Hilary Term

[2014] UKSC 18

On appeal from: [2012] EWCA Civ 397; [2010] EWCA QB 3163

JUDGMENT

Dunhill (a protected party by her litigation friend Tasker) (Respondent) v Burgin (Appellant)

Dunhill (a protected party by her litigation friend Tasker) (Respondent) v Burgin No 2 (Appellant)

before

Lady Hale, Deputy President

Lord Kerr

Lord Dyson

Lord Wilson

Lord Reed

JUDGMENT GIVEN ON

12 March 2014

Heard on 3, 4 and 5 February 2014

Appellant	Respondent
James Rowley QC	Christopher Melton QC
Matthew Stockwell	Marc Willems
	Maria Roche
(Instructed by Keoghs LLP)	(Instructed by Potter Rees)

LADY HALE (with whom Lord Kerr, Lord Dyson, Lord Wilson and Lord Reed agree)

1.
There are two issues in this case, both of them simple to state but neither of them simple to answer. First, what is the test for deciding whether a person lacks the mental capacity to conduct legal proceedings on her own behalf (in which case the Civil Procedure Rules require that she has a litigation friend to conduct the proceedings for her)? Second, what happens if legal proceedings are settled or compromised without it being recognised that one of the parties lacked that capacity (so that she did not have the benefit of a litigation friend and the settlement was not approved by the

court as also required by the CPR)? Can matters be re-opened long after the event or does the normal rule of English law apply, which is that a contract made by a person who lacks capacity is valid unless the other party to the contract knew or ought to have known that she lacked that capacity in which case it is voidable (the rule in Imperial Loan Co Ltd v Stone [1892] 1 QB 599)?

2.
These issues are of very considerable importance, particularly in personal injury cases. On the one hand, there is the need to protect people who lack capacity from making settlements which are disadvantageous to them. On the other hand, people are assumed to have capacity to make their own decisions and should only be deprived of the right to do so in clear cases. There is also a public interest in upholding bargains which everyone, but particularly the other party, thought were valid when they were made and in putting an end to litigation. The spectre looms of many personal injury claims which insurers thought had been settled long ago being reopened on the basis of an incapacity which they had no reason to suspect at the time. The real culprits, they would say, are the claimant's original legal advisers (if she had any) against whom she will almost always have a claim for professional negligence.

The history of this case

3.
On 25 June 1999, there was a road accident on a dual carriageway near the entrance to a roundabout in Goldthorpe (which is roughly half way between Doncaster and Barnsley in South Yorkshire). Mr Burgin, who was riding a motorcycle in the offside lane, struck Ms Dunhill, who was crossing the road having emerged from between parked vehicles in the nearside lane. She suffered a severe closed head injury along with soft tissue injury to both legs. On 13 May 2002, shortly before the limitation period ran out, she issued a claim for damages in the Barnsley county court. She claimed still to be suffering from a complete loss of the senses of smell and taste, some hearing loss, forgetfulness, headaches, personality change, low moods and tearfulness, anxiety, mood swings, occasional suicidal ideation and self-mutilation. She claimed general damages for pain, suffering and loss of amenity, and special damages (totalling £2,262.92) for travelling expenses and 10 hours' care a day for six months followed by one hour a day for two years, the total claim being limited to £50,000. It was accompanied by two reports from a consultant surgeon specialising in accident and emergency medicine. Mr Burgin denied liability and alternatively alleged contributory negligence.

4.
The case was listed for a trial on the issue of liability at the Sheffield county court on 7 January 2003. Ms Dunhill was at court, accompanied by a mental health advocate, and represented by counsel and a trainee solicitor. One of her witnesses to the accident did not arrive and negotiations took place towards a settlement. The claim was eventually compromised for the total sum of £12,500 with costs. This was embodied in a consent order, which was signed by both counsel and placed before the judge. This provided that (i) the defendant pay the claimant the sum of £12,500 in full and final settlement of her claim by 28 January 2003; (ii) the defendant pay the claimant's costs, to be the subject of detailed assessment if not agreed; and (iii) there be detailed assessment of the claimant's community legal service costs. On any view this was a gross undervaluation of her claim, which her current advisers would put at over £2,000,000 on a full liability basis and the defendant's would put at around £800,000.

