

The Advocate and the Expert in the Court of Protection

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Introduction

The aim of this article is to explore the practical interface between the advocate and the expert in proceedings before the Court of Protection ('COP'), and is written for both lawyers and experts. Unless otherwise stated, all statutory references are to the Mental Capacity Act 2005 ('MCA'), and the person over whom the court has jurisdiction is referred to a 'P'.

The COP has power to make declarations and decisions on behalf of a person who lacks capacity. One area of the court's work which is growing very rapidly is deprivation of liberty (DOL), discussed further below. People lacking capacity who are deprived of liberty in hospitals or care homes must have that deprivation authorised by the local authority. The number of applications for DOLS has been growing very fast year on year since the DOLS were introduced in 2009, and for the year 2015–16 there were 195,840 applications. Appeals against a DOLS authorisation may be made to the COP under section 21A MCA. In relation to people deprived of their liberty outside hospitals or care homes, for example

in supported living arrangements or hostels, the application for authorisation must be made directly to the COP. In 2017 there were 3,955 DOL applications to the court, a rise of 27% compared to 2016. As applications for authorisation should be made for everyone who lacks capacity and is deprived of liberty, and as this will include many people with dementia or intellectual disability, these figures, although large, are likely to be substantially less than the number that should be made. A largely unexplored question relates to the position of those who are in fact deprived of liberty but for whom no application has been made.

At the apex of the MCA pyramid, Section 1 sets out a decision-making framework consisting of five 'overriding principles' as follows:

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

(3) *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*

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

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

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

Therefore the analytical starting point is that:

- capacity is ultimately a question of fact for the court to decide on the balance of probabilities with a presumption of capacity;
- an adult is presumed to have the mental capacity to make a particular decision, until the contrary is proved, Section 1(2) (the rebuttable Statutory Presumption);
- in arriving at a determination the judge must answer the question, what is in the best interests of P?;
- expert evidence is only opinion; and
- the judge is free to reject expert opinion.

The Court of Protection

The COP is a superior court of record which derives its jurisdiction from the MCA Part 2. The court has its own procedure, the Court of Protection Rules 2017 (as supplemented by Practice Directions) (the 'Rules'), and enjoys the same powers, rights, privileges and authority as the High Court (including the power to grant injunctions). In addition to the Rules there is a Code of Practice to the MCA (the 'Code'), which experts must have regard to when providing assistance to the court.

The MCA

The MCA sets out a comprehensive integrated jurisdiction for the making of personal welfare decisions, health care decisions and financial decisions on behalf of people who lack capacity to make specific decisions for themselves, and is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further. On an application under this Act, therefore, the court has no greater powers than the patient would if he were of full capacity.

Lady Hale in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67.

Jurisdiction

The MCA focuses on capacity in relation to a specific decision or matter. Rather than granting declaratory relief available under section 15, it is better if possible for the court to make orders under section 16. There is scope under section 16 for the court to make a decision on P's behalf, or to appoint a deputy to make such decisions, and the court's powers set out in section 17 include the power to decide where P is to live and what contact, if any, P is to have with any specified persons. These powers do not extend to decisions compelling third parties to accommodate, or meet, or to provide services or treatments for P. The fact that the court has no greater power to take a decision than P would have had himself means that it too can only choose between the 'available options'. Nor can the court use its powers to put pressure upon a local authority to make particular decisions in exercise of its statutory pow-

ers and duties to provide public services. Such decisions can instead be challenged on judicial review principles, where the legal considerations for the public authority and for the court will be different from those under the MCA.

The Supreme Court Press Summary in *N (Appellant) v ACCG and others (Respondents)* [2017] UKSC 22.

Remedies

MCA section 15 provides that:

(1) *The court may make declarations as to—*

- (a) *whether a person has or lacks capacity to make a decision specified in the declaration;*
- (b) *whether a person has or lacks capacity to make decisions on such matters as are described in the declaration; [and]*
- (c) *the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.*

A declaration involves the court declaring the law or a person's rights or interests in relation to a particular matter, historically without reference to enforcement. It registers what exists and declares what it finds.

With one exception judicial review is the only proper remedy to challenge unreasonable or irrational decisions made by care providers and other public authorities, including an alleged breach of statutory duty by a local authority under the Care Act 2014 ('CA 2014'). Exceptionally, where a public authority has acted in breach of convention rights by refusing to fund a particular form of care, that can be raised in the COP by way of a formal application under Section 7 of the Human Rights Act 1998, which is rare.

Under s. 17 MCA, the court is empowered to make decisions (or appoint deputies to make such decisions) on matters including:

- (a) *deciding where P is to live;*
- (b) *deciding what contact, if any, P is to have with any specified persons;*
- (c) *making an order prohibiting a named person from having contact with P;*
- (d) *giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P; [and]*
- (e) *giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.*

Case-management powers

The court's case management powers are contained in Part 3 of the Rules, which need to be read alongside the overriding objective and the duties of the parties contained in Part 1.

s. 3.1 which provides:

- (1) *The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.*
- (2) *The court may—*
 - (a) *extend or shorten the time for compliance with any rule, practice direction, or court order or direction (even if an application for extension is made after the time for compliance has expired);*

- (b) adjourn or bring forward a hearing;
 - (c) require P, a party, a party's legal representative or litigation friend, or P's rule 1.2 representative, to attend court;
 - (d) hold a hearing and receive evidence by telephone or any other method of direct oral communication;
 - (e) stay the whole or part of any proceedings or judgment either generally or until a specified date or event;
 - (f) consolidate proceedings;
 - (g) hear two or more applications on the same occasion;
 - (h) direct a separate hearing of any issue;
 - (i) decide the order in which issues are to be heard;
 - (j) exclude an issue from consideration;
 - (k) dismiss or give judgment on an application after a decision is made on a preliminary basis;
 - (l) direct any party to file and serve an estimate of costs;
 - (m) direct or limit the means of communication to be used by the parties; and
 - (n) take any step or give any direction for the purpose of managing the case and furthering the overriding objective.
- (3) A judge to whom a matter is allocated may, if the judge considers that the matter is one which ought properly to be dealt with by another judge, transfer the matter to such a judge.
- (4) Where the court gives directions it may take into account whether or not a party has complied with any rule or practice direction.
- (5) The court may make any order it considers appropriate even if a party has not sought that order.
- (6) A power of the court under these Rules to make an order includes a power to vary or revoke the order.

Rules 1.3 to 1.6 concern the duty of the court to further the overriding objective by actively managing cases, and the duty of parties, legal representatives and unrepresented litigants to assist the court in furthering the overriding objective.

A party who seeks to rely upon any provision of or right arising under the Human Rights Act 1998 or who seeks a remedy available under that Act must inform the Court in the manner set out in the relevant practice direction specifying the Convention right which it is alleged has been infringed and details of the alleged infringement, and the remedy sought and whether this includes a declaration of incompatibility. The Court may not make a declaration of incompatibility unless 21 days notice, or such other period of notice as the court directs, has been given to the Crown, and a minister or other permitted person will then be joined as a party on filing an application.

Ashton (2018), paragraph 8.44.

It should also be noted that a nominated judge may sit in a dual capacity, i.e. in the COP and also the civil or family court. Where for example, a local authority has made a decision about the placement of an incapacitated adult, and it may be necessary, if that decision is to be challenged, to proceed both by way of proceedings for judicial review and a best interests claim under

the new Court of Protection jurisdiction [then] a nominated High Court judge could deal with both matters together ... If a case requires transfer in whole or part to the Court of Protection, if a judge is also nominated to sit in the Court of Protection, he can reconstitute himself as a Court of Protection judge and make appropriate orders to bring the case within that court. He may also dispense with the need to make an application.

Ashton (2018), paragraphs 8.124 and 1.125.

Fundamental Concepts

Two fundamental concepts underly the scheme and purpose of the MCA:

- (i) lack of capacity; and
- (ii) best interests.

These are *private law* issues.

Whilst the COP's powers under s. 16 in relation to P's personal welfare extend to deciding where P is to live, the COP has no power to decide a public law issue.

The relationship between best interests decision making and the public law duties of statutory bodies responsible for meeting community care needs was recently examined in the case of *N (Appellant) v ACCG and others (Respondents)* [2017] UKSC 22, in which King J emphasised the danger of:

blurring of the distinction as between the Court of Protection's statutory duties in a private law context, (namely to consider the best interests of an incapacitated adult), with public law challenges in relation to the willingness, unwillingness, reasonableness or rationality of the services a public authority is willing or able to provide.

Legal test of capacity

MCA s. 2 provides:

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
 - (a) a person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person ("D") may exercise under this Act—
 - (a) in relation to a person who lacks capacity, or
 - (b) where D reasonably thinks that a person lacks capacity, is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

S. 3 further states:

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

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his decision (whether by talking, using sign language or any other means).

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

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

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

- (a) deciding one way or another; or
- (b) failing to make the decision.

A person will lack capacity if any of the four limbs of s.3(1)(a) to (d) is satisfied. The definition of capacity in MCA 2005 is intended to build on, rather than contradict, the terms of pre-existing common law tests. The Code suggests that, as cases come before the court, judges may adopt the statutory definition if they see fit and use it to develop common law rules in particular cases.

In applying the test for capacity set out in Sections 2 to 3 to determine whether an individual has capacity to make a particular decision, the Code advises that a two-stage procedure must be applied:

(i) it must be established that there is an impairment of, or disturbance in the functioning of, the person's mind or brain; and

(ii) it must be established that the impairment or disturbance is sufficient to render the person unable to make that particular decision at the relevant time.

The 'causative nexus' is crucial.

Whether the diagnostic aspect is considered before the functional aspect, or afterwards, the determinative question is always whether there is a sufficient causative link between the identified impairment or disturbance and any functional inability to take the decision in question.

The true question is whether the impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play? This is a purposive construction.

Parker J in *NCC v PB and TB* [2014] EWCOP 14, [2015] COPLR 118.

*Whilst it is suggested that this is, indeed, the true question, it is easier to state than it is to answer in practice...the answer will then send those concerned down very different routes as regards the relief that might be available from the courts, because it will determine whether they lack capacity or are to be regarded as a vulnerable adult. In seeking to answer this question, it may in due course be that the Court of Protection will find assistance from the decision of the Singaporean Court of Appeal in *Re BKR* [2015] SGCA 26 [in which the court reached the pragmatic conclusion*

that] it is necessary to have regard to the circumstances under which a person with potentially impaired capacity may be seeking to make decisions and, where it is clear that they will be seeking to make decisions in the context of an oppressive social situation from which it is not possible realistically to remove them, it is possible to conclude that they in fact fall with the scope [of the MCA].

Ashton (2018), paragraph 2.61.

Best interests

MCA s. 1(5) states, 'An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests,' and so the advocate must convince the court that the order sought is in P's best interests.

While the Act does not define best interests, paragraph 5.38 of the Code states,

In setting out the requirements for working out a person's "best interests", section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now. But their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests.

MCA s. 4 sets out how best interests are to be determined:

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

- (a) the person's age or appearance, or
- (b) a condition of his, or an aspect of his behaviour; which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular; take the following steps.

(3) He must consider—

- (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
- (b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider; so far as is reasonably ascertainable—

- (a) the person's past and present wishes and feelings (and, in particular; any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to

- influence his decision if he had capacity, and the other factors that he would be likely to consider if he were able to do so.*
- (7) *He must take into account, if it is practicable and appropriate to consult them, the views of—*
- (a) *anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
- (b) *anyone engaged in caring for the person or interested in his welfare,*
- (c) *any donee of a lasting power of attorney granted by the person, and*
- (d) *any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).*
- (8) *The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—*
- (a) *are exercisable under a lasting power of attorney, or*
- (b) *are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.*
- (9) *In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.*
- (10) *“Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.*
- (11) *“Relevant circumstances” are those—*
- (a) *of which the person making the determination is aware, and*
- (b) *which it would be reasonable to regard as relevant.’*

Proceedings

Whilst COP judges vary in their approaches, and no doubt High Court judges sitting in the court adopt a different approach to district judges, hearings are usually conducted in a relatively informal fashion.

