

Masterman-Lister and the Capacity to Manage One's Property and Affairs

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Inrtoduction

The judgment of Mr. Justice Wright in *Masterman-Lister v Jewell and Home Counties Dairies and Masterman-Lister v Brutton & Co.*, [2002] EWHC 417 (QB), which was handed down on 15 March 2002, is the most important decision so far in English law on the meaning of the term 'patient'. This, of course, is one of the two disabilities recognized in CPR Part 21. It is also the cornerstone of the Court of Protection's jurisdiction under the Mental Health Act 1983.

Section 94(2) of that Act defines a 'patient' as someone who is 'incapable, by reason of mental disorder, of managing and administering his property and affairs.' There are two prerequisites. A person must (a) have a mental disorder, and (b) as a consequence, be incapable of managing and administering his property and affairs.

'Mental disorder' is defined in the legislation, but the incapacity to manage one's property and affairs is not, and this is where Sir Michael Wright's decision has filled a void, and possibly opened a debate. In fact, he said nothing startlingly new, but the significance of his judgment is that it will be widely reported, whereas previous decisions on the meaning of incapacity to manage one's property and affairs have been inaccessible, either because they were unreported, or because they emanated from other common law jurisdictions, whose reports are only available in a few very specialist libraries.

The background

Martin Masterman-Lister was born in 1963. In 1980, while he was on his way to work on a motorbike, he collided with a milk float driven by Mr. Jewell, and sustained various orthopaedic injuries and a severe head injury. Brutton & Co., Solicitors, Fareham, acted for him in the personal

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injury litigation, and in 1987, on counsel's advice, the claim was settled for £76,000 – half its value on full liability on account of contributory negligence.

A few years later, Martin felt aggrieved that the claim had been settled at an undervalue, and sought to re-open it. His solicitors, Stewarts, obtained a medical report from an expert in head injuries, Dr. Martyn Rose of St Andrew's Hospital, Northampton, who was of the opinion that Martin was a patient, and that he had been ever since the accident in 1980. Dr Rose was the first of the many doctors who had seen Martin to have expressed this view, and it was shared by Dr. Graham Powell, a leading clinical neuro-psychologist. The defendants, however, obtained reports from some equally eminent doctors and psychologists to support their contention that Martin was not a patient.

Essentially, if he were a patient, time would not have run against him under the Limitation Act 1980, and the original settlement would have been a nullity because it had not been approved by the court. In March 2000 Master Murray ordered that the question be tried as a preliminary issue. The trial began before Mr. Justice Wright on 28th January 2002, and lasted fifteen days. Laura Cox QC appeared for Martin, Robin De Wilde QC for Brutton & Co., and Richard Methuen QC for the driver and the dairy.

Sir Michael Wright decided that Martin may have been a patient for the first three years after the accident; but that he had not been a patient since 1983; that he had survived for the last twenty years without any major or even minor catastrophe, and that his affairs had, in fact, been perfectly adequately managed. Accordingly, the claim was statute-barred.

The fundamental issue, as far as Martin's counsel was concerned, was his vulnerability. Mr. Justice Wright was of the view that, even if he accepted such an approach (which he did not), he would not have felt able to hold that Martin was sufficiently vulnerable to the risks of unwise decisions, bad advice, or self-interested and manipulative persons, to justify the inroads on his personal freedom and autonomy that are implicit in declaring him a patient.

Earlier authorities

The meaning of the term 'incapable of managing and administering his property and affairs' had previously been considered in four cases. *Re CAF* (1962) (unreported), was a decision of Mr. Justice Wilberforce, of which there is no surviving transcript. However, it was referred to in a footnote in *Heywood & Massey's Court of Protection Practice* as authority for the statement that "the question of the degree of incapacity of managing and administering a patient's property and affairs must be related to all the circumstances, including the state in which the patient lives and the complexity and importance of the property and affairs which he has to manage and administer."

In *PY v RJS* [1982] 2 NSWLR 700, Mr. Justice Powell, a specialist judge who headed the Protection Division of the Supreme Court of New South Wales, drawing partly on a decision of the great American jurist Benjamin Cardozo, defined a patient as someone who is "incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man, as a consequence of which there is a real risk that he may be disadvantaged in the conduct of such affairs, or that such money or property which he may possess may be dissipated or lost." However, in another Australian case, *Re MacGregor* [1985] VR 861, Mr. Justice Starke chose not to follow Powell's definition, and preferred *Re CAF*, because the legislation itself refers to "his property and affairs" rather than the "ordinary routine affairs of man."

Finally, in *White v Fell* (1987) (unreported), a case in which the facts were very similar to those in *Masterman-Lister*, Mr. Justice Boreham said that the meaning of the expression "incapable of managing his property and affairs" should be construed in a commonsense way as a whole. Few people have the capacity to manage all their affairs unaided, and whether they are capable of managing their property and affairs depends on whether they are capable of taking, considering, and acting upon appropriate advice.

In addition to these judicial authorities, Mr. Justice Wright also considered the checklist in *Assessment of Mental Capacity: Guidelines for Doctors and Lawyers*, published jointly by the British Medical Association and the Law Society in 1995. Following *Re CAF*, the checklist suggests that, when assessing an individual's capacity to manage his financial affairs, one needs to consider their extent, importance and complexity. This might include, for example, considering:

- the value of his income and capital (including savings and the value of the home)
- financial needs and responsibilities
- likely changes in his financial circumstances in the foreseeable future
- the skill, specialized knowledge and time it takes to manage his affairs properly
- whether he would be likely to seek, understand, and act on appropriate advice where needed, in view of the complexity of his affairs.