5.

In July 2006, Mrs Dunhill sought the advice of new solicitors. In December 2008, nearly six years after the consent order was made, her litigation friend issued proceedings on her behalf for professional negligence against her former solicitors and counsel. Those proceedings have been stayed pending further order. On 11 February 2009, her litigation friend issued the present proceedings. These took the form of an application in the original action, seeking (i) a declaration that the claimant "did not have capacity at the time of the purported settlement of the matter on 7 January 2003", and (ii) that the consent order be set aside and directions given for the further conduct of the claim. Such applications are known as Masterman-Lister proceedings, after the case of Masterman-Lister v Brutton & Co (Nos 1 and 2) [2002] EWCA Civ 1889, [2003] 1 WLR 1511.

6.
It was agreed between the parties that there should first be a trial of whether or not the compromise and consent order made on 7 January 2003 required the approval of the court. This depended on two issues: (i) whether Mrs Dunhill was a "patient" within the meaning of Part 21 of the Civil Procedure Rules, which regulates the procedure to be adopted in proceedings involving children and (as the Rules then were) "patients"; and (ii) what the consequences were if she was such a patient, specifically whether this meant that the compromise and consent order should have been approved by the court under CPR 21.10. The defendant has not sought retrospective approval of the settlement.

7.
Issue (i) was tried by Silber J in February 2011: [2011] EWHC 464 (QB). The parties were agreed that the test of whether a person was a "patient" was whether she had the mental capacity to conduct the proceedings. They further agreed that this was to be judged by reference to her capacity to make the decisions likely to be required of her in the course of the proceedings, a test derived from the judgment of Chadwick LJ in Masterman-Lister. But they disagreed as to whether this test was to be applied to the proceedings which she had actually brought, on the advice of her legal representatives, or whether it was to be applied to the proceedings as they might have been brought had her lawyers given her different advice. If it was the former, then the most difficult decision she had to take was whether to accept the sum which was offered on 7 January 2003, so in practice the question was whether she was able to understand matters well enough to make that decision. If it was the latter, the defendant concedes that she did not have the capacity to conduct the larger and much more complicated claim which should have been brought.

8.
Silber J decided that capacity was to be judged by reference to the decisions which the claimant was actually required to take in the action as drafted and not to the decisions which she might have been required to take had it been differently framed. In practice this meant whether she had capacity to make the compromise on 7 January 2003. He held that, on the evidence, the presumption that she did have that capacity had not been rebutted: [2011] EWHC 464 (QB), para 97. In the light of that decision, issue (ii) did not arise. The claimant appealed on the point of law. The Court of Appeal held that the judge should not have confined himself to the actual decision required of her on 7 January 2003, but should have considered her capacity to conduct the proceedings as they should have been framed. Ward LJ concluded at [2012] EWCA Civ 397, para 29:

"Since capacity to conduct proceedings includes . . . the capacity to give proper instructions for and to approve the particulars of claim, the claimant lacked that capacity. For her to have capacity to approve a compromise she needed to know . . . what she was giving up and, as is conceded, she did not have the faintest idea that she was giving up a minor fortune without which her mental disabilities were likely to increase."

9.
As a result, the case was remitted to the High Court to determine issue (ii). This was now framed as whether CPR 21.10 has any application “where the claimant has brought a claim in contravention of CPR 21.2, so that in the eyes of the defendant and the court she appeared to be asserting that she was not under a disability?” No doubt this reformulation was intended by the defendant to hammer home that the general rule in contract is that laid down in Imperial Loan Co Ltd v Stone. Bean J decided that where a civil claim is issued, the Civil Procedure Rules are incorporated into any agreement made to settle the case and that CPR 21.10(1) required that this settlement be approved by the court irrespective of how matters appeared at the time. Hence the settlement was void, the court order should be set aside and the case should go for trial: [2012] EWHC 3163 (QB); [2012] 1 WLR 3739.