It is a mistake however, to confuse a relaxed atmosphere in court, with a lack of intellectual rigour, because at trial, every fact in dispute needs to be proved by cogent and convincing evidence. In that respect proceedings in the COP are no different to those in any other court:

- the customary order of speeches is usually followed;
- evidence is tested by the advocates (who, when cross-examining a witness, must put their client's case); and
- in closing, the advocate must persuade the court that the burden of proof has been discharged, or otherwise.

The outcome is binary. However, the opportunity exists through negotiation/mediation, to craft a mutually satisfactory solution around common agreement about what in principle is in P's best interests.

COP proceedings are supported and facilitated by three key bodies:

- the Official Solicitor to the Senior Courts (who is an independent statutory office holder appointed by the Lord Chancellor to represent parties to proceedings who are without capacity, deceased or unascertained when no other suitable person or agency is able and willing to do so) – frequently appointed as P's Litigation Friend;
- the Public Guardian (whose functions include reporting to the court on such matters relating to proceedings as the court requires); and
- the Independent Mental Capacity Advocate ('IMCA') service (who provide safeguards for people who: (i) lack capacity to make a specified decision at the time it needs to be made; (ii) are facing a decision on a long term move or about serious medical treatment; and (iii) have nobody else who is willing and able to represent them or be consulted in the process of working out their best interests).

Burden and standard of proof

Capacity must be proven on the balance of probabilities (MCA s. 2(4)). In other words, having decided what the facts are, and having applied the law to those facts, the judge must decide whether on balance P is more likely to have capacity, or more likely to lack capacity to do something. As HHJ Paul Matthews recently stated in *Ball & Ors v Ball & Ors* [2017] EWHC 1750 (Ch):

Our system of fact-finding is binary. It is either one thing or the other. There is no room for maybe. As I have said, the standard of proof in a civil case is the balance of probabilities, that is, that a thing is more likely to have happened than not. In mathematical terms, more than 50%. It is not scientific certainty at 100%.

Whether or not the burden of proof has been discharged depends upon the weight and value that the judge attaches to the various strands of evidence. This involves weighing up the credibility or reliability of the evidence, and ultimately comes down to deciding which version of the relevant matters is more likely to be correct. At trial the judge is concerned with the balance of probabilities rather than certainty. Having decided what the facts are, and having applied the law to those facts, a trial judge must decide whether on balance P is more likely to have had capacity, or more likely to have lacked it.

Inquisitorial method

The distinguishing characteristic of the COP is that: *the processes of the court...are essentially inquisitorial rather than adversarial. In other words, the ambit of the litigation is determined, not by the parties, but by the court, because the function of the court is not to determine in a disinterested way a dispute brought to it by the parties, but rather, to engage in a process of assessing whether an adult is lacking in capacity, and if so, making decisions about his welfare that are in his best interests.*

Mr Justice Baker in *Cheshire West v P* [2011] COPLR Con. Vol 273 at [52]

In contrast to the adversarial method, which aims to get at the truth by two competing parties arguing their case and the judge arriving at a conclusion in favour of the probability of one version of events in preference to another, the aim of the inquisitorial method, is to get at the truth through extensive investigation and examination of all of the evidence.

This requires a more collaborative approach. In particular, legal representatives are required to help the court to further the overriding objective by amongst other things addressing whether the case can be swiftly resolved.

The judge will expect [the advocates] to have all communicated with each other before [they] go into court in order to try and narrow down the issues that the judge has to consider that day... [Advocates] are simply wasting...the court's time if [they] are not ready when the case is called in simply because no one has spoken to each other... Whatever the issues may be between you and the other parties, be pleasant to each other. Unpleasantness rarely produces positive outcomes for anyone. If you are pleasant and speak in a calm and rational manner you are most likely to engender support from other parties and most importantly the judge. Turning up at court being belligerent by not speaking to the other parties but saying you only want to speak to the judge will not help further your case. Politeness and manners cost nothing but the benefits may be immense... Ultimately remember that the court only wants to have to make decisions about matters which cannot be resolved amicably between the parties. Essentially it is the last resort if the court has to make orders. Attending court early gives you the opportunity to speak to the other advocates and parties in the case to see whether you can resolve what may have been fundamental issues between you... One of the first things a judge will ask all parties when they attend before them will be whether any agreement has been reached on the issues which the judge is being asked to decide. If the judge is told at that stage that none of the parties has spoken to each other prior to coming to court, you must expect the judge to show a level of exasperation. Remember court time is precious... It is equally important to remember that the order the judge may make may actually not make anyone happy. If a compromise can be reached that everybody can live with, that is often so much better as a way forward... If all the issues are agreed before the hearing starts, the judge may endorse a consent order that has been drafted by the parties.

Keehan (2016)

The advocates should therefore exchange position statements/skeleton arguments (which in part can serve the purpose of opening submissions) sufficiently in advance of the hearing, and arrive at court allowing enough time to engage in a constructive discussion (on instructions) about how issues can be narrowed and agreed before the parties go in and see the judge.

Zone of influence

The zone of influence is the space in which the judge can move to decide what is in P's best interests.

[In] the nineteenth century philosophy of law, in light of Montesquieu's idea of the separation of powers, the task of the judge was to apply the law as it was formulated by the legislator [i.e. by subsuming the facts of a specific case under a

general legal rule]... In a modern view, the judge has a certain latitude in interpreting legal rules and in formulating the norm that is to be applied in the specific case. In this view, the judge is no longer considered as the "mouth of the law" who automatically deduces the decision from the general rule, but he establishes the meaning of the legal rule in the context of the specific case. In this conception, legal rules do not have a context-independent meaning, but the judge must decide in the individual case what the exact meaning of the legal rule is. In this decision process judges have a certain discretionary power and they have to account for this discretionary power in their justification. In the justification of their decisions judges must specify the considerations that underlie the choice for a particular interpretation and formulation of the legal rule for the concrete case.

Feteris (2017)

Unlike a rule that can be analysed as a conditional statement of the form, if p then q, the legislator has left it to the judge to decide what is in P's best interests on the facts. To persuade the judge to rule in favour of your client, you must consider the discretionary space in which the judge can move to decide what is in P's best interests. That is the zone of influence counsel needs to enter and navigate in order to win.

Because P's best interests are paramount, in exploring that space, the court will also seek to ascertain what P's actual or likely wishes, views, and preferences are.

COP PD 1A states:

1. *Developments in the case law both of the European Court of Human Rights and domestic courts have highlighted the importance of ensuring that P takes an appropriate part in the proceedings and the court is properly informed about P; and the difficulties of securing this in a way which is proportionate to the issues involved and the nature of the decisions which need to be taken and avoids excessive delay and cost.*

2. *To this end, rule 1.2 makes provision to—*

(a) *ensure that in every case the question of what is required to ensure that P's "voice" is properly before the court is addressed; and*

(b) *provide flexibility allowing for a range of different methods to achieve this, with the purpose of ensuring that the court is in a position to make a properly informed decision at all relevant stages of a case.*

What are the mechanics of judicial fact finding?

Most judges adopt the approach of first seeking out agreed facts as an anchor or base from which to build up a picture of what they can safely find is the more likely to have happened when forced to choose between conflicting events. If the likelihood is finely balanced and it is difficult to make a value judgment as to which evidence to prefer, they will rely on the burden of proof to come to a decision. If he who asserts a fact has to prove it, the task of the judge becomes far easier when deciding whether or not the standard of proof required has been met sufficient to discharge respectively the evidential and legal burden.

Many judges admit to a fairly strong intuitive approach which develops with experience. They will fit the facts to a gut feeling of whether someone is lying, or of where the justice of the case rests. This can be limited to their analysis of specific material before them rather than the outcome of the whole case. Sometimes they use their intuition at the point where it becomes necessary to stand back and take in the whole picture; or where a key exchange in evidence becomes the centre of gravity of the entire case.

Goodman (2018)

As the jurisdiction of the court is essentially inquisitorial, a COP judge will frequently take a very active role in questioning witnesses.

The judge must be absolutely satisfied that evidence necessary to decide whether P has or lacks capacity, and where P's best interests lie is before the court. Once all the witnesses for the applicant have given their evidence, the witnesses for the next party will give their evidence. The court will usually want to hear from any experts who have been called to assist at the end of all the other evidence. This will allow the experts to have (hopefully) heard the evidence given by the other witnesses, and therefore be in a better position to be able to give their final opinions as to the matters upon which they are assisting the court. The normal practice where the Official Solicitor is instructed on behalf of P is that the Official Solicitor's lawyers will call the expert(s) and take the lead in confirming, for instance, the expertise of the expert. If a person other than the Official Solicitor is acting as the litigation friend (and especially if they are acting without the benefit of legal representation), then the court may well look to the representatives of any public authority involved formally to call the expert. Once all parties have given their evidence, the judge will usually want to hear closing submissions, in other words oral arguments as to what the judge should do or find on the basis of the evidence that is before them. The usual practice is that the judge will want to hear from or on behalf of the litigation friend acting on behalf of P at the very end.

Ruck Keene (2014)

There is a trap door inside the zone of influence through which an unwary advocate may fall, because when looking at P through the eyes of a COP Judge, an advocate must not conflate a capacity assessment with a best interests analysis. As Mr Justice Baker put it in CC V KK and STCC [2012] EWHC 2136 (COP) at [25]:

There is a further point, to which I alluded in an earlier decision in PH v A Local Authority, Z Ltd and R [2011] EWHC 1704 (Fam). In assessing the evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians and professionals treating and working with, P. In PH, I drew attention to a potential risk, identified by Ryder J in Oldham MBC v GW and PW [2007] EWHC 136 (Fam) [2007] 2 FLR 597, another case brought under Part IV of the Children Act 1989, that the professionals and the court may be unduly influenced by what Ryder J called the "child protection imperative", meaning "the need to protect a vulnerable child" that, for perfectly understandable reasons, may influence the thinking of professionals involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person—including, of course, a judge in the Court of

Protection—may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective. On the other hand, the court must be equally careful not to be influenced by sympathy for a person's wholly understandable wish to return home... A fundamental point in this case is the principle articulated by Macur J in LBJ v RYJ (supra) that in evaluating capacity the court must recognise that different individuals may give different weight to different factors. There is, I perceive, a danger that professionals, including judges, may objectively conflate a capacity assessment with a best interests analysis and conclude that the person under review should attach greater weight to the physical security and comfort of a residential home and less importance to the emotional security and comfort that the person derives from being in their own home. I remind myself again of the danger of the "protection imperative" identified by Ryder J in Oldham MBC v GW and PW (supra). These considerations underpin the cardinal rule, enshrined in statute, that a person is not to be treated as unable to make a decision merely because she makes what is perceived as being an unwise one.

The assessment of whether P has capacity, and if not, what is in P's best interests, are distinct issues and must be approached in a manner that is detached and objective.

Advocates and experts must ensure that they specifically address the issue of capacity within the framework of the MCA.

An analysis of the s.3 test will always be necessary. [However]...experts must be careful not to set the bar too high, nor to add elements into the test that are unsupported by statute or relevant jurisprudential tests. Medical practitioners assessing capacity would normally seek to take into account all aspects of the personality and behaviour of the person, including vulnerability to exploitation. However, vulnerability to exploitation must not of itself lead to the conclusion that there is a lack of capacity.