The checklist goes on to recommend that a number of personal factors should be taken into account, such as:

- age
- life expectancy
- psychiatric history
- prospects of recovery or deterioration
- the extent to which the incapacity could fluctuate
- the condition in which he lives
- family background
- family and social responsibilities; and
- the degree of back-up and support he receives or could expect to receive from others.

It finally proffers three further questions that should be considered:

- could his inability to manage his property and affairs lead to him making rash or irresponsible decisions?
- could his inability to manage lead to exploitation by others – perhaps even members of his family?
- could his inability to manage lead to other people being compromised or jeopardized.

These further questions, of course, raise the issue of vulnerability, and, In *Masterman-Lister* Mr. Justice Wright held that "while they are plainly proper and appropriate questions to ask, they have to be answered, in my view, in the light of the other guidance set out in the checklist."

He concluded his masterly review of the existing authorities by discussing the Law Commission's report on *Mental Incapacity* (Law Com No. 231), published in 1995. He approved its 'functional approach' to capacity, namely that a person should not be regarded as unable to make a decision

unless he is unable to understand an explanation – in broad terms and simple language – of the information relevant to that decision, and that he should not be regarded as unable to make a decision merely because he makes a decision which would not be made by a person of ordinary prudence.

Comment

In *Masterman-Lister* Sir Michael Wright upheld all the existing authorities on the question whether a person is a patient, except the decision of Mr. Justice Powell in New South Wales. He approved and applied *Re CAF*, *Re MacGregor*, *White v Fell*, the BMA/Law Society guidelines, and the Law Commission's report on Mental Incapacity. The problem is that each of these authorities approaches the question in a slightly different way, and each arrives at a rather different conclusion. I shall try and explain why.

It is an anomaly – particularly after the Woolf reforms – that the definition of a patient in CPR Part 21 should still be linked to the criteria under which the Court of Protection is entitled to assume control over the management of someone's property and finances. There really ought to be a discrete capacity to litigate, but what constitutes the capacity to litigate?

- Does it depend on the proposed litigant's ability to take, understand, and act upon appropriate advice (following *White v Fell*)?
- Is it the ability to understand an explanation in broad terms and simple language of the information relevant to making the decision (following the Law Commission's proposals in its report on *Mental Incapacity*)?
- Does it depend on the extent, complexity, and importance of the litigation involved (following *Re CAF*)? or
- Is it a combination of all three (*semble*, following *Masterman-Lister*)?

The Law Commission's functional approach to capacity is ideally suited for one-off transactions, such as entering into a contract, making a will, or signing a power of attorney. Such decisions are largely based on understanding the nature and effect of that particular transaction, but it is less obvious whether this approach is suitable for the wider, more generic range of activities involved in managing one's property and affairs, and maybe even litigation.

The BMA/Law Society guidelines suggest that a person may not need to be declared a patient if they have adequate back-up and support mechanisms at home which enable them to cope with the management of their finances. Many demented elderly women come into the Court of Protection's jurisdiction shortly after the death of their husband, because – until then – the husband has been looking after their financial affairs and there has been no need for the court to intervene. The availability of a support network was particularly important in *Masterman-Lister*. Martin had been readily able to draw upon the support of his parents, and, when eventually they are no longer around, he will be able to enlist advice and assistance from his sister and brother-in-law. In *White v Fell* Mr. Justice Boreham recognized the importance of similar help given to Susan White. But what happens if someone comes from a dysfunctional family, or from an environment in which the support is not disinterested?

In theory, the decision in *Masterman-Lister* should make the assessment of capacity more arduous for doctors, who have traditionally been gatekeepers of an individual's status as a patient. They will

need to consider a broader range of social, domestic and economic factors. While acknowledging that “the opinions of skilled and experienced medical practitioners are a very important element in the evidence to be considered by the court,” Mr. Justice Wright added that, “that element has to be considered in conjunction with any other evidence that there may be about the manner in which the subject of the inquiry actually has conducted his everyday life and affairs.” In practice, however, it is unlikely that the decision will have much impact on the way in which doctors and clinical psychologists assess capacity, unless challenges to their professional opinion of the kind mounted in *Masterman-Lister* become more commonplace. Until now they have been extremely rare.

Mr. Justice Wright was, I am sure, perfectly entitled to reach the conclusion he did on the facts, but I do have some sympathy for Martin and his advisers. There is a growing body of opinion, particularly among those involved in the rehabilitation and case management of head injury victims, that the law (public and private, criminal and civil) provides inadequate safeguards for their clients, and that the proposed reform of the mental incapacity legislation will bring little or no further remedy. The Law Commission's report on *Mental Incapacity* addressed a single issue – capacity, in which understanding an explanation in broad terms and simple language seems to be all that is required. It did not consider undue influence, or that vast grey area between undue influence and incapacity (known in Scots law as ‘facility and circumvention’), which is inhabited by people who have a mild or moderate cognitive impairment that does not amount to actual incapacity, but nevertheless leaves them easy prey to predators. The main problem is that capacity is relatively easy to define, assess and prove, whereas vulnerability is more elusive.

Because these are important issues, not only in England and Wales but elsewhere in the common law world, Mr. Justice Wright gave leave to appeal. Funding has been granted, and the Court of Appeal will consider the case on either 11 or 12 November 2002.