APPROVAL OF COMPROMISES ON BEHALF OF CHILDREN AND PROTECTED PARTIES: A TOOLKIT

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2 May 2023

INTRODUCTION AND ACKNOWLEDGEMENTS

1. The purpose of this paper is to set out the practical realities and considerations that the practitioner should have in mind when advising a client in a case where approval of the Court pursuant to CPR 21 will or is likely to be necessary and how to go about obtaining such approval.

2. Inevitably, this paper is not a comprehensive statement of the law, which is potentially relevant to either compromise or approval, but hopefully draws attention to some of the pitfalls for the unwary and provides guidance.

3. I am something of a magpie in my practice, constantly looking to learn from others and borrowing what I consider to be their 'best' bits. Consequently, it is not possible to credit everyone who has assisted me, but I should like to thank William Latymer-Sayer KC for his thoughtful observations to me when I was preparing and to Mr Justice Poole, whose notes in relation to the assessment of capacity under Mental Capacity Act 2005 I have borrowed from. I am also grateful to Master Sullivan for inspiring this seminar and for providing helpful comments on the first draft and to Richard Dew for his insight into trusts law. Thanks also to Charlie Bagot KC, Chair of PIBA, who kindly invited me to speak. Any errors are my own and I would welcome editorial suggestions.

READING LIST

4. This paper is not a replacement for the wider reading which in my view is essential for any practitioner who must navigate settlement of a personal injury or fatal accident claim on behalf of a child or protected party. I would recommend everyone to read the chapter in **Kemp & Kemp** in its commentary on approvals. **Foskett On Compromise (9th Edition)**

Part 9 is not entirely up to date, but it is an excellent reminder of the fundamental principles. The **White Book** commentary is an essential source of up-to-date information.

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5. I will address in outline the following considerations which arise on approval of a compromise under CPR 21.

    a. Compromise: the legal framework

    b. Does this party have capacity to litigate?

    c. CPR 21: an overview

    d. Approval: some practical considerations

6. The overwhelming majority of personal injury and fatal accident claims are subject of settlement by way of compromise. It may be because of this that a complex thicket of legal provisions has grown up tall around such compromises. These are all relevant where there is a Child or Protected Party involved but must fall outside the scope of this paper.

7. The impact of **recoverable benefits** whether social security or third party will need to be considered. This is an issue which is relevant not only to the amount of any proposed monetary compromise, but also control and management of any funds. I will touch upon the issue only insofar as it is relevant to approval, but practitioners will be aware that **CPR 36** contains important provisions regarding the impact of third-party payments on damages and costs.

8. For example, practitioners will need to have in mind the provisions in relation to settlement of claims which do or might include a claim for **damages on a provisional basis** pursuant to the Senior Courts Act 1981 s 32A or County Courts Act 1984 section 51 (see also CPR 41.2 and paragraph 4.1 of CPR Practice Direction 41A).

9. Similarly, where the claim includes damages in respect of post-trial loss and damage, then consideration must be given to the appropriate form of award, whether some or all the damages ought to be awarded on a **periodical payment** basis pursuant to the terms of the Damages Act 1996 (see also CPR 41, Part II, and the accompanying Practice Direction 41B).

10. Practitioners will need to have regard to the client's wider interests in respect of potentially harmful publicity regarding any compromise and address the question of whether the public interest in transparency of open court proceedings needs to be modified or overridden to protect the private interests of the injured party by way of an **anonymity order**. It is very common in cases involving settlement of any significant value for the identity of a child or protected party and their family to be protected against unwarranted intrusion by restrictions on the extent of media reporting of settlements.

11. The general principles are those established in *X v Dartford and Gravesham NHS Trust [2015] EWCA Civ 96; [2015] 1 WLR 3647, CA*.

12. A standard order is at **Form PF 10** which can be found at in the forms section of CPR 21 in the White Book 2023. This should be used unless there is very good reason to depart from it. Practitioners are urged to resist the temptation to allow edits (such as removing the need to file anonymised documents with the Court). These provisions exist for good reason to ensure the order succeeds in meeting its objective. The standard form is the product of consultation with APIL and FOIL as well as the Masters and therefore reflects best practice.

COMPROMISE: THE LEGAL FRAMEWORK

13. A compromise ends a dispute from which the agreement to compromise arose. It means that any issues of law or fact which were the subject of the dispute are 'buried beneath the surface of the compromise' *Ovlas SA v Strand (London) Ltd [2009] EWHC 1564 (Ch)*. The general rule is that once a dispute has been validly compromised, a court will not permit that dispute to be raised again in a new action. It does not matter whether a claim was issued in relation to the dispute or not, this principle still applies.