Hodgkinson and James (2015)

Human rights

Skimming the atmosphere of English jurisprudence and the ambit of the COP's jurisdiction and powers, is Article 5 of the European Convention on Human Rights ('ECHR')—the protection of liberty. Detention in a care home or hospital, has been designated as a Convention right for the purposes of the Human Rights Act 1998 ('HRA'). Domestic courts will therefore consider ECHR rights, because an individual who has exhausted domestic remedies has the right to bring a case in Strasbourg.

It follows that each branch of government (legislature, executive, and judicial) is responsible for giving effect to Convention rights when exercising public powers. However various concepts apply in the interpretation and application of Convention rights which will not be familiar to lawyers brought up on the common law and statute law:

(i) Not only can proceedings be brought against a public authority in relation to Convention rights (the 'vertical' effect), but as the courts are public authorities they must apply Convention rights when adjudicating on proceedings between private individuals (the 'horizontal' effect). So litigants can

argue their human rights in the courts and these must be respected.

(ii) To some extent the European Court adopts a hands-off approach to the way that individual countries apply Convention rights, although this ‘margin of appreciation’ has no application to national courts. This reflects the fact that those courts are in a better position to assess the needs and standards of their own society and the national authorities should be deferred to (especially in moral matters and social policy) as long as the whole process is fair and the outcome is true to the convention.

(iii) Where a state interferes with a Convention right, the means (‘the limitation’) must be balanced against the end (‘the permitted purpose’) and shown to be necessary. There must be a reasonable relationship between the goal pursued and the means employed. This follows from the fact that any limitation on a convention right must be in accordance with law and ‘necessary in a democratic society’, and has become the principle of ‘proportionality’.

(iv) A ‘principle’ of legality is derived from the use by the ECHR of the phrases ‘in accordance with the law’ and ‘prescribed by the law’ and the use of the word ‘lawful’. It has been stated to mean:

- (a) the legal basis for any restriction on Convention rights must be identified and established by the domestic law;
- (b) that law must be accessible and not interpreted according to unpublished criteria; and
- (c) the law must be clear to those affected by it so that they can understand it, although it may allow some discretion as long as the limits are clear.’

Ashton (2018), paragraph 1.182

Expert Evidence Relevance

The court must ultimately decide whether P has capacity and, if not, what would be in P’s best interests. Whilst an absence of medical evidence must not be a bar to a court finding lack of capacity, but where medical evidence cannot be obtained, the court should be particularly cautious before concluding that there has been a disturbance of the mind. In *NHS Trust v DJ* [2012] EWHC 3524 (COP) at 81, (a decision reversed by the Supreme Court in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67, but not for misstatement of the law), Mr Justice Peter Jackson emphasised that, *where medical matters are concerned, the court must have regard to the unanimous expert advice. In particular, the evidence of the burdens of this kind of treatment must carry heavy weight. Even so, that advice is bound to be based on an assessment of probabilities, and there will be a very small number of cases where the improbable occurs. Moreover, the assessment of best interests of course encompasses factors of all kinds, and not medical factors alone, and reaches into areas where doctors are not experts.*

Permission

No person may file expert evidence unless the Court or a Practice Direction permits, or if it is filed with the permission or application form and is evidence that the incapacitated person is a person who lacks capacity to make a decision in

relation to the matter to which the application relates or as to his or her best interests. An applicant may only rely upon such evidence to the extent and for the purposes that the Court allows ... In a simple or non-controversial situation a single expert may be allowed or appointed. Where each party instructs their own expert there may be a direction for these experts to communicate with one another and produce a joint statement of issues on which they are agreed and issues on which they disagree, with reasons. There are also provisions for “single joint experts” who will be instructed by the parties jointly. An expert may request directions from the Court to clarify his or her function, and the Court may allow the parties to put written questions to the expert on his or her report. Where a party has disclosed an expert’s report, any party may use this as evidence at any hearing in the proceedings.

Ashton (2018), paragraphs 8.87 and 8.89

When deciding whether to give permission the court is to have regard in particular to—

- (i) the issues to which the expert evidence would relate;
- (ii) the questions which the expert would answer;
- (iii) the impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings;
- (iv) any failure to comply with any direction of the court about expert evidence; and
- (v) the cost of the expert evidence.

Restriction

The court has the power to:

- restrict expert evidence (Rule 15.5); and
- direct that evidence be given by a single joint expert (Rule 15.12).

Rule 15.3 provides,

(1) *Expert evidence shall be restricted to that which is necessary to assist the court to resolve the issues in the proceedings.*
 (2) *The court may give permission to file or adduce expert evidence as mentioned in rule 15.2(1) and 15.5(1) only if satisfied that the evidence—*

- (a) *is necessary to assist the court to resolve the issues in the proceedings; and*
- (b) *cannot otherwise be provided either—*
 - (i) *by a rule 1.2 representative; or*
 - (ii) *in a report under section 49 of the Act.*

Duty

An expert owes an overriding duty to the court. Rule 15.4 provides,

- (1) *It is the duty of the expert to help the court on the matters within the expert’s expertise.*
- (2) *This duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.*

It is the duty of an expert to help the court on matters within the expert’s own expertise. Expert evidence should be the independent product of the expert uninfluenced by the pressures of the proceedings. An expert should assist the court by providing objective, unbiased opinion on matters within the expert’s expertise, and should not assume the role of an advocate. An expert should consider all

material facts, including those which might detract from the expert's opinion. An expert should make it clear:

- (i) when a question or issue falls outside his expertise; and
- (ii) when he is not able to reach a definite opinion, for example because the expert has insufficient information.

If, after producing a report, an expert changes his view on any material matter, such change of view should be communicated to all the parties without delay, and when appropriate to the court.

8. *An expert's report should be addressed to the court and not to the party from whom the expert has received instructions.*

9. *An expert's report must—*

- (a) *give details of the expert's qualifications;*
- (b) *give details of any literature or other material which the expert has relied on in making the report;*
- (c) *contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based (or annex the instructions insofar as they are in writing);*
- (d) *make clear which of the facts stated in the report are within the expert's own knowledge;*
- (e) *say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;*
- (f) *where there is a range of opinion on the matters dealt with in the report—*
 - (i) *summarise the range of opinion, and*
 - (ii) *give reasons for the expert's own opinion;*
- (g) *contain a summary of the conclusions reached;*
- (h) *if the expert is not able to give his or her opinion without qualification, state the qualification; and*
- (i) *contain a statement that the expert understands the expert's duty to the court, and has complied and will continue to comply with that duty.*

10. *An expert's report must be verified by a statement of truth as well as containing the statements required in paragraph 9(h) and (i) above.*

11. *The form of the statement of truth is as follows— 'I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true and that the opinions I have expressed represent my true and complete professional opinion.'*

COP Practice Direction 15 A

Reliance

Where a party has disclosed an expert's report, any party may use that expert's report as evidence at any hearing in the proceedings (Rule 15.9). In COP proceedings the opinions of professionals will be admitted as expert evidence but considered alongside factual evidence from those who know P and will only be persuasive if the expert has been given all relevant information and applied the correct legal test. In general, professional witnesses provide factual ev-

idence about what has taken place and their part in it, while expert witnesses apply their knowledge and expertise of the area to the factual evidence in order to reach an opinion. This general distinction may be blurred in section 49 reports prepared for the COP (see below) because professionals involved in the care of P are also asked to give their opinion on matters before the court.

Weight

The duty of the court is to consider the expert evidence in the light of the facts, not in isolation from them, and where a case involves substantial elements of both opinion and factual evidence, the court may accord as much weight to each as it sees fit.

The probative value of an expert opinion depends upon proof of the underlying facts. There is a difference between the facts which form the basis of the expert's opinion, and his opinion. If the facts which form the basis of the opinion are not proven, then the opinion is essentially worthless.

It is vital as a preliminary point to remember that: when the opinion of an expert is based upon the report of facts, those facts, unless within the expert's own knowledge, must be proved independently; an expert may (in an appropriate case) give evidence upon 'ultimate questions' going to factual matters, for instance as to the accuracy or truthfulness of a witness, but the final decision remains for the judge; likewise, the 'ultimate' questions of whether P had capacity and as to what is in their best interests are matters for the court.

Ruck Keene (2018)

As Charles J observed in *A County Council v K.D and I* [2005] EWHC 144 (Fam), '... it is important to remember (i) that the roles of the court and the expert are distinct; and (ii) it is the court that is in the position to weigh the expert evidence against its findings on the other evidence ... the judge must always remember that he or she is the person who makes the final decision.'

The court must determine capacity on the basis of, 'all the relevant evidence. Clearly the opinion of an independently instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important.'

PH v A Local Authority and others [2011] EWHC 1704 (Fam), per Baker J.

A judge may therefore depart from the expert evidence put before him. Where a departure concerns the potential level of risk to the welfare of P it is submitted that the judge should provide appropriately detailed reasons.

The Expert

Acting as an expert witness demands a particular set of skills and interests. It is not for everyone, but it is a rewarding and challenging activity. An expert must always remember that his central duty is to assist the court on matters within his expertise. He is unique

amongst witnesses in that he is allowed to offer opinion evidence as opposed to factual evidence. His opinion is only as good as the information on which it is based, and on his own knowledge and experience of the subject.

In offering an opinion to the court, the expert is bound by the court's own rules and practice directions. The COP has its own rules, and on matters not covered by the COPD rules, the civil procedure rules apply. The COPD rules and practice directions are freely available on the internet and are reproduced in Ashton (2018). Part 35 of the civil procedure rules, also freely available on the internet, deals with expert evidence.

An expert must have specific knowledge and experience relevant to the subject matter of the case. It is important for the solicitor preparing to instruct an expert that this is established at the outset. It is embarrassing and unhelpful for an expert to admit under cross examination that he does not in fact have the relevant knowledge and expertise.

The COP often orders that an expert be instructed jointly by the parties in the case. One solicitor will usually take the lead in providing instructions, but the letter of instructions should be agreed by all parties. The solicitor's instructions to the expert must be clear, comprehensive, and precise. The solicitor should summarise the background to the case, the nature of the proceedings, and identify precisely the questions which are being put to the expert. Medical experts are doctors rather than lawyers, and will need to be advised of the relevant legal tests and relevant case law. An excellent model letter of instructions for an appeal under section 21A of MCA is given in Ruck Keene (2018).

Having received instructions and confirmed that he has the relevant knowledge and expertise, the expert must consider what evidence is required to form his opinion. There will usually be a need to interview P, and possibly others involved in the case who have knowledge of P, and to review documents. COP cases often involve very large quantities of documents. There will be a court bundle, and there may be medical records (GP and hospital records), social care records (local authority), and care home records. There may be witness statements. It is not at all unusual for there to be 2,000 pages or even considerably more. It is regrettably rare for these to be provided in a paginated form, and records files are often very disorganised. Records are often provided as they are received by the solicitor, over a period of time. These factors make it very difficult for the expert to refer in his report to specific entries in the records. If records are provided electronically, it is easier to refer to a page in an electronic file. This may enable the expert to keep track of the source pages and to refer back to them if necessary, but it is not helpful to others involved in the case unless everyone has access to the same electronic files, which is rarely the case. Very occasionally in this author's experience, but very welcome, the expert may be sent paginated records (paper or electronic, according to prefer-

ence), clearly divided into sections according to the source. Failing this, a partial solution is for the expert to prepare a detailed chronological table as he reads through the source files, transcribing relevant extracts into the table as he reads. Some experts prefer to paraphrase extracts from each source in turn, but that has the disadvantage that it is very difficult for the reader to build up a chronological picture of the sequence of events as they unfolded. A decision has to be made whether to transcribe sources as accurately as possible or to paraphrase. Whichever route is taken, it is important that the reader knows what editorial procedure has been adopted. Given the difficulty of identifying the relevant pages and referring back to the sources, there is much to be said for a transcription so that the court can decide for itself if the record in fact demonstrates what the expert claims it demonstrates. Even then, the expert must decide whether to transcribe exactly (which, because of the terminology, abbreviations, and often rather careless typing or illegible handwriting in many records) may result in something that is nearly incomprehensible to non-medical readers. It may be helpful for the expert to include explanations of terms in square brackets or as footnotes or a glossary.