10.
Between the hearing before Bean J in early October 2012 and his judgment in November 2012, this court had given the defendant permission to appeal against the decision of the Court of Appeal on issue (i). Accordingly Bean J certified, with the parties’ consent, that the conditions were met for a “leapfrog” appeal under sections 12 to 16 of the Administration of Justice Act 1969 on issue (ii). This was in order that both issues could be heard together if this court gave the defendant permission to appeal on issue (ii), which it duly did in March 2013.

11.
The whole question of the proper approach to the problem is therefore before this court. As so often happens, the parties do not agree on precisely how the issues should be formulated and new arguments have been introduced to bolster the decisions reached in the courts below. The defendant, in particular, has a sense of grievance at the way in which the issues and the arguments have shifted over time. But in this court we have to do our best to arrive at the right result and thus to allow all relevant arguments to be deployed before us unless this would be unfair to an opposing party. There is no unfairness here. Everyone has been well aware from the outset of what the underlying questions are and each party has had sufficient time to respond to all the arguments deployed. Indeed we are grateful to them for the assistance which we have received.

The test of capacity

12.
In 2002 when this claim was launched and 2003 when it was compromised, CPR 21.1(2)(b) to the Civil Procedure Rules 1998 (SI 1998/3132 (L 17)) defined a “patient” as “a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his own affairs”. This was much the same definition as that in Order 80, rule 1, of the former Rules of the Supreme Court, which referred to his “property and affairs”; this phrase also used to appear in Part VII of the Mental Health Act 1983 as the definition of those over whose property and affairs the Court of Protection might take control; and in section 38(2) of the Limitation Act 1980 as the definition of those under a disability in respect of whom limitation periods did not begin to run. It suggests a global inability to manage and administer all one’s property and affairs, whereas of course a person may be able to manage some of his affairs but not others.

13.
The general approach of the common law, now confirmed in the Mental Capacity Act 2005, is that capacity is to be judged in relation to the decision or activity in question and not globally. Hence it was concluded in Masterman-Lister that capacity for this purpose meant capacity to conduct the proceedings (which might be different from capacity to administer a large award resulting from the

proceedings). This was also the test adopted by the majority of the Court of Appeal in Bailey v Warren [2006] EWCA Civ 51, [2006] CP Rep 26, where Arden LJ specifically related it to the capacity to commence the proceedings (para 112). It would have been open to the parties in this court to challenge that test, based as it was mainly upon first instance decisions in relation to litigation and the general principle that capacity is issue specific, but neither has done so. In my view, the Court of Appeal reached the correct conclusion on this point in Masterman-Lister and there is no need for us to repeat the reasoning which is fully set out in the judgment of Chadwick LJ.

14.
Under the Rules as amended when the Mental Capacity Act 2005 came into force (the Civil Procedure (Amendment) Rules 2007 (SI 2007/2204 (L20)), "patients" in rule 21.1(1)(a) has been replaced by "protected parties", and in rule 21.1(2)(d) a "protected party" is defined as "a party, or intended party, who lacks capacity to conduct the proceedings". Thus the current test is stated in the same terms as that which was applicable to these proceedings. The current rule 21.1(2)(c) defines "lacks capacity" to mean "lacks capacity within the meaning of the 2005 Act". Given that the courts had already arrived at a test of capacity on which the 2005 Act test was closely modelled, it seems unlikely that this has introduced any differences between the old and the new law. But that question does not arise in this case, where the issue is what is meant by the "proceedings" which the party must have the capacity to conduct.

15.
This is a question of construing the Rules. Rule 21.2(1) provides that "a protected party must have a litigation friend to conduct proceedings on his behalf". By rule 21.4(3), a litigation friend must be someone who can "fairly and competently conduct proceedings" on behalf of the patient. This in itself suggests a focus on proceedings in general rather than on "the proceedings" as framed. Furthermore it applies right at the start of any proceedings. Indeed, as will be seen later, rule 21.10 applies to claims which are settled before any proceedings have begun. Read as a whole, therefore, rule 21 posits a person with a cause of action who must have the capacity to bring and conduct proceedings in respect of that cause of action. The proceedings themselves may take many twists and turns, they may develop and change as the evidence is gathered and the arguments refined. There are, of course, litigants whose capacity fluctuates over time, so that there may be times in any proceedings where they need a litigation friend and other times when they do not. CPR 21.9(2) provides that when a party ceases to be a patient (now, a protected person) the litigation friend's appointment continues until it is ended by a court order. But a party whose capacity does not fluctuate either should or should not require a litigation friend throughout the proceedings. It would make no sense to apply a capacity test to each individual decision required in the course of the proceedings, nor, to be fair, did the defendant argue for that.