14. The underlying public policy principle is that there should be finality and an end to disputes.

15. The agreement to compromise itself is a contract to which the general principles of contract law apply. This includes where a contract is made by a child or a person lacking capacity, namely that such a contract is voidable at their instance (see Chitty on Contracts Vol 1, Ch 8).

16. Where a contract of compromise is validly entered, any cause of action is replaced by the rights and obligations of the contract of compromise. This means that an alleged tortfeasor is discharged from his obligations arising out of the tort once he has fulfilled the terms of the compromise agreement.

17. Where a compromise is embodied in a court order, then the order is subject of the principles of res judicata.

18. As a result of the **Mental Capacity Act 2005** and **CPR 21** there is special provision for those who may be incapable of entering into valid contracts or whose ability to enter contracts is restricted by their age.

19. **CPR 21.10(1)** provides that no settlement compromise or payment or acceptance or any money paid into court is valid, insofar as it relates to a claim by, on behalf of, or against a child or protected party, without the approval of the court.

20. **CPR 21.3(4)** also provides that any step taken in litigation before a child or protected party has a litigation friend will be of no effect unless the court orders otherwise.

21. The effect of these rules is that a defendant who settles a claim against a protected party or child which does not have the approval of the court does not secure a discharge from liability.

Drinkall v Whitwood [2004] 1 WLR 462

A child was knocked off her bicycle by the Defendant in his car. There was an issue of contributory negligence and before proceedings were issue a settlement of 80:20 was agreed in the child's favour. However, quantum issues were left outstanding. About 18 months after the agreement, just before the child turned 18 (when she would have been able to adopt the agreement and make it binding), the Defendant sought to resile from the agreement to allege a higher degree of contributory negligence, on the basis that the child had not been wearing a helmet.

It was held by the Court of Appeal that the Defendant was entitled to withdraw from the agreement because it was not binding until it had been approved by the Court under CPR 21.10. The Court advised that claimants' representatives ought to issue proceedings with the specific purpose of securing approval of a partial settlement.

22. It should be noted that no argument was raised in *Drinkall* based on estoppel or change of position and it is possible that such an argument would succeed. By contrast, it is clear following the decision of Dingemans J in *Revill v Damiani [2017] EWHC 2630 (QB)* that there is no breach of ECHR Art 6 as read with Art 14 rights of the protected party that a defendant is entitled to withdraw from a proposed agreement in such circumstances.

23. The right to withdraw extends until the time the Court makes an order under CPR 21.10. It does not, however, extend into the period between the Court making the order and its terms being agreed and drawn: Re *Barrell Enterprises [1973] 1 WLR 19*.

Burgin v Dunhill [2014] 1 WLR 933

The Supreme Court considered the effect of a negotiated settlement of a claim where there had been a failure to appreciate that a litigation friend was required and therefore no appointment had been made and no approval of the settlement obtained. C was injured in a road accident in 1999 and at the door of the court to trial in January 2003 was advised to settle for £12,500, because one of her witnesses did not attend. A consent order was made by the court. In 2006, C, with new legal advisers, issued an action against her former lawyers. She also issued a separate claim to set aside the original consent order. The new legal team considered that C had a brain injury, lacked capacity and the claim was worth in the region of £2m.

The first issue which arose was whether, as the Defendant alleged, the test for capacity in respect of the contract of compromise was whether the Claimant understood how far her claim was adversely affected by the non-attendance of the witness and what was a reasonable settlement in the circumstances, or whether, as the Claimant contended, it meant capacity to understand and give instructions on the claim as whole, including how the claim was put, including the fact that it might be a gross undervalue. It was held that the capacity required was in respect of the cause of action which the Claimant in fact had, rather than the one which her then lawyers had actually advanced.

The second issue was what effect on the negotiated settlement was there by the fact that the Claimant lacked capacity and the provisions of CPR 21 ought to have been followed? It was held that there was no requirement for the Defendant to be on notice that the settlement required the approval of the Court in order for CPR 21 to be engaged and as the purpose was to protect parties from their own vulnerabilities, it should apply, regardless

of whether it was their own lawyers who put them in that position or otherwise. The settlement was set aside.