It will probably be found that many pages of source material have little bearing on the case and can be skimmed very quickly, while other parts are critical and must be considered very carefully. Once the material has been examined and compiled, the expert can consider it 'in the round' in order to reach an opinion.

The second key component of the material on which the expert must base his opinion is an examination of P. The interview will need to be arranged in advance in the usual way. The expert will need to introduce himself to P and explain why he is there. He must try to obtain consent from P to conduct the interview and provide a report. This can be problematic if P is cognitively impaired and lacks capacity to consent to the interview. In that situation, the assessor must proceed on the basis of best interests, and it may well be the case that it is in P's best interests that the assessment should go ahead so that the court can make a proper determination in the case. On occasion, but rarely, P may object strongly or decline to cooperate with the assessment. It is not possible to compel an unwilling person to be assessed, but it may be that it is possible to set up the appointment on another occasion on another day under different conditions, perhaps with someone else present who can support P or give him confidence so that the interview can go ahead.

The expert may wish to interview other people concerned in the case such as relatives or carers (professional or otherwise). It is important to keep records of such interviews and, if they are relevant, to describe them in the report. In the interests of limiting time and costs, some of these interviews may be conducted by telephone.

The letter of instructions will have put some very specific questions to the expert (usually based on the

court order). As noted above, capacity and best interests are the two key concepts in COP cases. It is common for different experts to be instructed on each of these matters. Although at times they can seem to be closely connected, it is important for the expert to limit himself to the questions put to him. It is essential to read the instructions very carefully. Capacity to do what? When? Capacity is time- and decision-specific. Capacity can fluctuate, and that presents particular difficulties in assessment. The law as it stands is not particularly illuminating in defining how fluctuating capacity is to be approached. The expert can describe and explain what he finds, but he should not try to invent the law on fluctuation: that is for the court to deal with. The expert's job is limited to his professional expertise.

Chapter 4 of the Code of Practice sets out what is meant by capacity and how it should be assessed, and chapter 5 deals with best interests. In terms of capacity, an assessment that a person lacks capacity should not be made on the basis simply of age, appearance, assumptions about their condition, or any aspect of their behaviour. That does not mean that these things are irrelevant (for example, older age is a very strong risk factor for dementia, which is a common cause of incapacity), but it does mean that these factors should not be relied on without further evidence of incapacity. Regarding appearance and condition, the Code says:

4.8 The Act deliberately uses the word 'appearance', because it covers all aspects of the way people look. So for example, it includes the physical characteristics of certain conditions (for example, scars, features linked to Down's syndrome or muscle spasms caused by cerebral palsy) as well as aspects of appearance like skin colour, tattoos and body piercings, or the way people dress (including religious dress).

4.9 The word 'condition' is also wide-ranging. It includes physical disabilities, learning difficulties and disabilities, illness related to age, and temporary conditions (for example, drunkenness or unconsciousness). Aspects of behaviour might include extrovert (for example, shouting or gesticulating) and withdrawn behaviour (for example, talking to yourself or avoiding eye contact).

The first part of the capacity test requires the identification of the impairment of, or disturbance in the functioning of, the mind or brain which gives rise to incapacity. The Code (4.12) gives a non-exhaustive list of examples:

- *conditions associated with some forms of mental illness*
- *dementia*
- *significant learning disabilities*
- *the long-term effects of brain damage*
- *physical or medical conditions that cause confusion, drowsiness or loss of consciousness*
- *delirium*
- *concussion following a head injury, and*
- *the symptoms of alcohol or drug use.*

In considering the second part of the capacity test, the so-called functional test, the expert must be clear about what the relevant decision to be made is, and then assess if P is able to understand, retain, use or weigh the relevant information, and communicate his

decision. It will be helpful to identify and set out explicitly what information the expert thinks is relevant to the specific decision. In a deprivation of liberty case which is often about capacity to make decisions about care and accommodation, this is likely to include an understanding of what the problems with previous (more independent) care and accommodation were such that the local authority now thinks that a deprivation of liberty is necessary, and what options are now under consideration. This information should be included in the documents provided to the expert. In practice, at the time the expert is instructed, the options under consideration may not always have been identified. However, it is impossible for an expert to discuss the person's views of the options until those options are known. It may be necessary to go back to the instructing solicitor to request more information about those options, and possibly to delay the assessment until that information is available.

An assessment for the court is not the same as a standard medical assessment. It must be conducted in order to answer the questions put to the expert, and it will not be helpful simply to provide a description of the person's current medical condition (although that description may well be part of the information in the expert report).

An expert report must comply with the rules and procedures of the court. It must set out the expert's relevant experience and qualifications; it must describe his instructions; it must separate the evidence on which he bases his opinion from that opinion. In order to be helpful, an expert report should be clearly set out, coherently argued, and deal with the questions put to the expert. It should not try to resolve matters of fact which may be disputed. It is often helpful to provide a summary of the case and summary of the opinion near the beginning, and to provide a table of contents (especially in a longer report). The opinion should deal with each question in turn, and should show how the conclusion follows from an application of the relevant legal test or definition to the evidence. Where conclusions are uncertain (as they often are), the report should set out the range of possible opinion, and why the expert favours one view over another. The expert should address as carefully and precisely as he can why each part of the capacity test is or is not met in the particular case.

Once the report has been provided, the parties have an opportunity to put written questions to the expert. These must be answered within the specified time-frame. In a joint instruction, the expert must be open in his communication with all parties. In practice, practical matters such as timing of the interview and report, and access to documents are usually agreed with the instructing solicitor, but any significant matters must be agreed with all parties. In a joint instruction it is not permitted to have confidential communications with one party only.

In some cases, the expert will be called to court to give oral evidence. This requires a different set of skills from report writing. Experts unused to giving oral evidence may wish to consider attending one of the training courses available. It may also be helpful for

experts to consult some of the books on advocacy described in this paper so that they can understand better how the advocates are likely to approach the matter before the court, and how they may frame questions. Rather counter-intuitively, answers are best addressed to the decision-maker (the judge) rather than the advocate who has put the question. This may mean turning from one to the other before answering. Experts may reasonably expect the court to treat them respectfully (although not necessarily to accept what they say), and if an expert feels that under cross-examination he has not been able to say something which is relevant and important, he can turn to the judge and ask if he can say it. It would be very unusual for a judge to refuse a reasonable request of that kind.

Courts can request expert evidence either by ordering that an independent expert be instructed, or requiring a report to be made under MCA s. 49. The latter allows the Court to require that a report be made by the Public Guardian, or a Court of Protection Visitor, or by a local authority or an NHS body. This means that an NHS trust may be required to provide a report, even if P is not under current care. It will usually be provided by a consultant psychiatrist, but not necessarily by one who has experience of working as a court expert, nor one who has previously been involved in assessing or treating the person. The advantage to the court is that no fee is payable for a s. 49 report, while an independent expert will expect a fee (usually at the current Legal Aid Agency rates). Such reports can be helpful, but it may also transpire that the report does not adequately deal with the matter instructed, and the court then has to instruct an independent expert.

In relation to fees, the expert will usually be required to submit a quotation in advance. This should be split into elements for reading, interviewing, writing, travel time, and travel expenses. At the time the quote has to be provided it may not be clear how much documentation there will be to read. If more is provided than originally quoted for, it may be necessary for the expert to go back to the instructing solicitor with an amended quote for the extra material. This must be done in advance as the request will not usually be granted after the work has been carried out.

Tips for experts

1. Before you accept instructions, consider if you have the necessary professional knowledge and experience.
2. Many organisations provide training courses in acting as an expert. These can be extremely helpful.
3. Make sure you have an understanding of the relevant court rules of procedure.
4. Stay within your expertise. If something is outside it, say so.
5. Make sure you have clear instructions from your instructing solicitor, with clear questions. If unsure, go back and ask. Sometimes you are asked what appears to be the wrong question to resolve the case. If so, discuss with the solicitor whether the question

should be put in a different way.

6. You may need to explain to the solicitor what records you will need to see and how to obtain them. You are likely to know more about which hospitals/GP surgeries/care homes/local authorities may have relevant information.

7. In Court of Protection cases, experts are often asked about several different kinds of capacity, for example: to make decisions about care and accommodation; to make decisions about treatment; to make decisions about finance and property; to conduct litigation/instruct a solicitor. Each of these needs to be considered separately, and some of them have specific case law which should be set out in your instructions. If unsure, ask.

8. It is helpful in framing your questions to P and in explaining your view in your report to be explicit about what you think is the relevant information in relation to each question. It is possible to alter the apparent threshold of capacity by making the relevant information more or less complex. In general, courts are wary of setting the bar too high, thereby rendering P incapacitous. Ultimately, the decision on where the threshold lies is a matter for the court, not the expert.

9. In considering capacity to make decisions about care and accommodation, the assessment needs to be based on concrete options. The expert needs to know what these options are in order to discuss them with the person concerned. Do not be embarrassed to delay the assessment until these options are known (local authorities sometimes leave it until late in proceedings to set out the options).

10. Make sure you understand the legal tests or concepts which relate to the questions. If unsure, ask the solicitor.

11. If you think you will not be able to meet the required timeframe, discuss this with the solicitor as soon as possible. It may be possible to seek an extension of time, but this will require the agreement of the parties and the court.

12. An expert report is not the same as a medical history and examination, although it may contain them. It is an opinion given in answer to specific questions.

13. Do not try to answer questions which should be left to the court. You are allowed to give evidence only because you have special knowledge and expertise which the court does not have.

14. Check your report very carefully before you send it off. You may be cross examined on it in detail and have to explain why you have said what you have said. If you are called to give evidence, it may be months after you wrote the report, and your report will be the main document on which you are questioned. It should clearly set out the evidence and argument by which you reached your opinion.

15. A chronological table constructed from the records is not the only way to present the data on

which your opinion is based, but it can be a very useful one.

16. Mental capacity is often a grey area. Even if the court ultimately disagrees with your opinion, your evidence, both in summarising the records and in reporting your interview with the patient, may be very useful.

17. Matters are decided on the balance of probability, and there is a rebuttable presumption that the person has capacity. In many cases, the records will contain previous assessments of capacity which do not agree with each other. If you really cannot decide one way or the other, say so, but you do not have to be sure to give an opinion which is based on the balance of probability.

18. Be honest and truthful. Your overriding duty is to the court, not to the party/parties instructing you. A useful test for yourself is to consider what opinion you would have given if the other side had instructed you. If it is not the same as the opinion you have given, ask yourself very carefully why not. However, in COP work, many cases are given as a joint instruction.

Advocacy Manner

More is communicated by you as a person than simply what you say. People look at how you say it, with what tone, with what expressions, and with what body language. With a sympathetic hearing, there is more opportunity to be persuasive, so try to be liked by the judge. People are more sympathetic to those they like: it is human nature.

Everyone with whom you come into contact has an agenda. That agenda may appear to be compatible with your own, but in reality, it might not be. This suggests that you should take the attitudes of other people into account when you consider your own behaviour. First, you should observe other people so that you can adapt your tactics and communications to their willingness to accept your idea. Second, you should observe how other people react to you ... In practice, all that opposing counsel must do is present a face of moderation and good judgment. The judge will lean as far as is practical in that direction. This is simply an application of the principle that one can rely upon people who demonstrate good judgment. Excessive language is the enemy, and often demonstrates the opposite of good judgment.