16.
There are, of course, statements in the cases which might suggest a different approach. In Masterman-Lister, Kennedy LJ (para 18) quoted with approval the test described by Boreham J in the limitation case of White v Fell (unreported) 12 November 1987 (which the best efforts of counsel in this case have been unable to find for us):

"To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice . . . Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and to advise her appropriately . . . Finally, she needs sufficient mental

capacity to understand and make decisions based upon, or otherwise give effect to, such advice as she may receive".

Applied to the facts of this case, this could suggest that, having identified a problem and gone to a lawyer, all that is needed is the capacity to understand and make decisions based upon the actual advice given by that lawyer. The same might be said of the test as stated by Chadwick LJ at para 75 of Masterman-Lister:

"For the purposes of Order 80 – and now CPR Pt 21 – the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings."

17.
Equally, of course, those words could be read in the opposite sense, to refer to the advice which the case required rather than the advice which the case in fact received. In truth, such judicial statements, made in the context of a different issue from that with which we are concerned, are of little assistance. But they serve to reinforce the point that, on the defendant's argument, the claimant's capacity would depend upon whether she had received good advice, bad advice or no advice at all. If she had received good advice or if she had received no advice at all but brought her claim as a litigant in person, then she would lack the capacity to make the decisions which her claim required of her. But if, as in this case, she received bad advice, she possessed the capacity to make the decisions required of her as a result of that bad advice. This cannot be right.

18.
I would hold, therefore, that the test of capacity to conduct proceedings for the purpose of CPR Part 21 is the capacity to conduct the claim or cause of action which the claimant in fact has, rather than to conduct the claim as formulated by her lawyers. Judged by that test, it is common ground that Mrs Dunhill did not have the capacity to conduct this claim.

The effect of incapacity

19.
It follows that Mrs Dunhill should have had a litigation friend when the proceedings were begun, as required by CPR 21.2(1). As Kennedy LJ pointed out in Masterman-Lister, at para 30,

"Order 80 and CPR Pt 21 are worded in such a way as to indicate that in that event the litigation is ineffective and decisions made in the course of litigation are invalid – see for example, Order 80, rr 2(1) and 10, CPR rr 21.2(1) and 21.10(1), but CPR r 21.3(4) does suggest a solution. It provides: 'Any step taken before a child or patient has a litigation friend, shall be of no effect, unless the court otherwise orders'".

Kennedy LJ went on to say that "Provided everyone has acted in good faith and there has been no manifest disadvantage to the party subsequently found to have been a patient at the relevant time I cannot envisage any court refusing to regularise the position" (para 31). But of course, everything must depend upon the particular facts. It might be appropriate retrospectively to validate some steps but not others. In this case, we have not been asked to validate anything, but no doubt we could do so of our own motion if we thought it just.

20.

I would not think it just to do so. While every other step in the proceedings might be capable of cure, the settlement finally disposing of the claim is not. For obvious reasons, we have not been asked retrospectively to validate the settlement and consent order made on 7 January 2003. CPR 21.10(1) relevantly provides:

“Where a claim is made – (a) by or on behalf of a child or patient [now protected party] (b) against a child or . . . patient [now protected party], no settlement, compromise or payment and no acceptance of money paid into court shall be valid, so far as it relates to the claim, by, on behalf of or against the child or patient [now protected party], without the approval of the court.”

The embodiment of this settlement in a consent order did not constitute the approval of the court for the purpose of this rule. The purpose of the rule is to impose an external check on the propriety of the settlement and the accompanying practice direction sets out the evidence which must be placed before the court when approval is sought (see now 21PD.6). Given the finding that Mrs Dunhill was a patient at the time, does this automatically mean that the settlement and court order are of no effect?