24. It follows that a defendant is at risk in settlement of any personal injury or fatal accidents claim, even if it acted in good faith and neither party's legal representatives considered lack of capacity to be an issue. However, it ought to be a rare case where a claimant can demonstrate that she in fact lacked capacity at the time of her original litigation.

WHO LACKS CAPACITY?

25. The test of capacity is – **ss. 1-3 Mental Capacity Act 2005**.

26. The most significant early case on the interpretation of the statute is *Masterman-Lister v Jewell [2002] EWCA Civ 1889*.

27. Another useful summary is the one by MacDonald J in *TB v KB and LH* [2019] EWCOP 14.

28. Some key points summarised:

    a. A person is presumed to have capacity unless otherwise established.

    b. A person shall not be treated as lacking capacity unless "all practical steps to help" them have been taken without success.

    c. Capacitous people may make unwise decisions.

    d. Decisions on capacity are to be made by the court.

    e. The burden of proof lies on the person asserting lack of capacity. The civil standard of proof applies. However, the court may itself seek to investigate the issue of capacity of its own initiative in which case the presumption of capacity applies, and the party is presumed to have capacity unless otherwise established on the balance of probabilities.

29. MCA 2005 s2(1): "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."

30. Capacity is time specific – "At the material time." It is also decision specific – "a decision in relation to the matter." This is particularly important in the context of serious injury litigation: the question of whether a party has capacity to litigate is separate from whether they can manage their financial affairs. It is possible to have different answers to those questions in the same individual.

31. There is a diagnostic test – "impairment of or a disturbance in the functioning of the mind or brain." There is a functional test – "unable to make a decision for himself." There must be a causal connection - the inability to decide for himself must be because of the impairment or disturbance.

> **MCA 2005 s3(1).: "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)."**

32. Capacity should be determined at the earliest opportunity.

33. Case law on capacity to litigate - *Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511; *Dunhill v Burgin* (Nos 1 and 2) [2014] 1 WLR 933; *Richardson-Ruhan v Ruhan* [2021] EWFC 6; *TB and KB v LH (Capacity to Conduct Proceedings)* [2019] EWCOP 14; *Re P* [2021] EWCOP 27.

34. Note that Mostyn J in *Re P* suggested that the bar was high for capacity to litigate was high:

> "Conducting litigation is not simply a question of providing instructions to a lawyer and then sitting back and watching the case unfold. Litigation is a heavy-duty, dynamic transactional process, both prior to and in court, with information to be recalled, instructions to be given, advice to be received and decisions to be taken, on many occasions, on a number of issues, over the span of the proceedings as they develop." He also took issue with MacDonald J in *TB and KB v LH*: "I would respectfully disagree

> that if a person lacks capacity to conduct proceedings as a litigant in person she might, nevertheless, have capacity to instruct lawyers to represent her …. In my opinion, a litigant needs the same capacity to conduct litigation whether she is represented or not."

See also *Bailey v Warren [2006] EWCA Civ 51* in which it was held that the court's enquiries should be on the ability to conduct proceedings as a whole and not judged on a piecemeal basis.

35. Evidence will usually be in the form of a GP certificate or letter or an expert report from a psychologist, neuropsychologist, psychiatrist, neuropsychiatrist, or other expert as may be appropriate. Where expert evidence is obtained it is essential that it specifically addresses the test in the MCA and analyses the position by reference to evidence before the expert including her own findings. Guidance for experts is available in a book published jointly by the British Medical Association and the Law Society: Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers.

36. However, the decision is for the court and expert evidence will not always be required - *Hinduja v Hinduja* [2020] EWHC 1533 (Ch), [2020] 4 W.L.R. 93

37. Generally speaking, capacity evidence tends to fall into 3 categories: -

    (1) Where it is clear the person has capacity. This includes cases where with the correct support to obtain and act upon advice the person can make their own decisions and communicating them.

    (2) Where the person clearly lacks capacity. This includes cases, for example. where a person might be trusted to operate small sums in a current account for the purposes of day-to-day groceries and needs, but lacks the ability to manage their finances. Similarly, a person might be able to understand advice from his lawyers on a narrow issue, but lacks the ability to make decisions 'over the span of the litigation as it develops' (see *Re P*) above.

(3) Borderline or unclear cases where there is either a lack of suitable evidence upon which a judgment can be formed, where capacity fluctuates or where there is a dispute between the judgment of different experts and witnesses regarding capacity.