Hollander (2018)

Therefore in face to face discussions outside the door of the court:

- stay calm;
- always allow others to speak;
- solicit the input of others, then acknowledge it as seriously intended; and
- allow others to finish their thoughts without interruption.

Whilst displaying poise in the marshalling of detailed facts and in the handling of complex medical evidence, be sensible and realistic in making your submissions. Your tone of voice is critical. Whilst an advocate can captivate by speaking with vigour and conviction, he will offend if he crosses the line and is

perceived to be rough and arrogant. As Cicero observed, 'we don't always have to employ vigorous oratory, but often we should rather speak in a quiet, low-keyed, and gentle manner...so much is accomplished by speaking thoughtfully and with a certain taste.'

Although forceful advocacy is not the norm in the COP, you must be ready to switch gears when required. Whatever your personal style is, be yourself, present your case with confidence (i.e. with a rhythm and tone that allows you to communicate your message effectively, and the audience to listen, understand, and remember what you are saying). Speak slowly and use short sentences. Look the judge in the eye, and engage in a conversation. To entrench your message, use memorable words and phrases as psychological sign-post on the road-map of your argument.

'Keep it simple. Give it life. Be brief... Irresistibility... is the hallmark of the truly great advocate. An irresistible argument is just that – an argument that is irresistible. The tribunal cannot fight it. It sweeps them happily, effortlessly, to your conclusions... To be irresistible, an argument is three things:

Reasonable, not emotional

Softly delivered, and

Common sense...

[The] most persuasive feature of any case is if it accords with common sense. If you can find the common sense position in any argument, then you have the beginnings of something irresistible. You then weave around the common sense position careful words and a careful delivery... The irresistible argument is usually the easy, simple argument. Always ask yourself, what is the easy, simple argument? Where is the common sense in this case?

Morley (2015)

Rapport

Real life is not like an episode in Suits.

There are many things going on in the present for the judge for which you have no appreciation. What you can certainly anticipate, however, is that the judge does not see your case, your client, or you, the way you do...you should anticipate that opposing counsel also does not see your case, your client, or you, the way you do...One of the choices you can make is to take all steps you can to get along well with others. There are few situations in which aggression, conflict, arrogance, or single-mindedness represents the best strategy...your chances of success improve as you develop rapport with the court, with counsel, and with lay folk...[This] requires that we act in a manner that is courteous and dignified. In other words, we have to act as professionals...Outbursts and rudeness increase stress...To deal with people appropriately, you have to know what impact you make on others...Rapport starts with trust...A calm demeanour helps build trust; an angry one does not. A calm demeanour helps to resolve disputes; an angry one adds fuel to the fire...Stay calm and polite...Sincerity, empathy, thoroughness, and professionalism all lead to rapport. [The Ten Commandments of rapport are];

- *be punctual;*
- *[be comfortable and have everything with you that you need];*

- *be prepared;*
- *be understood;*
- *communicate;*
- *be practical;*
- *[do not spring surprises on your opponent];*
- *be honest;*
- *be open minded; and*
- *be level-tempered – Consider that the opposing client will react poorly to your excessive language, and that this reaction may prevent resolution and lead to protracted stress.’*

Hollander (2018)

It is also salutary to remember the volume of cases with which judges have to deal and the time pressure they are under. Consequently, trial judges working at the coal face

at the lower end, are concerned principally with the facts before them, and to engage in the adjudicative process as efficiently, and perhaps, conveniently as possible. By and large, first instance judges do not like to make new law. They tend to work intuitively, within general legal concepts and look for precedent only where the facts of a relevant authority and facts of the case before the court are either indistinguishable or substantially the same. Judges at first instance are most happy when the finding of facts alone determines the outcome of a case, and will avoid becoming enmeshed in legal argument unnecessarily if they can. If a trial judge has to consider legal issues, he usually first finds the facts, then looks at the relevance of the previous case and decides whether the legal reasoning in the previous case can be compared and applied to the facts before him. He will not wish to make new law, far less give vent to any policy considerations. Even the higher courts tend to shy away from making indications of policy on questions lacking general importance, and to the surprise of many advocates appearing before it, the Supreme Court is as equally concerned with the factual matrix of a case as the puisne judge. Judges like other professionals require both confidence and experience to arrive at firm conclusions. Even the most experienced judge may be troubled by an oddity or perhaps the general peculiarity of a situation with which he is faced. He may be dissatisfied with submissions by the advocates appearing on both sides. He may be troubled by a recent authority that appears to be out of step with his own thinking or a common sense approach to solving the problem. Or he may face real uncertainty as to what to do... Judges in the lower courts also tend to be conscious of the disapproval in the profession of intellectual dishonesty. “Distinguishing” is sometimes an ingenious intellectual contrivance to avoid having to follow an inconvenient previous decision which would otherwise bind the court.

Goodman (2018)

Communication

The trial advocate should remember at all times that *Human beings are far more video than audio. The way we collect most of our information is through our eyesight... Intent listening is something we do with surprisingly rarity... What most lawyers ask the fact finders to do in court is to use their second best device for gathering understanding. And the fact finders do it: on the whole they do it well. But since we don't tie blindfolds on them, they don't switch off their best information gathering device... People who have*

studied the psychology of communications have some terrifying statistics for us lawyers. Examples:

- *60% of a message is conveyed by body language and visual appearance generally.*
- *30% of the message is conveyed by tone of voice.*
- *Only 10% of a message comes through the words used.*
- *Only 10% of what people hear gets remembered. If, on the other hand they see something connected with what they are hearing, as they are hearing it, they remember 50%. Lawyers tend not to know these statistics, just as they don't seem to realise that they are operating all the time in the Video dimension.*

Evans (2010)

In his book the Golden Rules of Advocacy, Keith Evans adds,

[At trial what the judge normally has to do] is decide which parts of the evidence [he] prefers. An advocate's job is to lead his or her fact finder to a preference and thus to an opinion... Your fact finders may arrive at their preference and their opinion entirely as a result of thinking. But that's not very likely, is it? Even trained thinkers like us, in choosing between two conflicting witnesses, often ask ourselves what our gut reaction is... The process of getting to a preference and an opinion involves both – thinking and feeling. In a trial by judge alone you are before a trained thinker: here there may be more thinking than feeling involved in the search for preference or opinion. I say “may be” because that isn't by any means certain. Judges are human too... You see lawyers behaving as if their fact finders had no feelings at all, whereas it is their feelings you should be reaching out to all the time. Your job is to make them feel, as well as think, that they prefer your version. It is your task, in total honesty, to lead them to this. And if you take this as your starting-point all sorts of guidelines present themselves.

Evans (1993)

Keith Evans' guidelines include:

Be likeable – Leave the macho advocate where he belongs, on the television screen. The nice approach is infinitely more effective. If you are likeable, affable and kindly you will evoke all your fact finders nicest feelings. They will want to believe you. Coming across as utterly real and genuinely nice works wonders in court.

The sympathy rule – Try to imagine what it must be like sitting where your judge is sitting, seeing what she is seeing, hearing what she is hearing. Try and put yourself as completely as you can in her position. Do it as they come into court at the outset and do it now and again right through the trial. Imagine yourself into the individual's skin: get behind his or her eyes. This simple exercise puts you in far greater sympathy with them and, somehow or other, they are subconsciously aware of it. The result is that they give sympathy back to you. They will listen willingly.

They will put the kindest interpretation on what you say.

They will feel reluctant to deny you what you ask.

They will feel inclined to overlook your mistakes.

The rule of equals and opposites – If you pay attention to the sympathy rule you won't get into a confrontation with your fact finder. Most advocates go barging into confrontation with the fact finder as a matter of course. The rule is simple. You push and they'll push back. You pull and they'll resist.

You demand and they'll refuse you. You insist and they'll turn you down. An action almost invariably produces its equal and opposite reaction, and it's one of the most important Golden Rules of Advocacy.

Include the fact finder – Think 'we', never 'they'. The witnesses tell us not you. The fact finders must always feel included rather than as dispassionate umpires sitting on the side lines.

Prepare them – If you have weaknesses in your case, and all cases have weaknesses, make sure that you are the first to mention them. Get to your difficulties before anybody else does. You will handle them so much more sympathetically than your opponent.

Always aim to be the honest guide – By the time the fact finder has spent 20 minutes in your company they should be beginning to feel, not only that you are honest, but that they can trust you. More than that, they should already have started to get the feeling that they can trust you completely, that you are not going to dupe them in any way. There's no substitute for real sincerity and real honesty and real niceness.

Don't ask them to believe the unbelievable – If you press them to accept something that is beyond them, your credibility will vanish in a puff of smoke. Any good you may have accomplished so far will be undone.

When there is a weak point in your case don't pretend that it isn't a weak point. Admit it and show them how you still ought to succeed despite that weakness.

Don't misquote the evidence in any way at all and don't put a slick interpretation on any part of it.

Make sure that you always come across as being absolutely fair:

Practice listening intently.

Stop dead in your tracks – As soon as you realise your sentence is a failure, stop. Say something like: "I'm not putting this clearly. Let me start again."

Use repetition very sparingly.

The coffin nail exception – If, in cross-examination you get a witness on the run and you have a list of things which you know he is going to have to admit, then you can use one form of repeating the question over and over again, driving the nails into the lid of the coffin.

The Mark Anthony exception – In your final speech (and in the rarest of cases in your opening) you might be able to find a short form of words that you can repeat like a theme. "For Brutus is an honourable man, so are they all, all honourable men." If you can find such a theme, use it. But make sure it's worth hearing again and again.

Sit down and write your final speech – As soon as you have an approximate idea of what a new case is about, sit down and write your closing speech. Then read it. See how well the available evidence supports it. At once you will see the gaps, the missing bits. Trying to close those gaps is the preparation of your case. When you think you are getting close sit down and write your opponent's final speech. This will concentrate your focus more sharply on what you still need to do by way of preparation and on the weak points you will have to reach and deal with before anybody else does.

Perfect your final speech – This is the blueprint of your trial. It becomes a record of your progress through the case, a shop-

ping list of all you have to do, a foolproof checklist. The evidence you need and the way you need to present it stares straight at you from this final plan.

Show them the way home – Home is the goal we are aiming at, the objective, the only reason we are in court. Everything we have done has been done for this. Your fact finder usually starts out as a complete stranger to your case. They come like travellers in a new land. Somewhere in this country is the city you want to take them to, the city called verdict. You know their journey to that city could be a difficult one. If this weren't so you wouldn't be in court. And you have an opponent who wants to take them somewhere else altogether. Both of you are there, as the travellers arrive like tourists wondering what lies ahead of them, and from the outset you are like two tour operators in competition for those tourists. The brilliant advocate grabs them all, there and then. He paints them a picture of an easy, enjoyable journey, through interesting countryside, over smooth, paved roads. He sells them his city as a place where they'll feel content to be, a place worth having arrived at, a place where they'll be so welcome, a place where they'll be more than just tourists, a place where they'll experience a new and exciting sensation: the pleasure of bringing right where before there was wrong. And off they'll all go, with the other tour guide chasing along behind, desperately trying to catch up and never even coming close. Unless there is a catastrophe in the evidence they never swerve. They choose the guided tour they prefer and stick with it.

Evans (1993)

Never become angry with the judge. You may think you have every justification, but you will lose. If you save the face of the court, you retain the respect of the court.

A respected advocate, although sometimes not popular, is a credible advocate. And a credible advocate is a persuasive advocate. A shouting advocate without respect is useless.