21.
The defendant makes two arguments that the rule does not have that effect. The first is that the rule only applies where the patient (or protected party) has a litigation friend. Only then is the other party to the settlement put on notice that the settlement requires the approval of the court. Despite the particulars of injury given in the Particulars of Claims in this case, it has never been suggested that this defendant either knew or ought to have known of the claimant’s lack of capacity. As a general proposition, the other party is unlikely to be in a position to know the details of his opponent’s mental faculties unless these are fully explored in medical reports to which he has access.

22.
The problem with the defendant’s argument is that it involves writing words into the rule which are not there. If anything, the words hint at the reverse, as they refer to a claim made “by or on behalf of” a patient or protected party. As CPR r 21(2)(a) says, it is the task of a litigation friend to conduct proceedings “on behalf of” a patient or protected person. Although there are other circumstances in which a claim may be made on behalf of a child or protected party, the inclusion of “by” suggests proceedings conducted by the patient herself. Equivalent wording is not used in relation to claims made against a patient or protected person; but clearly the same rule must apply to settlements made by or on behalf of claimants or defendants. Defendants who lack capacity require as much protection as claimants against improvident settlements. To disapply the rule where there was no litigation friend would in each case require the words “having a litigation friend” to be written into the rule.

23.
Furthermore, in Dietz v Lennig Chemicals Ltd [1969] 1 AC 170, the House of Lords held that the “compromise rule” embodied in the predecessor to CPR 21.10(1) applied to the settlement of a claim made on behalf of a child before any proceedings were begun. Following this decision, in Drinkall v Whitwood [2003] EWCA Civ 1547, [2004] 1 WLR 462, Simon Brown LJ pointed out that “the claim” in CPR 21.10 must mean the cause of action rather than any proceedings in which the claim is asserted. This is clear from the wording of CPR 21.10(2), which provides the procedure whereby settlements made before proceedings are begun are approved by the court (that is, as pointed out in Dietz, by a simplified process rather than having to issue a claim in the ordinary way):

“Where – (a) before proceedings in which a claim is made by, or on behalf of, or against a child or patient [now, protected party] (whether alone or with any other person) are begun, an agreement is reached for the settlement of the claim; and (b) the sole purpose of proceedings on that claim is to

obtain the approval of the court to a settlement or compromise of the claim, the claim must (i) be made using the procedure set out in Part 8 (alternative procedure for claims); and (ii) include a request to the court for approval of the settlement or compromise."

The "claim" at the end of (a) must necessarily predate the commencement of proceedings. If the "claim" in CPR 21.10(2) predates the commencement of proceedings, there is no reason why the "claim" in CPR 21.10(1) should not also do so. If there are not yet any proceedings, there can be no litigation friend. There is no obvious way to read a limitation to cases where the party lacking capacity has a litigation friend into CPR 21.10(1) as it applies to proceedings which have already been started but not as it applies where proceedings have not yet begun. Nor would it make any practical sense to do so. The other party is, if anything, in a rather better position to assess whether his opponent may lack capacity to conduct the proceedings after they have begun than he is beforehand.

24.
Dietz and Drinkall were both cases in which the defendant wished to resile from the compromise of a child's claim which had not yet been finally approved by the court. In Bailey v Warren, the Court of Appeal held that there was no reason to distinguish between claims involving children and claims involving patients in this respect. Hence a settlement made before proceedings began by a person who lacked capacity to conduct proceedings on his claim required the approval of the court under CPR 21.10(1) (although in that case the court gave the settlement its approval).

25.
In Bailey v Warren, the Court of Appeal also rejected the defendant's second argument. This is of a more fundamental nature than his argument upon the construction of the Rules, although he uses it to bolster his construction argument, for he says that without the limitation for which he contends the rule would be ultra vires. This argument was foreshadowed by Chadwick LJ in Masterman-Lister, at para 68:

"To my mind it is not self-evident that rules 10 and 12 [the predecessors to CPR 21.10(1) and 21.11] have any application where the plaintiff brings a claim in contravention of rule 2 – so that, in the eyes of the defendant and the court, he is asserting that he is not under a disability. If rules 10 and 12 were intended to apply in such a case (which I doubt) then it would be open to question whether the rule making body had power to change the substantive law expounded in Imperial Loan Co Ltd v Stone [1892] 1 QB 599 and Hart v O'Connor [1985] AC 1000."