38. Where capacity is in issue, this is a question for trial. The phrase "property and affairs" is construed to include only 'business matters, legal transactions and other dealings of a similar kind': see *Re F (Mental Patient: Sterilisation) [1990] 2 AC 1.* It does not extend to physical care or treatment.

39. Be aware that when considering the capability of an individual, regard must be had to the specific circumstances of that person and their immediate problems: see *Masterman-Lister* at paragraph 20.

40. It is not generally useful to have a preliminary issue about whether a claimant lacks capacity or not: *Folks v Faizey [2006] EWCA Civ 381*.

CPR 21: AN OVERVIEW

41. There is a new version of **CPR 21** which came into force on 6 April 2023. The former practice direction to Part 21 has now been revoked.

The basics

42. Part 21 has definitions which are now in line with the terminology of the MCA 2005:

Child	Person under 18
Lacks Capacity	Lacks capacity within the meaning of the MCA 2005
Protected Party	Party or intended party who lacks capacity to conduct the proceedings
Protected Beneficiary	Protected party who lacks capacity to manage and control any money recovered by them on or on their behalf or for their benefit in the proceedings

43. **CPR 21.2(1)** provides that a protected party **must** have a litigation friend to conduct proceedings on their behalf. The position in respect of a child is slightly different: here the general rule requiring a litigation friend can be departed from by order of the Court: **CPR 21.2(3)**.

44. The appointment of a litigation friend must take place before any other step in proceedings (save for issue and service of a claim form or any step taken with the court's permission): **CPR 21.3.**

Who can be a Litigation Friend and how are they appointed?

45. A Deputy appointed by the Court of Protection: **CPR 21.4(2)**. They must file an official copy of the order of the Court of Protection which confers their power to act at the time of the protected party's first step in proceedings: **CPR 21.5(1) and (2)**.

46. A person appointed by the Court (see below)

47. Otherwise, a person (**CPR 21.4(3)**) who

    a. Can fairly and competently conduct proceedings on behalf of the child or protected party; and

    b. Has no interest adverse to that of the child or protected party; who

    c. Undertakes in the case of a claimant to pay any costs which the claimant is ordered to pay, subject to the right to be repaid from the assets of the child or protected party.

    Such a person must file a certificate of suitability (**Form N235)** at the time of the first step in proceedings made on behalf of the child or protected party. That statement is signed with a statement of truth which verifies the Litigation Friend:

    a. Agrees to act.

    b. Knows or believes the person to lack capacity.

    c. That they meet the requirements above.

    d. Any expert evidence relied on in respect of lack of capacity must be filed at the same time (**CPR 21.5)**.

48. The procedure for appointment by Court Order is at **CPR 21.6.** The Court has power at **CPR 21.7** to direct that a person may not be a litigation friend, whether that is to terminate an existing appointment and to appoint a new litigation friend. Both are done by way of Part 23 application notice. There are special rules concerning the service of such applications in respect of Litigation Friends, at **CPR 21.8** the key point being that service of on the person responsible under **CPR 6.13** is required. Applications must be served on the protected party themselves unless the court orders otherwise **CPR 21.8(2)**.

49. It is worth noting that the appointment of a Litigation Friend cannot be challenged by the Defendant and where there is credible evidence of lack of capacity presented with the application then the Litigation Friend should be appointed. It is also worth noting that there is no requirement to serve the evidence in support of the application on the Defendant in **CPR 21**. The question of capacity can and will sometimes be challenged by the defendant at trial because the costs of controlling and managing monies can only be recovered as damages where the person lacks capacity to do it themselves.

Ending the appointment of a Litigation Friend

50. In the case of a child, the appointment ceases automatically when they attain their majority at age 18 (**CPR 21.9(1)**). The position for protected parties is different: if they regain or acquire capacity to conduct the litigation, a court order must be made to end the appointment of the Litigation Friend: **CPR 21.9(2)**.

51. Where an appointment ceases, either automatically or by court order, notice of the termination of the appointment must be served on the other parties to the litigation and if not done within 28 days of the ending of the appointment, the court may on application strike out any claim or defence: **CPR 21.9(6)**. The costs liability of a Litigation Friend continues until the notice has been served: **CPR 21.9(7)**.

Approval of Compromise and Control of Monies

CPR 21.10

Compromise etc. by or on behalf of a child or protected party

(1) Where a claim is made—

(a) by or on behalf of a child or protected party; or

(b) against a child or protected party,

no settlement, compromise, or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court.

