White v Fell (unreported November 1987), approved by Chadwick LJ in Masterman-Lister. He held that the C certainly did not have capacity at the time of the applications under consideration or on 4 December 2001 when judgment was entered, and that the decision to treat him as a patient and appoint a litigation friend in 2003 was "readily sustainable". He held however that the C he did have capacity in November 2000 for the purpose of agreeing a 50/50 apportionment of liability. He drew a distinction therefore between the liability and quantum issues

As to the 50/50 apportionment, Holland J had before him the police report, photographs, the respondent's witness statement and that of an independent witness who did not see the accident but considered that the D's driving had been normal at the time. The judge did not hear evidence or submissions on the circumstances of the accident itself. He nonetheless considered the D's lookout was inadequate, his speed probably above 30mph and his guilty plea "sensible", but considered contributory negligence would be considerable. Whilst expressing the view that he would have queried an apportionment of liability of less than 60/40 "it might have been difficult to resist a strong submission in favour of 50/50". (It was submitted on appeal that this observation might prejudice any claim the C might have against his former advisers).

Holland J accordingly directed that the compromise be approved and that the judgment stand.

The Claimant appealed:

- i) that the judge was wrong to distinguish the liability and causation issues when deciding whether or not the C had capacity to agree the compromise on liability
- ii) that the judge failed properly to apply the Masterman-Lister test or to address the 8 questions set out at paragraph 49 of Kennedy LJ's judgment in that case
- iii) that the judge was wrong on the evidence to find that C had capacity at the time of compromise of liability in November 2002
- iv) that the judge was wrong to hold that if C was a patient in November 2002, he would nonetheless have approved the settlement, arguing that:
 - a. only where the settlement is manifestly in the interests of the party with a disability, should the court exercise its power retrospectively in this way.
 - b. in the absence of the consent of the litigation friend and support of the C's lawyers, so to act is not approving a compromise but imposing one.
 - c. The advice for 50/50 was 'plainly wrong', the D having pleaded guilty in the Magistrates court.
 - d. Baker v Willoughby [1970] AC467 and Eagle v Chambers [2003] WCA 1107 are examples of the appellate courts interfering with a trial judge's assessment of apportionment and in the latter Hale LJ referred to the 'destructive disparity' between a pedestrian and a motorist that she believed should be reflected in such apportionment¹

D contended that Kennedy LJ in Masterman-Lister (paragraph 30 and 31) held that if steps in litigation are taken on behalf of a claimant who lacks capacity but no-one realizes it at the time, provided everyone has acted in good faith and there is no manifest disadvantage to the party subsequently found to have been a patient at the relevant time, CPR allows the judges to regularise the position and that Holland J's approach was entirely in accordance with this.

¹ This however appears to be part of her own crusade for 'distributive justice' which the writer believes at times parts company with the accepted rules of tort: see her judgment in [Parkinson v St James and Seacroft University Hospital NHS Trust \(2001\)](#) 3 AER 97 (wrongful birth)

Held: Appeal dismissed

- 1) the test for mental capacity was issue specific and directed to the transaction which had to be effected. The difficulty was in defining the ambit of that issue or transaction. The court's enquiry should be focused on the litigant's capacity to conduct proceedings: he must be able to understand all aspects of those proceedings and take an informed decision with the help of any explanation from his advisers.
- 2) (Hallett LJ dissenting) The issue of capacity cannot be judged piecemeal during the course of a case; if a litigant had the ability to understand what was meant by a 50/50 split of liability but lacked the capacity to understand the concept of damages which resulted from that apportionment of liability, then he lacked true capacity to conduct proceedings. On the facts of the instant case, therefore, it was pertinent to ask whether C was a patient for the purposes of CPR Pt 21 in 2000 when he approved the liability split. In the circumstances the judge had approached this aspect of the case too narrowly on a proper application of Masterman-Lister
- 3) The court's discretion to approve the compromise on liability was an unfettered one and would be exercised to ensure the protection of the patient and that his best interests were served. In the instant case, the compromise avoided the necessity for a trial and C had the full backing and support of his family when he agreed it. Further the parties had acted in good faith and any disadvantage caused to C was alleviated by the fact that he may have an arguable case against his former advisers if he was dissatisfied with the settlement
- 4) The case would not be remitted to the judge for hearing; he had heard all the relevant evidence and was satisfied that at the time of agreement on liability C did not lack the mental capacity to agree the settlement. If the case was remitted it was inevitable that he would either find against C or exercise his discretion in favour of the settlement on liability.