In Imperial Loan Co Ltd v Stone [1892] 1 QB 599, the Court of Appeal held that a contract made by a person who lacked the capacity to make it was not void, but could be avoided by that person provided that the other party to the contract knew (or, it is now generally accepted, ought to have known) of his incapacity. As Mr Rowley points out on behalf of the defendant, this rule is consistent with the objective theory of contract, that a party is bound, not by what he actually intended, but by what objectively he was understood to intend. The rule in Imperial Loan was applied by the Judicial Committee of the Privy Council in Hart v O'Connor [1985] AC 1000, a case from New Zealand, where the issue was whether this only applied if the contract was fair. Overruling prior New Zealand authority to the contrary in Archer v Cutler [1980] 1 NZLR 386, but consistently with the decision of the High Court of Australia in McLoughlin v Daily Telegraph Newspaper Co Ltd (No 2) (1904) 1 CLR 243, the Board held that a contract made by a person who was ostensibly sane could not be set aside simply because it was unfair but only if there was equitable fraud which would also avail a sane person.

26.

This rule, it is argued, applies just as much to the settlement of civil claims as it does to any other sort of contract. Once the parties to ordinary civil litigation have reached agreement, it is not for the court to interfere in their bargain. If they desire to embody it in a consent order, they can do so simply by having it entered and sealed by a court officer under CPR 40.6(2). They do not have to submit it for the approval of any judicial officer. In this case, it was simply a matter of courtesy to show the order to the judge, who had (no doubt) been waiting patiently or getting on with other business while the negotiations were proceeding. Matrimonial proceedings are different, because the parties cannot oust the jurisdiction of the court, and so if they want their agreement embodied in a court order, they cannot avoid at least a degree of judicial scrutiny.

27.
Neither the Rules of the Supreme Court nor the Civil Procedure Rules can change the substantive law unless expressly permitted so to do by statute: see In re Grosvenor Hotel Ltd (No 2) [1965] Ch 1210. Thus, it is argued, section 1 of the Civil Procedure Act 1997 gave the Civil Procedure Rule Committee power to make rules governing "the practice and procedure" to be followed in the civil courts and as further provided in Schedule 1 to the Act. Paragraph 4 of that Schedule provides that the Rules may modify the rules of evidence, thus showing that where it is intended that the Rules could modify the substantive law, express provision is made for this.

28.
The comment made by Chadwick LJ in Masterman-Lister was obiter dictum, because it was there held that the claimant did not lack capacity to litigate. In Bailey v Warren, it was pointed out that the cases of Dietz and Drinkall had not been cited in Masterman-Lister. Dietz is of particular relevance, because it was there argued (on behalf of the party who was trying to uphold the unapproved settlement) that the "compromise rule" as embodied in the Rules of the Supreme Court, Order 80, rule 11 (the predecessor to CPR 21.10(1)) was ultra vires (see counsel's reply at p 179). This argument was dealt with by Lord Pearson (with whom Lord Reid and Lord Pearce certainly agreed) as follows, at p 189:

"There was a suggestion made in the course of the argument that the Compromise Rule, if it meant what it appears to say – if 'invalid' means 'of no legal effect' – is ultra vires. I do not accept that suggestion. When the claim of an infant or other person under disability is before the court, the court needs, for the purpose of protecting his interests, full control over any settlement compromising his claim. In my view, the making and re-making of the Compromise Rule were valid exercises of the rule-making power under the Judicature Acts, which is now contained in section 99 of the Act of 1925."

29.
Mr Rowley rightly points out that Dietz was a child's claim, where the common law of contract is different, so their Lordships did not have to address their minds to the position of persons who lacked capacity. In practical terms, of course, it is a great deal easier to know whether one is dealing with a child than it is to know whether one is dealing with a patient or protected party. But the fact that a child's contracts may be avoided in rather wider circumstances than may the contracts of a patient or protected party does not alter the fact that both are subject to the same compromise rule and for the same reasons. It did not occur to the Court of Appeal to distinguish between them in Bailey v Warren.