An advocate who is not respected is an advocate without credibility. Without credibility, we are unpersuasive. The quickest way to lose respect is by being quarrelsome with the judge, or with the opposition, by taking mindlessly dull points...by being high handed with witnesses, condescending, pointed, irritated, arrogant, slightly sneering, and pompous.

Morley (2015)

Opening submissions

A speech consists of two essential parts:

(i) The Statement, that is to say the statement and explanation of what has to be proved.

(ii) The Proof, that is to say the arguments in support.

The proof falls into two divisions, which need not, of course, follow one another consecutively, but may be intermingled. The first division consists of the arguments in support of one's own case; the second is the refutation of the argument advanced, or likely to be advanced, on the other side... [Arguments] ought not, in a legal speech, to be set out in a continuous sequence, but worked in here and there... [An argument] may be refuted in two ways: either by objecting to its validity on one ground or another; or by setting up a counter argument. In addition to these essential components – which must always be present – a speech may also contain:

(i) An introduction, sometimes known as the Exordium or Proemium; and

(ii) *A Peroration, also described as the Epilogue or the Re-capitulation.*

If the subject is plain and short, there is no need for an introduction. Its object is to pave the way, as it were, for the main speech. Thus in his introduction a speaker seeks chiefly to arouse interest, in order that attention may be given to his arguments; he seeks also to remove prejudices, and to make his audience favourably disposed towards the case he is about to present.

Munkman (1991)

The purpose of a written opening is to educate the judge. Define the issues before the court. Summarise your case and that of your opponent. Avoid pitching your case too high, because the evidence has yet to be tested. Identify the relevant principles and authorities. Where you are aware that there is an area of controversy, flag it up. The opening should be accompanied by a bundle of authorities. These should be agreed if possible.

The oral opening is another opportunity to bring the judge up to speed, and draw his attention to the principal issues in the case. Establish what he has read. Identify the principal areas of controversy and bring out the main points of your case. Draw attention to the most important documents. Keep it concise.

Hochhauser (2013)

The single most important rule concerning opening statements is to present a coherent theory of the case... clearly, succinctly, and persuasively... Your trial theme... should be expressed in a single sentence that captures the moral force of your case. A theme communicates to the [judge] the reason that your client deserves to win. Thus introducing a theme in opening is particularly effective as a persuasive matter since it can focus the [judge's] attention on a cognitive image that you will return to throughout the trial ... Your case can be only as persuasive as the theory behind it, and your theory can only be persuasive if it ties the evidence to the legal issues. Your opening statement, then, must address the legal issues in your case.

Lubet (2004)

When logic permits, put your winning argument up front in your affirmative case. Why? Because first impressions are indelible. Because when the first taste is bad, one is not eager to drink further. Because judicial attention will be highest at the outset. Because in oral argument, judges' questioning may prevent you from ever getting beyond your first point... If you're the first to argue, make your positive case and then pre-emptively refute in the middle – not at the beginning or the end. It's an age old rule of advocacy that the first to argue must refute in the middle, not at the beginning or the end. Refuting first puts you in a defensive posture; refuting last leaves the audience focussed on your opponent's arguments rather than your own.

Scalia & Garner (2008)

The gift of selection is the genius of victory... The most important single element of successful oral argument is the ability to select the heart of your case – the nub – the core, upon which all else depends... rather than “go for the jugular”, many lawyers spend oral argument “going for the capillary”. They – and their message – get bogged down in a swamp of murky and difficult to follow detail. One judge compared

such an argument to being cornered at a party by someone from whom you cannot get away who insists on telling a complicated and impossible to follow story... [Argument] is best that goes to the jugular of the case... There is in every case a cardinal point around which lesser points revolve like planets around the sun... a central fortress which if strongly held will make the loss of all the outworks immaterial... your argument should be directed principally to that issue.

Garner (2009)

'Pick your best independent reasons why you should prevail—preferably no more than three—and develop them fully... Select the most easily defensible position that favours your client. Don't assume more of a burden than you must... Don't try to defend the indefensible... Make a virtue of a necessity. Boldly proclaim your acceptance of [a point of fact and law which goes against your case to demonstrate your reasonableness then go on] to explain why the conceded point makes no difference or why other factors outweigh it... [A weak argument] speaks poorly of your judgment and thus reduces confidence in your other points... Always start with a statement of the main issue before fully stating the facts.

Scalia & Garner (2008)

Examination-in-chief

The purpose of examination-in-chief is to get into evidence the facts necessary to prove your case. To achieve this purpose, it is necessary to elicit each witness's evidence in a clear and concise manner, and to anticipate, so far as is necessary and possible, any attack on that evidence likely to be made in cross-examination. When examining his own expert witness the advocate's aims include:

- ensuring that the judge understands the expert's evidence;
- persuading the judge of points essential to the case; and
- anticipating the other side's cross-examination and fortifying against that assault.

In relation to the expert, the court will expect the advocates to address:

- the expert's qualifications;
- the opinion sought;
- the information available to the expert (who in the COP will usually be a single jointly-appointed expert);
- assumptions made by the expert;
- what the expert did, i.e. interviews tests, and investigations;
- the methodology used by the expert, and: (i) whether there were multiple methodologies available; (ii) why one methodology was chosen; and (iii) limitations on that and other methodologies;
- whether the expert reasoned from: (i) the information available; (ii) the assumptions made; (iii) his expert knowledge and experience; and (iv) whether there are any gaps in the reasoning process;
- the expert's opinion and: (i) the clarity of communication and authority of the opinion (i.e. any equivocation, expression of doubt) and qualification; (ii) whether it follows logically from information and the expert's reasoning process;

- how it compares with any opposing opinion, and: (i) whether the basis of the opinion and reasoning is sound compared with the opposing expert's; and (ii) its reasonableness in light of all the other evidence;
- how professional the expert is, and whether the expert: (i) has demonstrated his understanding of an expert's duties to the court; (ii) (and his report) has complied with professional protocols and the Rules and Practice Directions; and (iii) has acted diligently and demonstrated accuracy; and
- whether the evidence should be acted upon; and
- whether: (i) the expert is impartial and trustworthy; and (ii) the expert's opinion is unbiased and trustworthy.

The expert is obliged to state his qualifications in his report (PD 35, paragraph 3.2(1)). The usual practice at trial is for the judge to be referred to the relevant page in the report and for the advocate to then move on to the substance of the expert's evidence.

In almost every civil case the expert will have written a report before the trial which will have been disclosed to the other parties pursuant to a direction of the court. This report should have been pre-read by the judge and examination-in-chief is usually relatively brief consisting of the advocate highlighting the important sections of the report and asking the expert to amplify or clarify ambiguities in the report and, sometimes, to comment on issues raised by the other side's expert (albeit that this has usually been done in the expert's joint statement) and/or issues that have arisen since he wrote the report. The bulk of the expert's time in the witness box is usually taken up with cross-examination. In many civil cases (in particular those involving a single joint expert) all of the expert evidence is given by report alone and, thus examination-in-chief does not arise.

Hodgkinson and James (2015)

The opinion of an expert, however correct, is of no use to the court unless it is clearly formed by inference from facts which have been or are to be proved in evidence. The expert must always, in expressing an opinion, indicate which facts he relies upon. Counsel calling an expert should therefore in examination-in-chief, ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination. *'Unless a witness states in his evidence in chief the grounds and reasoning that have led to the opinion, the opinion is valueless.'* Cadbury Schweppes v Durrell Lea [2007].

After the expert's opinion has been stated, provide the underlying theory. The theory should furnish the nexus between the expert's conclusion and the data used to support the conclusion. In other words the examination should follow this pattern: (i) here is my opinion; (ii) here are the principles that support my opinion; and (iii) here is what I did to reach my final conclusion. Having stated and supported his theory choice, the expert can then specify the nature of his investigations and tests. It is not necessary to explain or outline every hypothesis used by your expert, but the more important assumptions should be noted and supported. The examination in chief of an expert should conclude with a powerful re-statement of his most important conclusions. Many complex ideas can be made understandable with examples, analogies,

or metaphors. Expert witnesses should be encouraged to clarify their testimony through the use of such imagery.

Lubet (2004)

Cross-examination

There are...two rules of practice, firmly established in British courts, which must be complied with. The first is that the witness must be cross-examined on all material facts which are disputed. Otherwise the court will take it that his evidence is not contested. The second rule is that an advocate, in cross-examining must put to the witness the case he is going to set up, so far as it lies within the witness's knowledge; such cross-examination is a necessary preliminary to the calling of contradictory evidence...A real artist...will comply with the rule that he must challenge the adverse evidence not in any perfunctory and formal manner, but by using all the resources of his technique to weaken, undermine or destroy it. Likewise, instead of formally putting his case to obtain denials, he will try to insinuate it and build it up out of the witness's own mouth. Sometimes of course, there is no scope for anything but a formal challenge.

Munkman (1991)

Cross-examination of an expert witness is a hazardous undertaking. *'A witness under cross-examination does not want to agree with you. He will fight tooth and nail to confound you. He will misunderstand your questions. He will provide evasive answers. He will try to use your questions as an excuse to repeat the deadly features in his testimony which destroy your case. Unlike TV, a witness has no script which must be followed. He will try everything to wriggle out from under your questions. Every question in cross-examination is an invitation to disaster. It is an opportunity for the witness to hammer you and your case. So your first thought is don't do it. Always start from the point of view: if I can avoid it, I will.'*

Morley (2015)

Where the aim of cross-examination is to advance your own case, the advocate should seek to establish facts that fit in with or corroborate his case. In doing so the advocate's manner should not appear hostile. Where the aim is to undermine your opponent's case, just as a party must in cross-examination challenge evidence of fact given in chief by a lay witness which is not accepted, so the opinions of an expert must be challenged if they are to be disputed.

The cardinal rule of cross-examination is that you must put your case. You must challenge all material parts of the evidence given by witnesses called by your opponent that your client (or his witnesses) do not accept. The rule is that witnesses must be given the opportunity while in the box to answer the case presented contrary to their account of the facts. This does not mean that an advocate has to challenge every unessential detail, but he must cross-examine on material particulars.

Forceful advocacy in the COP is usually inappropriate unless an expert or professional witness is being evasive to the detriment of P, and it is rare to seek to exclude evidence or undermine an expert's credibility.

...when "putting your case"...you have the chance to develop your case in the sense that you can begin to show your audience the way you want them to look at all the facts. It is

usually better to let the facts speak for themselves ... [be subtle] when putting your case. Although in most cases, the witness will not agree with your client's version of events, at the very least you will introduce and develop your theory of the case and prepare the way for your witnesses to give evidence in support to it. Aim to do this without labouing your points or making them in a heavy-handed way.'

Advocacy

Effective cross-examination of an expert is no different than that of any other witness: you must have a sound analytical approach to the witness so that you can determine whether to cross-examine and, if so, how to organize and execute the cross-examination to carry out realistically attainable goals. This approach involves the following basic considerations.

Should you cross-examine? Not every witness needs to be cross-examined. If the expert has not hurt you, or if you have no effective points to make, or your own experts have been more persuasive, consider not cross-examining.

How should the cross-examination be organized? All cross-examinations have two possible basic purposes: eliciting favourable testimony, and conducting a destructive cross. Eliciting favourable testimony ordinarily comes before a destructive cross. If the expert has substantially helped you by agreeing to helpful facts, consider not attempting a destructive cross at all, although you have destructive ammunition.

Effective cross-examinations have a structure that starts strong, and keeps it simple. They maintain control over the witness by asking simple, leading questions and stop when the point is made.

What favourable information can you elicit? Did the witness say things on direct that you can have her repeat on cross? Can the witness admit facts not yet mentioned that support your case? What must the witness admit that helps?