(2) Where—

(a) before proceedings in which a claim is made by or on behalf of, or against, a child or protected party (whether alone or with any other person) are begun, an agreement is reached for [a settlement or compromise or a payment (including any voluntary interim payment) which relates to the claim]; and

(b) the sole purpose of proceedings is to obtain the approval of the court to a settlement or [compromise or a payment (including any voluntary interim payment) which relates to the claim],

the claim must—

(i) be made using the procedure set out in Part 8 (alternative procedure for claims); and

(ii) include a request to the court for approval of the settlement or compromise [or payment (including any voluntary interim payment)].

[

(3) The documents supporting any application or request for approval must include—

(a) a draft consent order setting out the proposed settlement terms.

(b) details of whether or to what extent liability is admitted.

(c) the age and occupation (if any) of the child or protected party.

(d) confirmation that the litigation friend approves the settlement.

(e) a copy of any relevant medical, financial, or other expert evidence or advice.

(f) in a personal injury claim arising from an accident, details of the accident and of claimed loss and damage.

(g) any documents relevant to considerations of liability; and

(h) a legal opinion on the merits of the settlement, except in very clear cases, together with any relevant instructions unless they are sufficiently set out in the opinion.

(4) If the claim includes damages for future financial loss, the court must be satisfied that the parties have considered whether the damages should wholly or partly comprise periodical payments.

(5) If the settlement includes periodical payments, the draft consent order must satisfy the requirements of rules 41.8 and 41.9as appropriate.

(6) In proceedings to which Section II or Section III of Part 45 applies, the court will not make an order for detailed assessment of the costs payable to the child or protected party but will assess the costs in the manner set out in that Section.

(7) Where settlement of a claim by or on behalf of a dependent child includes agreement on a sum to be apportioned to the dependent child, the parties must provide to the court in addition details of—

(a) the claimed loss of future earnings in respect of the deceased.

(b) the nature and extent of the dependency.

CPR 21.11

Control of money recovered by or on behalf of a child or protected party.

(1) Where in any proceedings –

a. Money is recovered by or on behalf of or for the benefit of a child or protected party; or

b. Money paid into court is accepted by or on behalf of a child or protected party,

The money will be dealt with in accordance with directions given by the court under this rule and not otherwise.

(2) Directions given under this rule may provide that the money shall be wholly or partly paid into court and invested or otherwise dealt with.

(3) Where money is recovered by or on behalf of a protected party, before giving directions under this rule, the court will first consider whether the protected party is a protected beneficiary.

(4) Where a child lacks capacity to manage and control any money recovered by or on behalf of the child and is likely to remain so on reaching full age, the fund will be administered as a protected beneficiary's fund.

(5) Where a child or protected beneficiary is in receipt of publicly funded legal services the fund shall be subject to a first charge under section 25 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (statutory charge) and an order for the investment of money on the child's or protected beneficiary's behalf must contain a direction to that effect.

(6) The representative or litigation friend of the child or protected beneficiary must apply to the court for directions for management of the fund or payment into court (using Form CFO 320 or CFO 320PB to be completed by the judge), stating the nature and terms of any proposed investment vehicle, with appropriate supporting evidence.

(7) The judge hearing the application may adjourn it and give directions for further information to be provided and, unless the judge directs otherwise, the money recovered will be paid into the court special account pending determination of the application for investment.

(8) Where money is recovered for the benefit of a child who is not a protected beneficiary-

  a. If the court considers it appropriate, it may order that the money be paid directly to the litigation friend to be placed in a bank, building society or similar account for the child's use.

  b. If the money remains invested in court, it must be paid out to the child when the child reaches the age of 18.

  c. Any investments held in court other than money must either be sold, and the proceeds paid to the child or transferred to the child when the child reaches the age of 18.

(9) Where money is recovered for the benefit of a protected beneficiary-

  a. If the amount is £100,000 or more, subject to (b) below, the court shall direct the litigation friend to apply to the Court of Protection for the appointment of

a deputy, after which the fund shall be dealt with as directed by the Court of Protection.

b. The procedure in sub-paragraph a. will not apply where a person with authority to administer the protected beneficiary's financial affairs has been appointed as attorney under a registered enduring power of attorney, or as donee of a registered lasting power of attorney, or as the deputy appointed by the Court of Protection.

c. Any payment out of money must be in accordance with any decision or order of the Court of Protection.

d. If an application to the Court of Protection is required, that application must be made.

e. If the Court of Protection so decides on its own initiative or at the request of the judgment hearing the application for investment, an amount exceeding £100,000 may be retained in court and invested in the same way as the fund of a child.