30.
It is fair to say that Lord Pearson gives no reason for his acceptance that the compromise rule is within the powers of the rule-making body. Given that it applies to claims compromised before proceedings are brought, it is carving out a substantial but quite specific exception to the common law rule in Imperial Loan Co Ltd v Stone. Nevertheless, we are bound by Dietz unless there is a very good

reason to depart from it. Mr Melton, on behalf of the claimant, also points out that paragraph 1 of Schedule 1 to the Civil Procedure Act 1997 expressly provides that “Among the matters which Civil Procedure Rules may be made about are any matters which were governed by the former Rules of the Supreme Court or the former county court rules . . . ” This could certainly be read as conferring an express power to make rules of court modifying the substantive law to the extent that the previous rules did so, whether or not those rules were within the powers which the previous rule-making bodies had been given.

Agency

31.
Having reached the conclusion that the Compromise Rule is intra vires and applies to this case, there is no need to address a further argument made on behalf of Ms Dunhill. This is to the effect that counsel was acting as her agent, rather than a mere messenger, when making the settlement on 7 January 2003. It has been held that the principal’s incapacity terminates a contract of agency, whether or not it is known to the agent (Yonge v Toynbee [1910] 1 KB 215), and this must logically apply also to the initial formation of a contract of agency. This means that the agent lacks any actual authority to make a contract on behalf of the incapacitated principal, whether or not the other party to the contract knows of the incapacity. Thus, it is said, the rule in Imperial Loan Co Ltd v Stone does not apply to a contract concluded by an agent on behalf of a principal who lacks the capacity to make it. Nor, it is said, could there be any apparent authority if the principal lacked capacity at the time of making the initial representation as to the agent’s authority, again whether or not the other party knew of this. Reliance is placed, in particular, upon a passage in Bowstead & Reynolds on Agency (19th ed, (2010) para 2-009). This argument has led the current editor of that work, Professor Peter Watts, to reconsider and disavow what is there stated. The authorities are indeed in a state of some confusion, as is amply demonstrated by A.H Hudson at (1959) 37 Canadian Bar Review 497. It would be most unwise for this court to express any opinion, one way or another, as to the present state of the law. Fortunately, the issue does not arise.

Policy

32.
Much was made in the course of argument of the competing policy arguments, some of which I touched upon at the outset of this judgment. In particular, Mr Rowley emphasised the need for finality in litigation, the stresses and strains which prolonged litigation places upon both litigants and the courts, the difficulty of re-opening cases such as this so long after the event, and the alternative protection given to the parties by their legal advisers, who should bear the consequences of their own mistakes. Against this Mr Melton emphasised the disadvantages of claims for professional negligence when compared with claims for personal injuries, principally the discount for the chance that the claim might not have succeeded and the inability to make a periodical payments order. He also points out that lack of insight is a common feature in head injury cases, so that the parties should be encouraged to investigate capacity at the outset. A litigant in person would, of course, have no legal advisers against whom to make a claim, but the legal position cannot differ according to whether or not a party is, or is not, represented by lawyers.

33.
Policy arguments do not answer legal questions. But to the extent that they are at all relevant to the issues before us, the policy underlying the Civil Procedure Rules is clear: that children and protected parties require and deserve protection, not only from themselves but also from their legal advisers.

The notes to Order 80 in the last (1999) edition of the Supreme Court Practice stated that among the objects of the compromise rule was “to protect minors and patients from any lack of skill or experience of their legal advisers which might lead to a settlement of a money claim for far less than it is worth”, a sentiment which has been carried forward into the current edition of Civil Procedure.

Conclusion

34.
I would therefore dismiss both appeals and uphold the order made by Bean J. On the test properly to be applied, Ms Dunhill lacked the capacity to commence and to conduct proceedings arising out of her claim against Mr Burgin. She should have had a litigation friend from the outset and any settlement should have been approved by the court under CPR 21.10(1). We have not been invited to cure these defects nor would it be just to do so. The consent order must be set aside and the case go for trial.