What discrediting or destructive cross-examination can you do? Are the witness's perception, memory, or communication skills vulnerable? Can the witness be impeached? Can you expose the witness's bias, interest, or motive? Has she made prior inconsistent statements? Can the witness be impeached by a treatise?

A good approach to any cross-examination is to ask yourself: what will I say about this witness in closing arguments? Planning the cross-examination is then a matter of determining what facts you can realistically make the witness admit during cross-examination that support your planned closing argument.'

Mauet (2017)

In general, if wishing to contest the opinion of an expert being called by our opponent, we can either contest the factual basis of the opinion, or we can contest the opinion itself. If the factual basis of the opinion is disputed, then we should be able to get the witness to agree in cross-examination that if the facts were as we contend, then his or her opinion would be different. If it is the opinion which we are contesting, on the other hand, then we will probably need to call our own expert witness...

There are six critical questions we can ask about experts:
Expertise questions: How credible is E as an expert source?
Field question: Is E an expert in the field that A is in?

Opinion question: What did E assert that implies A?

Trustworthiness question: Is E personally reliable as a source?

Consistency question: Is A consistent with what other experts assert?

Backup evidence question: Is E's assertion based on evidence? The expert's possession of special expertise or knowledge is obviously the main foundational fact for expert opinion evidence; but it is not sufficient to prove some expertise at large. The expert witness must also be shown to be an expert in the field to which the issue about which they have been called to give evidence belongs.

Palmer (2003)

An expert may therefore be:

- (i) challenged as to credit in relation to his opinion as he may in respect of facts;
- (ii) asked to justify or deny particular opinions expressed on other occasions (including evidence given in similar cases) to cast doubt upon the opinions he has expressed in the present case;
- (iii) asked about his attitude to the parties, i.e. if it is suggested that he is biased; and
- (iv) questioned about whether he is or was not in a physical or mental state to express a proper opinion.

When cross-examining an expert witness the advocate's aims specifically include:

- (a) limiting the witness's apparent expertise. Narrow the extent of his or her expertise/experience by showing that it is not directly applicable to the case in question or, perhaps, by contrasting it to the experience of your expert;
- (b) showing that the witness has had less involvement/contact with the case than your expert;
- (c) showing your knowledge of the expert's subject. Using your knowledge of the technical terms involved or the way in which any tests were carried out, the expert will be less inclined to avoid your questions. Contrast this approach with the way you may deal with an ordinary witness of fact by simplifying technical terms;
- (d) inviting the witness to define technical terms and sometimes in highly complex matters it may be necessary to invite the expert to use common language;
- (e) challenging his or her methods, for example showing that there were other tests that the expert could/should have carried out that might have produced a different result. Remember to check that the expert's facts, calculations and methods do actually produce the results set out in his or her report and, if they do not, challenge the expert as this may undermine the confidence and credibility of the expert's evidence;
- (f) inviting the witness to agree with the propositions that form the basis of your expert's opinion – he or she is unlikely to disagree with everything your expert says, and you should know from your own expert those areas that are in dispute. Remember to 'put your case' to the expert by inviting him or her to deal with your expert's methods/opinions/conclusions;
- (g) inviting the witness to agree that, in his or her field, legitimate differences of opinion frequently occur between qualified experts. This shows that the witness is not infallible and that his or her evidence is 'opinion' only; and
- (h) using hypothetical facts to test the strength of the expert's

opinion. Testing whether a different interpretation of the same facts or a slight change in those facts would affect the expert's opinion.'

Advocacy

The advantage of a cross-examiner over even the most prepared witness is that only the cross-examiner knows which questions are going to be put next.

10 cardinal rules

(i) *Always put your case to a witness in so far as it is relevant to that person's evidence. Failure to do so may damage your case and may result in the witness being recalled.*

(ii) *Keep your xx to what is absolutely necessary.*

(iii) *Leading questions are permissible and should be used. Put propositions to a witness. Don't give them a chance to give equivocal answers. Listen carefully to what they have to say. If a witness avoids answering the question put it again until he/she does.*

(iv) *Do not ask multiple questions. Keep them short and keep a tight rein on the witness. You should be in charge.*

(v) *Permissible – forceful/insistent. Impermissible – hectoring/bullying. XX does not mean being cross. Never lose your temper with a witness.*

(vi) *Let the witness finish his/her answer; before proceeding to the next question. If a damaging answer has been given, pause before proceeding. Silence is golden. Let it sink in.*

(vii) *Watch the judge's pen. No matter how good the XX is, if the judge cannot record it, it may be lost. On a long trial, try to get a daily transcript if possible, it is very helpful for closing speeches.*

(viii) *Never put questions on a false premise. It denudes the XX of its force and makes you look bad/ incompetent/unprepared.*

(ix) *Never misrepresent a witness's earlier answer.*

(x) *Put questions, don't make speeches/submissions. Don't clutter the questions with comment – save that for closing.'*

Hochhauser (2013)

Re-examination

The purpose of re-examination is to correct, clarify or expand matters arising out of cross-examination. No question may be asked in re-examination which does not arise out of cross-examination. The basic rule about re-examination is do not do it, i.e. *'break glass in the event of emergency'*.

The advocate is not allowed to ask leading questions. *[In principle re-examination] is simply the insinuation of facts or possibilities which give a different turn to the answers in cross-examination, but as the advocate is examining his own witness, a roundabout approach is unnecessary. The real difficulty of re-examination is twofold. The first difficulty is to think of helpful points – which reduces itself to quick thinking and a detailed knowledge of the case. The second difficulty is to frame simple and straightforward questions without leading, for in view of the complications introduced in cross-examination, there is a tendency for questions in re-examination to be introduced by lengthy preambles and to be appallingly long-winded. The solution to this is, of course, a mastery of the use of language ... As it is the technique of insinuation which introduces something new in cross-examination, the object of re-examination is, more often than not,*

to counteract an insinuation. Suppose the evidence-in-chief has raised a certain probability or inference: and afterwards in cross-examination, a fact or a possibility is suggested to weaken this. Re-examination will then be directed either to excluding the suggested fact or possibility, or to bringing out something further to tilt the balance in favour of the original inference.'

Munkman (1991)

The closing speech

Closing is when you draw together all of the case, all the answers from the witnesses, all the legal incidents which arose at trial, and you present your theory of the case... Closing is all about persuasion... This means 100% comment. It is not about the facts; it is about comment on the facts. It is not about repeating what the facts were: it is about explaining why the facts as they emerged in trial mean you win.

Morley (2015)

In sum, the final argument must tell the whole story of the case but it cannot just tell any story. The final argument has to complement the portrait begun during the opening statement, and, even more important, must reflect and encompass the evidence in the case. This goal can be best accomplished only when the case is presented according to a well-defined theory... To be successful, the theory presented in a final argument must be logical, believable, and legally sufficient.

Lubet (2004)

In viewing the expert evidence through the eyes of the judge before commenting in closing, the advocate should bear in mind that in assessing materiality, reliability, and weight, a judge will usually consider:

- whether any norms used by the expert are mutually consistent;
- the degree of certainty stated;
- any boundaries have been crossed between different professional activities;
- the impression given by the demeanour and authority of the expert;
- whether the expert was dogmatic or flexible in his opinion; and
- whether the expert has taken in the facts of the case adequately.

Where (unusually) there is more than one expert and the judge must choose between them, he must be able to show that he has a reasoned basis for his preference. The factors by which a judge has drawn a distinction include:

- what the witnesses said;
- the extent to which their qualifications and experience lent authority to what was said;
- the relationship between their respective qualifications and experience and the task in hand; and
- where the weight of the evidence in terms of general principle lies.

Deprivation of Liberty Safeguards

The law on deprivation of liberty has gone through a profound transformation in the last 20 years, and at the time of writing a Bill is going through Parliament

which is likely to change it again. The story begins in 1953 with the coming into force of the European Convention on Human Rights (ECHR) signed by the 47 member states of the Council of Europe, including the UK. The context at that time was the terrible events of the Second World War. Article 5 of the Convention limits the circumstances under which a person may properly be deprived of his liberty, one of which is that the person is of unsound mind. Anyone who is deprived of his liberty has a right under ECHR article 5(4) to speedy access to a court capable of ordering his discharge. Patients with mental disorder who required treatment in hospital can be detained under the Mental Health Act 1983 (MHA), even if they are refusing treatment. The MHA automatically gives patients the right to appeal to a tribunal, satisfying the article 5 requirement. Until 1997, if they lacked capacity to consent to treatment and did not appear to be objecting, patients were usually admitted informally and treated on the basis of the doctrine of necessity, that is, that it was in their best interests to receive treatment. However, the landmark case of *Bournemouth* challenged that position by asserting that it was a breach of article 5 to hold a person lacking capacity in hospital on the basis that it was necessary and in his best interests, without further authorisation. The case went through the English courts to the House of Lords, as it then was, and was then appealed to the European Court of Human Rights, which found that there had been a breach of article 5 in those circumstances because there was no mechanism by which the person deprived of liberty could speedily appeal to a court (HL v The United Kingdom 45508/99 [2004] ECHR 720).

Parliament responded in 2007 by bringing in the Deprivation of Liberty Safeguards (DOLS) which are set out in schedules 1A and A1 of the MCA, together with a Code of Practice. Under these procedures, the ward manager (for patients in hospital) of anyone who lacks capacity and is deprived of liberty must seek authorisation for the deprivation. The ward manager can authorise urgent deprivation for up to seven days, renewable for a further 7 days while an application to the local authority is made for authorisation of the deprivation of liberty for longer periods. The local authority must send two assessors, one of whom must be a doctor, to investigate whether six qualifying requirements are met. These are: the person is aged 18 or more; lacks capacity; has a mental disorder; there are no relevant objections; the deprivation is in the patient's best interests; and the person is 'not ineligible' for detention under MHA.

At the time that these procedures were introduced it was anticipated that there would not be very many applications. However, following the landmark judgment in *Cheshire West (P v Cheshire West and P and Q v Surrey County Council)* [2014] UKSC 19), where the meaning of 'deprivation of liberty' was clarified as being a state of continuous supervision and control where the patient was not free to leave, the number of applications for DOLS authorisations escalated to the point where local authorities across the country

were (and are) unable to meet the requests for authorisations, with the result that the statutory time limits for authorisation cannot be met and large numbers of people in hospitals, care homes, and elsewhere are, strictly speaking, being deprived of their liberty unlawfully. A House of Lords post legislative scrutiny committee concluded that the present law is 'not fit for purpose'. The government accepts that this is an unworkable position and, following a consultation by the Law Commission, has introduced a Bill to Parliament with the aim of simplifying and streamlining the process.

At the time of writing the position is that hundreds of thousands of people in England and Wales are being unlawfully deprived of their liberty, either because those responsible for the deprivation have not sought authorisation from the local authority (or, in the case of those deprived of liberty outside hospitals or care homes, directly from the Court of Protection), or because the local authority has not yet been able to carry out the necessary assessments. These include people with disorders such as dementia and learning disability in care homes and supported living arrangements. Some of these people are in psychiatric hospitals, where a decision must be made between detention under MHA and deprivation of liberty using DOLS. A patient who lacks capacity but appears to be objecting to all or part of the treatment is ineligible for DOLS and therefore MHA must be used. In general hospitals, the legal position is particularly difficult. Patients who lack capacity because of delirium or other medical causes (probably a very large group), those under general anaesthetics, and the majority of those in intensive care units would appear to be being deprived of their liberty according to the definition in *Cheshire West*, and very few of them have had their deprivation authorised in the required way, which may suggest that they may be unlawfully deprived of liberty. At present, people who die while subject to a deprivation of liberty authorisation are considered to have died in state detention, and the death must be referred to the coroner irrespective of the views or feelings of the family. The case of *Ferreira (Regina (Ferreira) v Inner South London Senior Coroner)* [2017] EWCA Civ 31) concerned a woman who had died while being intubated in ICU. Although she had not had a deprivation of her liberty authorised under the procedures in the MCA, nor was she detained under the MHA, it was argued that, as she had died in state detention, her death should be reported to the coroner for an inquest. However, the Court of Appeal found that her physical condition and the life-saving treatment which she required was responsible for her loss of liberty, rather than the state, and therefore she was not in 'state detention', and her death did not have to be referred to the coroner.