(10) A request for payment of money from a fund held for the benefit of a child or protected party, or to vary an investment strategy, may be made in writing with appropriate supporting evidence (but without making a formal application) to a Master or District Judge and may be determined without a hearing unless the court directs otherwise.

CPR 21.12 Costs and Expenses incurred by a Litigation Friend

21.12

(1) In proceedings to which rule 21.11 applies, a litigation friend who incurs costs or expenses on behalf of a child or protected party in any proceedings is entitled on application to recover the amount paid or payable out of any money recovered or paid into court to the extent that it—

(a) has been reasonably incurred; and

(b) is reasonable in amount.

(2) Costs recoverable in respect of a child under this rule are limited to—

(a) costs which have been assessed by way of detailed assessment under rule 46.4(2).

(b) costs incurred by way of success fee under a conditional fee agreement or sum payable under a damages-based agreement in a claim for damages for personal injury where the damages agreed or ordered to be paid do not exceed £25,000, where such costs have been summarily assessed under rule 46.4(5); or

(c) costs incurred where a detailed assessment of costs has been dispensed with under rule 46.4(3) in the circumstances set out in Practice Direction 46.

(3) Expenses may include all or part of—

(a) a premium in respect of a costs insurance policy (as defined by section 58C (5) of the Courts and Legal Services Act 1990); or

(b) interest on a loan taken out to pay a premium in respect of a costs insurance policy or other recoverable disbursement.

(4) No application may be made under this rule for costs or expenses that—

(a) are of a type that may be recoverable on an assessment of costs payable by or out of money belonging to a child or protected party; but

(b) are disallowed in whole or in part on such an assessment.

(Costs and expenses which are also "costs" as defined in rule 44.1(1) are subject to rule 46.4(2) and (3).)

(5) In deciding whether the costs or expenses were reasonably incurred and reasonable in amount, the court will have regard to all the circumstances of the case including the factors set out in rule 44.4(3) and rule 46.9.

(6) When the court is considering the factors to be taken into account in assessing the reasonableness of the costs or expenses, it will have regard to the facts and circumstances as they reasonably appeared to the litigation friend or to the child's or protected party's legal representative or deputy when the cost or expense was incurred.

(7) Subject to paragraph (8), where the claim is settled or compromised, or judgment is given, on terms that an amount not exceeding £5,000 is paid to the child or protected party, the total amount the litigation friend may recover under paragraph (1) must not exceed 25% of the sum so agreed or awarded, unless the court directs otherwise. Such total amount must not exceed 50% of the sum so agreed or awarded.

(8) The amount which the litigation friend may recover under paragraph (1) in respect of costs must not (in proceedings at first instance) exceed 25% of the amount of the sum agreed or awarded in respect of—

(a) general damages for pain, suffering and loss of amenity; and

(b) damages for past financial loss,

net of any sums recoverable by the Compensation Recovery Unit of the Department for Work and Pensions.

(9) Except in a case to which Section II, III or IIIA of Part 45 applies, and where a claim under rule 45.13 or 45.29J has not been made, no application may be made under this rule for a payment out of the money recovered by the child or protected party until the costs payable to the child or protected party have been assessed or agreed.

(10) A litigation friend must support a claim for payment from a fund of costs or expenses by filing a witness statement setting out, so far as applicable—

(a) the nature and amount of the costs or expenses and the reason they were incurred.

(b) a copy of any conditional fee or damages-based agreement.

(c) a copy of any risk assessment by reference to which any success fee was determined.

(d) the reasons why the particular funding model was selected.

(e) the advice given to the litigation friend on funding arrangements.

(f) a copy bill or informal breakdown of the solicitor and own client base costs incurred.

(g) details of any costs agreed, recovered, or fixed costs recoverable by the child; and

(h) an explanation of the amount agreed or awarded for—

(i) general damages for pain, suffering and loss of amenity; and

(ii) damages for past financial loss, net of any sums recoverable by the Compensation Recovery Unit or the Department for Work and Pensions.

PRACTICAL CONSIDERATIONS ON APPROVAL

Do I need approval?

52. As the cases of *Burgin v Dunhill* and *Drinkall* serve to illustrate, even in cases where capacity is contested and would have been an issue at trial, it is usually in the interests of both parties to have a Litigation Friend and approval where there is a suspicion of disability.