Hallett LJ reviewed the law and in particular the judgment of Kennedy LJ in Masterman-Lister. Consideration was given as to whether a distinction should be read into Kennedy LJ's judgment between the capacity to conduct litigation as a whole and capacity to handle a large sum of money. In White v Fell (unreported November 1987, Boreham J said:

"The expression 'incapable of managing her own affairs and property' must be construed in a common sense way as a whole. It does not call for proof of complete incapacity ... to have that capacity she required first the insight and understanding of the fact that she has a problem in respect of which she needs advice ... Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and advise her appropriately ... Finally, she needs sufficient mental capacity to understand and to make decisions based upon, or otherwise give effect to, such advice as she may receive"

Chadwick LJ in Masterman-Lister in considering that case observed: "She had the necessary understanding to take the decisions which she needed to take in relation to a claim for compensation"

Hallett LJ therefore held that:

- 1) Masterman-Lister was issue specific and thus the court must concentrate on the particular individual and the particular transaction
- 2) Kennedy LJ when referring to "all lay client decisions related to the actions up to and including a decision to settle" he was merely highlighting the issue specificity nature of the mental capacity test and was satisfied that although, in law, a litigation may be able to follow all the steps up to and including the resolution of the issues of both liability and quantum, yet he or she may still be found to lack the capacity to administer a substantial award of damages. "All will depend on the facts of the case the capacity of the individual and the nature and complexity of the issues to be decided"
- 3) Whilst many claimants find quantum issues "almost invariably" complex, in this case the issues of liability were relatively straightforward". Simply because the C lacks the capacity to deal with issues of quantum in December 2001 does not mean that he must be taken to lack capacity from the very beginning
- 4) Much as the courts may wish to protect litigants from the ill-advised consequences of their own actions, a claimant who is managing perfectly well at home and at work might justifiably feel aggrieved if his wishes to accept a liability compromise are overridden by a refusal of court approval because his own legal advisers do not support it.
- 5) The right to take a decision on a claim of damages is an important one and not to be taken lightly. "Court should tread very carefully and only interfere with an individual's rights when absolutely necessary (paragraph 77). Chadwick LJ's views approved:

"It is not the task of the courts to prevent those who have the mental capacity to make rational decisions from making decisions which others may regard as rash or irresponsible"

- 6) She paraphrased the questions posed by Holland J:
 - a. Did the claimant have the insight and understanding that he had a problem with respect to the disposal of the liability issue so as to need advice?
 - b. Did he seek an appropriate adviser and instruct him with sufficient clarity
 - c. Did he have sufficient mental capacity to understand and to make decisions about the specific issue namely liability or otherwise give effect to such advice as he received?

"Whatever the formulation one chooses, it seems to me that these questions addressed the right issues and adhered to the principles confirmed in *Masterman-Lister*"
- 7) The approach that a court should adopt when faced with medical evidence as to mental impairment is that of Mummery LJ in Balfour Beatty Rail Maintenance Ltd [2002] IRLR 711

"The essential question in each case is whether, on sensible interpretation of the relevant evidence, including the expert medical evidence and reasonable inferences which can be made

from all the evidence, the applicant can fairly be described as having a physical or mental impairment”

- 8) Expert evidence, however authoritative, is not conclusive (paragraph 87). The judge had the benefit of the witnesses, the solicitor’s attendance notes; he accepted the medical evidence so far as 2001 was concerned but not as to November 2000. His reasons for doing so were based soundly on the evidence and the CA would not interfere
- 9) *Per curiam*. Had C been found to lack capacity, the approval was still appropriate. The failure of his current legal team and current litigation friend to support the compromise does not prevent a court from doing so retrospectively.

“Given the overriding objective to which CPR 21 is subject ... the judge has a very wide discretion to deal with the matter justly and proportionately”.

- 10) Holland J was noted to have a vast wealth of experience in personal injury cases and that contributory negligence would “loom large” in this case.

“No matter how critically the higher courts may regard motorists, an adult pedestrian is still expected to take some reasonable care of his or herself”

Arden LJ took a different approach to whether the litigation should be treated as one transaction or as a sequence of self-contained steps not connected with each other.

- 1) *Dissenting from Hallett LJ*, she considered it would be undesirable to have a different test of capacity dependent on whether the offer happened to be made while proceedings were in contemplation or after they were commenced. Accordingly Holland J took too narrow a view of the case and applied the wrong test. The implication that capacity would have to be reviewed at each stage of proceedings, would be impractical; the appropriate test is whether the client had capacity to start proceedings and would include the question whether he would have capacity for the purposes of an offer of compromise. “Where a client seeks damages for personal injury because he has suffered a brain injury, capacity is a question that ought in general routinely to be considered by those representing him. In cases of doubt, this will usually mean that the solicitor has to arrange for a medical opinion to be obtained.” (paragraph 125)
- 2) A compromise by a patient that has not been approved by a court is invalid unless it is approved by the court: Dienst v Lennig Chemicals Ltd [1969] AC 170. HL and Drinkall v Whitwood [2004] 1 WLR 462 CA. The question of whether CPR 21.10 applies to a person who was not known to be a patient at the time of the compromise, was left open in Masterman-Lister. There is a need for consideration of whether the C had capacity to conduct proceedings in November 2000 and that the issue of capacity at that time should therefore be a retrial of that issue with close evaluation of the expert medical evidence, unless the court can and should approve the liability compromise retrospectively.
- 3) “The overriding question on a retrospective application for approval of a compromise of a patient’s claim is ... whether the compromise would be in

the interests of the patient” and an analogy was drawn with applications made in respect of patients’ property. Therefore by asking whether the compromise was one that the court might have approved at the time, or whether it was “overwhelmingly unfavourable” to the C, Holland J was asking the wrong question. Matters have to be judged on the date when the court was considering giving the retrospective approval.