The Mental Health Act is also being reviewed currently. The future position on deprivation of liberty is uncertain.

Mediation

Undoubtedly, some disputes require a bargaining approach and some require a problem-solving approach. Mediators with sensitivity will deal with each according to its needs. And many may involve a mixture of both approaches ... although negotiation can be conducted in such a way as to create joint gains for both parties, an essential tension in negotiation exists between co-operation moves to create value and competitive moves to claim it.

Brown & Marriott (2018)

An application to the COP can include a request for an order that the parties attend mediation. In furtherance on the overriding objective (Rule 1.1), the court is expected to encourage the parties to use an alternative dispute resolution procedure where appropriate, and once proceedings are issued, the court can consider whether all or any of the issues subject to application are suitable to be referred to mediation. When is mediation appropriate?

The issues covered in case studies mediated ranged from residence (most frequently cited, with 59% of cases involving residence) to medical treatment and statutory wills (each raised in 7.4% of cases). Almost one-third of cases involved finance and property. Other issues in the cases mediated included Power of Attorney, Deputyship, holidays, and Deprivation of Liberty... The success rate in the reported cases was high, with 78% of reported cases reaching an agreement either during or following mediation. Written agreement was reached in 52% of cases, with a further 19% achieving written agreement following the mediation. Oral rather than written agreement was reached in 7% of cases. In 22% of cases there was no agreement. In most of those where an agreement was reached (59%), the terms of agreement were incorporated into a court order. Reasons for lack of agreement being reached included entrenched positions, too many parties and too little time, and the existence of allegations of financial abuse and fraud. Examples given of approximate cost savings were between £6,000 and £30,000 – the exact savings depended on length of case and when in the proceedings the mediation took place, as well as estimates of savings of judicial and court staff time, and time of counsel and local authority professionals.

Mediating Court of Protection cases – Summary of research' by Charlotte May:
<https://ukaji.org/2017/05/03/mediating-court-of-protection-cases-summary-of-research/>

For those who have proposed mediation or responded to a suggestion by the court or another party, it is essential to consider what to expect from the mediation. Advisers will need to have a clear grasp of the strengths and weaknesses of the client's case. Perhaps for this reason, many Court of Protection mediations take place after the receipt of experts' reports ... This is an ideal time to take stock of the evidence as it now stands, in as objective a way as possible... In anticipation of the mediation the following issues should be considered:

Assuming that new evidence (especially in the form of expert reports) has been received, what if any impact has this evidence had on the views and positions of the parties?

Advisers should explore with their clients as neutrally as possible whether there are any concessions which the client feels they could offer which might promote an agreement.

These might include matters that could not be achieved through litigation alone...

It is important to evaluate in the light of the evidence what the client can realistically achieve in the litigation. If mediation fails what is the likely outcome of a contested hearing? Is there any reason (on an objective evaluation) to believe that any of the other parties have not agreed to mediate in good faith?

The potential benefits of mediation should be weighed, even if it is unlikely to deliver a full resolution: might it narrow the issues or at least improve the parties' ability to communicate? With this point in mind advisers are encouraged to manage their client's expectations...

Court of Protection cases pose particular challenges. P's interests need to remain central to the process. If P is a party, he or she is likely to have a litigation friend who is likely to be present (or be represented) at the mediation. The litigation friend should make every attempt to ascertain P's wishes and feelings on the issues which are being mediated. By definition, P is unlikely to be able to take part in the process of compromise and give-and-take that may be involved in mediation. It is the mediator's role to ensure that P remains the focus of the mediation and to reduce the time spent disproportionately on satellite issues which may be considered important by the other parties. The second difficulty is that Court of Protection cases will frequently involve an imbalance of power between the parties, as they may typically involve a dispute between a statutory body and one or more individuals. It is suggested that this requires the mediator to satisfy him or herself that even though one party may be in a much stronger position, that party remains willing genuinely to consider an element of compromise.

Ruck Keene (2018), paragraphs 19.33 to 19.41.

In for example a residence dispute governed by the Care Act 2014, that is inextricably linked with COP proceedings, the mediator could be a leading specialist QC, who could be both facilitative and evaluative.

The co-author of this article, Carl Islam, has developed a new technique, called 'BME Mediation', for the amicable resolution of trust and estate disputes (which will be fully outlined in his forthcoming book for the Law Society, the 'Contentious Trusts Handbook': <https://newsite.carlislam.co.uk/contentious-trusts>).

'BME' stands for 'beginning', 'middle', and 'end'. The steps in the procedure are:

Beginning

(1) Commercial analysis - joint evaluation of:

- estate/trust assets;
- ownership;
- claims;
- value;
- opportunities (i.e. commercial exploitation of hidden value, e.g. IPR rights in relation to a work of art);
- risks (e.g. the IHT/CGT consequences of a DOV executed after the s.142 IHTA 1984 window has closed, or the actual impact of BREXIT on the property market, e.g.

if in the surrounding locality for valuation, a business fails or moves abroad, resulting in: (i) unemployment; (ii) a surge in mortgage default; and (iii) an increase in the volume of comparable properties being sold 'cheap' at auction, placing downward pressure on the market);

(2) Legal risk analysis – separate evaluation of the:

- facts (i.e. a chronology);
- issues;
- law;
- evidence;
- remedies & procedure; and
- costs.

Middle

Exploration/mapping of:

(1) needs/preferences e.g. retention of land to run a farm as a viable going concern versus assets available for sale to generate liquidity (and their saleability / current market value based upon condition/status quo);

(2) opportunities e.g. planning permission to release/exploit hidden or trapped value or tax e.g. the RNRB for deaths after 6 April 2017;

(3) choices - if e.g. party 'A' is willing to settle for asset 'X' and party 'B' for asset 'Y', evaluating the difference in value arising from the asymmetry between:

- the value of each party's respective claims on the estate/trust assets as a whole i.e. $X + Y$; and
- the individual market values of 'X' and 'Y'; and
- the cost of extracting value from 'X' and 'Y', e.g. if a property requires renovation before it can be sold, which when calculated may illustrate that the difference between the value at which 'A' and 'B' will settle (the 'Zone of Difference') is in fact less than 5%. In other words, that a symmetrical BATNA would = settlement at the mid-point of 2.5% (if actually doable, i.e. practicable);

(4) adjustments to be factored into the settlement equation, i.e. which can reduce the Zone of Difference ('Z') to zero; and

(5) arithmetical comparison of Z (as a crunched number) with the potential costs of litigation ('C') on:

- the standard basis if a party wins i.e. because that party would usually fail to recover around 1/3 of their actual costs (which e.g. in a trial costing around £150K each = a loss of £50K);
- liability for own costs and other party's costs (on standard basis if a party loses) (e.g. £250-£300K); and
- chances of success (which at the early stage of any proceedings, i.e. before disclosure has taken place and witness statements have been exchanged is difficult to forecast with any accuracy, hence a conservative estimate is unlikely to be greater than 60/70% on either side = a difference of 30:35).

End

Agreeing a fair and sensible split of estate/trust assets (i.e. $X + Y$) that avoids the ongoing and increasingly large risk of C either: (i) exhausting the available value (including hidden value) of X and Y, or (ii) the risk of either or both A and B, ending up in negative equity. This requires pragmatism because in the long term 'less can mean more' if litigation is avoided/discontinued.

In relation to COP proceedings:

- $X + Y = P$;
- the value of P = costs of implementing a 'best interests' decision ('BID');
- based upon expert evidence about P's capacity; assessments and reports provided by a local authority about P's needs and the available options, and resulting costs ('RC'), the COP can endorse a BID agreed in mediation between e.g. two warring local authorities ('LA's') about how RC is to be funded ('F');
- in agreeing F, the LA's can address adjustments e.g. to take account of voluntary payments already made by one LA ('LA1') toward P's residential care costs following a move by P to the administrative area of the other LA ('LA2'), which LA2 can compare to the future costs of litigation (including possibly a referral to the Secretary of State and where a convention right is engaged and the claim qualifies, proceedings in the ECHR).

The point being that in mediation:

- LA1 and LA2 can at the '*beginning*' agree upon what is in P's best interests based upon expert evidence;
- in the '*middle*' they can then work collaboratively to identify the practical options available and costs involved; and
- at the '*end*' can jointly develop a plan (including transition), to implement a BID for P that can be approved by the COP judge.

That should result in a win/win outcome all round because:

- P's best interests will have been met;
- LA1 and LA2 will have spent their precious resources on developing a plan for implementation, instead of on legal fees;
- the plan can be implemented by the COP (who do not have jurisdiction to decide public law issues and therefore cannot order a LA to pay for P's ongoing/future care); and
- LA1 will exit on terms that are satisfactory to LA2.

The acme of the advocate and the expert in the COP is therefore to work collaboratively in P's best interests with the aim of the parties agreeing a BID for approval by the court that is possibly better for both P and each LA, instead of pursuing an aggressive litigation strategy with a win/lose binary outcome at court. From the outset of a mediation the mediation advocate could say to the other counsel,

'Thank you for meeting with us today.

I will be corrected if I am wrong, but what I think you say about the facts and the law is...It is not my job to persuade you that your arguments will not succeed at trial.

As you know we say that we will succeed.

I am not interested in having an argument with you about whose view is right.

I suggest that litigation is not going to be a great outcome for either you or my client. The risks are...

I am here because I believe that we can reach a principled and fair deal that is not only good for my client but also better for you.

I hope that you will work with me to achieve this today'.

Each issue in dispute can then be approached constructively:

- from the point of view of needs, interests (with P's 'best interests' taking priority), and options, rather than fault and blame; and
- by focussing on the best possible outcome for all of the parties.

Both sides can then work to maintain an open and reasonable atmosphere, with the mediation advocates emphasising objectivity, resulting in a potential settlement being judged against agreed criteria to test fairness.

Because the *'beginning'* requires preliminary groundwork by each party, in preparing: (i) a commercial analysis; and (ii) a legal risk analysis, to be provided privately to the mediator ahead of the mediation, i.e. as a 'road-map' to educate him about the issues, facts, law, and dynamics underlying resolution of the claim, there is no need for a plenary session, other than to discuss 'house-keeping' matters. In other words, instead of exchanging partisan position papers, and wasting precious daylight engaged in posturing and positional argument about who is 'right' and who is 'wrong', resulting in tempers being inflamed, and the further entrenchment of positions, resulting in 'road-blocks' that prevent the making of a deal before 5pm, the parties can set the mediator free to work his magic, and get on with the business of 'doing a deal'. They can then start to engage constructively with each other in a joint-problem solving exercise, conducted by 'proxy', through the mediator. If progress has been made in agreeing principles but the detail and conditions of the deal remain to be agreed, perhaps because an issue has emerged which requires further investigation and proper evaluation so that a sensible and informed commercial decision can be made about allocation/sharing of risk, then the parties can resume their discussion through emails and if necessary a round-table negotiation, which does not require further involvement by the mediator. Terms of settlement can then be agreed and documented in order to implement a practical and efficient plan of action in the best interests of P.

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