53. Where proceedings have not yet been issued, then Part 8 should be used. Whilst generally all evidence should be served with a Part 8 claim, in this instance it is acceptable to have the Part 8 bundle as the proposed heads of agreement or exchange of letters and then a separate evidence bundle to be prepared later.

54. Where proceedings have already been issued, then an application under Part 23 can be made. As set out above, this should be done whenever there is agreement on a sub-issue, such as liability, a head of damage or interim payment. Where a Litigation Friend is appointed, mid-proceedings following loss of capacity (or recent discovery of lack of capacity), then retrospective application should be made to validate the steps taken to date in the proceedings.

55. Approval of settlement is still required where a child or protected party has died during the course of litigation: *Wormald v Ahmed [2021] EWHC 973 (QB) at [58]*.

56. Approval will be appropriate where:

    a. There is a personal injury or Human Rights Act damages claim by a Child or Protected Party.
    b. There is a Fatal Accidents Act claim where one of the persons for whose benefit the action is brought is a Child or Protected Party.
    c. There is evidence that a claimant may be a Protected Party.

57. In *Coles v Perfect [2013] EWHC 1955 (QB)*, Teare J, sitting as the Admiralty Judge, held that in a case which had settled close to Merchant Shipping Act limits, there was no justification for a trial on capacity and proceeded to approve the settlement even though neither party wished to assert that the presumption of capacity was displaced. This was an unusual

situation, and it is unlikely that the Courts will wish to entertain 'belt and braces' approval applications where there is no real evidence that capacity is in issue.

What does the Court need to see?

58. The Court's role in relation to approval of proposed settlements is not just a rubber-stamping exercise. The Court needs to be satisfied that the proposed settlement is reasonable and in the interests of the child or protected party. On the other hand, the Court is not there to act as advisor to either party and there is always a range of possible outcomes in contested litigation. Therefore, it is not for the Court to say that a settlement is the 'right' one, rather that it is a reasonable one considering all the circumstances, including those personal to the litigants.

59. Some advice from Counsel is generally required in all but the smallest value cases. That advice is a confidential document and is privileged. It should be shared with the Court on that basis, but not with any other parties to the proceedings.

60. The advice will need to include information about:

    a. Whether and to what extent liability is admitted
    b. The age of the child or protected party
    c. The circumstances which give rise to the claim
    d. Relevant medical and other expert reports
    e. The schedule of loss and damage
    f. Identification and analysis of the key issues with an assessment of the litigation risks and consideration of any discount against full liability being considered. The analysis should include consideration of any further steps remaining to be taken in the litigation and the impact they could have.
    g. The impact of third-party payments, such as subrogated claims by insurers, recoverable benefits, gratuitous care, including details of any payments to be made from damages, including in respect of costs and disbursements.
    h. Provisional damages and periodical payments considerations.
    i. The views of the litigation friend regarding the settlement.
    j. Any evidence and analysis regarding control and management of the monies.

61. It is entirely appropriate to provide materials to the Court on a without prejudice basis where the proposed settlement has been achieved prior to disclosure or exchange of evidence. These documents retain their privilege: see *IB v CB [2010] EWHC 3815 (QB)*. A separate bundle with open materials can provided to the Defendant as well as the Court.

The terms of the order

62. The form of order is that in **Form 292**. Its basic format is:

    a. That it is an order **by consent.**

    b. It expressly includes a term **giving permission to the claimant** to accept a certain sum and/or terms of settlement in satisfaction of her claim.

    c. Where a fatal accidents claim is involved it will expressly state **the apportionment of the damages** in favour of the protected party or child.

    d. It ought to include a **majority direction** allowing a child to obtain their funds upon attaining majority.

    e. That it imposes a **stay** on proceedings but includes a term giving the parties **permission to apply to enforce** the terms of the order without need for further proceedings.

    f. That it expressly provides the defendant with **discharge** of its obligations upon compliance with the terms of the order.

63. Tomlin Orders are only infrequently used on compromise cases engaging Part 21. It is difficult to comply with the obligations of CPR 21.10 and CPR 21.11 in the format of confidential schedule.

Costs

64. **CPR 46.4(2)** provides that where a child or protected party recovers money, the court **must** order detailed assessment of the costs payable by the child or the protected party to their solicitor and **must** also carry out assessment of the costs payable to the child or

protected party unless a default costs certificate has been issued under section II or section III of Part 45.