- 4) In re-exercising discretion appropriately, it has to be asked whether setting aside a compromise with which the claimant and his family has lived for some years was in his interests. Held that it was not: the other pedestrian had accepted a similar apportionment and it was within the range which a court would be prepared to accept in such circumstances.

Ward LJ

- 1) Considered that Counsel had wrongly approached the question of whether within the meaning of CPR 21 at any time since the accident the claimant has been a patient. Having carried out a careful review of the CPR rule 21 provisions, Ward LJ concluded that a ‘patient’ is “a creature of the rules” (paragraph 153) and proceedings do not begin and a claimant does not become a ‘patient’ until a claim or application has been issued.

- 2) At common law an agreement by a patient is valid unless the other party was aware of his status and that he did not understand the nature of that to which he was agreeing. Rule 21.10(1) however demands that “no settlement or compromise shall be valid insofar as it relates to the claim by the patient without the approval of the court.

“However valid the agreement was at common law when it was made, now that the claimant is a patient and the compromise is caught by CPR 21.10, it must now be treated as invalid. I agree with Arden L.J. in this respect”

There would be no sense to restrict the ambit of the rule to post-commencement compromises: this could result in a compromise wholly disadvantageous to a claimant being enforced against him: “it would be manifestly unfair and unjust so restrictively to interpret it” (paragraph 159). Ward LJ relied upon Drinkall²

- 3) The agreement can be in respect of a partial settlement: Drinkall v Whitward
- 4) Accordingly, pursuant to CPR 21.10(1) “the agreement is to be treated as invalid and of no legal effect unless and until the court approves it” (paragraph 162). Having found that the C lack capacity at the time when judgment was entered in 2001, the judge did not need to look back to November 2000: “it was enough that the Claimant was a patient when judgment was entered because that is when a decision has to be taken to approve the compromise or not.”
- 5) The language of CPR 21.10 gives the court unfettered discretion to give or withhold approval
- 6) Holland J cannot be shown to have fallen into error. He held the relevant facts in the balance. The weight to give them was a matter for him; deference must be given to a judge who has seen the evidence and heard the witnesses, particularly given his vast experience in the field.

² although that applied to a child who cannot as a matter of law enter into a binding contractual agreement, whereas an adult of assumed sound mind, can. This distinction was appreciated by C’s counsel in submissions but not, apparently, by Ward LJ

- 7) Therefore (agreeing with Hallett LJ) the judge gave the right answer for the wrong reason that the C was not a patient in November 2000
- 8) In the interpretation of the application of Masterman-Lister he was attracted to Hallett LJ's 'common-sense' reasoning. He considered that Arden LJ's view that "the enquiry should be focused on the capacity to conduct the proceedings" (paragraph of Arden LJ) is "totally consistent with Masterman-Lister" (paragraph 177) and that Holland J approached the issue too narrowly:

"If, as it seems to me, the relevant capacity is capacity to conduct proceedings, then the client must be able to understand all aspects of those proceedings and to take an informed decision, with the help of such explanation as he is given, which bears upon them. It cannot be judged piecemeal. If he has the ability to understand what is meant by a 50/50 split of liability but lacks the capacity to understand the concept of damages which results from that division of liability, then he lacks true capacity to conduct the proceedings." (paragraph 178)

- 9) All three LJJs were agreed that Holland J's comments on the possible favorability of the 50/50 compromise were in no way binding on a future judge hearing a professional negligence claim.

"A myriad of facts bear upon a compromise and encouragement to compromise is a sufficiently powerful incentive of current practice that one should not ordinarily too readily question the wisdom of the settlement when the Court is asked to approve it".

- 10) Whilst the patient's interests predominate, prejudice suffered by the Defendant must also be taken into consideration, as well as the interests of justice (paragraph 184)

"The certainty of outcome and finality of judgments are cardinal pillars which support the smooth passage of litigation through the courts. Setting this judgment aside undermines them"

Comment The different approaches taken in all three judgments in the interpretation of Masterman-Lister and the dissenting judgment of Hallett LJ as to whether 'capacity' can be a discrete issue at any stage of the proceedings without necessarily having retrospective effect, illustrates what a continuing minefield the issue of capacity is. This is in the context of conducting litigation in general, and in the application of CPR rule 21 in particular. The more restrictive construction by Arden and Ward LJJ of the meaning of the word 'patient' for the purposes of rule 21, is to be preferred and will result in greater certainty than the more idiosyncratic approach of Hallett LJ.

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