65. It is possible for the child or protected party's solicitors to waive any claim in respect of their costs and disbursements following inter party costs (save for a success fee) in which case no separate detailed assessment of the party own costs arises. The order must provide either such a waiver or for detailed assessment: see **CPR 46.4(5)**

66. In respect of Legally Aided claimants (an increasingly rare event), references in the old form N292 should be now:

> "Legal Aid Punishment and Sentencing of Offenders Act 2012 Pts 1 and 2"

and instead of the Legal Services Commission, the Legal Aid Agency. The regulations which are referred to in the standard form have now been replaced by LASPO.

67. The detail of the evidence and procedure in respect of deductions from recovered damages in respect of costs and expenses of the litigation friend is now codified in CPR 21.12 above.

Majority Direction

68. Where a Child is the claimant, there is the option for the Court to order that upon attaining his majority, the Court Funds Office sends a form to the child and asks for bank account details for payment out of the monies held by them on his behalf. Without such direction, it is necessary for the claimant to start a fresh application which carries additional effort.

Investment direction forms and other documents at the hearing

69. It is often overlooked that the Court's function under CPR 21 extends not just to consideration of approval of any terms of settlement, but also control and management of any funds.

70. The following documents will be necessary at the approval hearing:

    a. **Birth certificate** (for children)

b. **Court Funds Form** CFO320 (Management of a Child's Fund Pre-Investment Hearing) or CFO 320PB. This is accompanied by an Information Sheet for Litigation Friends CFO403

c. Evidence that a **Deputy** has been appointed and that a Court of Protection account has been opened (in protected party cases)

d. Form **N292** to transfer sums to Court of Protection

71. CPR 21.11 provides that where any money is recovered by a protected beneficiary or child, it will be dealt with by directions given by the Court **and not otherwise**. Depending on the terms of the order, money will be transferred from Court Funds into the Court of Protection and then the Court of Protection will give directions as to use of the money.

72. Whilst the drafting is less than clear, it is intended that sums paid to a protected beneficiary less than £100,000 should be treated for investment purposes as if they were the funds of a child.

73. The **Court Funds Rules 2011/1734** are made by the Lord Chancellor in exercise of his power under s 38(7) Administration of Justice Act 1982. The Rules apply to funds deposited in Court and provides that money of a child or protected party shall be held in the special account unless otherwise directed by a court, deputy, or investment manager. It contains rules about investment of funds and payments out of funds invested as well as what happens if the person entitled to money held in court dies. There is power to make regular payments as directed in a schedule.

74. If the amount of funds in court is more than £10,000 and there are 5 years or more left to majority, a percentage of funds may be placed in the Equity Index Tracker Fund. Otherwise, funds are held in the special account.

75. Common forms of investment are permitted in principle, including payment into a Personal Injury Trust or bank account or similar. A trust must be a bare trust because the Court does not have power to order or impose a discretionary trust: *Allen v Distillers [1974] QB 384*. On the other hand, a discretionary trust can be approved prior to judgment. If the fund is paid into a bare trust, a child upon attaining the age of 18 is entitled to call for the fund to be paid out but would be able to leave their fund in the trust.

76. The court will wish to see the terms of the trust and will (almost?) always require one of the trustees to be a professional to ensure proper supervision of the fund. The evidence on approval will need to address the comparison between investing in court and also the costs of a professional trustee in addition to any other advice (including that of Chancery Counsel, see below).

77. *OH v Craven [2016] EWHC 3146 (QB); [2017] 4 WLR 25, Norris J,* is an important decision concerning the fact that a solicitor-client relationship is one of rebuttable presumption of undue influence and therefore the burden lies on the solicitor to establish the settlor of a trust (usually the litigation friend) has had appropriate independent advice such that the decision to make his solicitor a trustee was one which was freely reached and untainted by any improper influence. Generally speaking, that means advice of Chancery Counsel not less than 5 years' standing. The advice and the instructions need to be before the court at the time of approval.

78. Be aware that there is some debate currently about whether the costs incurred by the claimant in obtaining approval in respect of control of the monies under CPR 21.11 are 'costs of the proceedings'. Some defendants, unattractively in my view, have sought to argue by reference to the line of caselaw which states that costs of investment advice are not recoverable as damages, that these costs somehow fall outside the scope of the proceedings. The point is likely to require resolution before an appellate level court, but in the meantime, claimants' advisers are recommended that the safest option is to have the CPR 21.11 issues addressed at the same time as those under CPR 21.10 and 21.12.

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