

Webinar: Mental Capacity for medico-legal experts

SUMMARY KEYWORDS

expert, capacity, client, case, issues, question, next slide, assessment, deputy, report, defendant, court, witness statements, claimant, lacks, instructed, solicitors, decision, terms, area

SPEAKERS

Huw Ponting, Dr Edmund Bonikowski

Dr Edmund Bonikowski 04:31

Okay, well let's make a start. Good afternoon, everybody. Just a few words quickly and by way of introduction, NRC Medical Experts is a chambers rather like barristers, chambers of experts in neurological rehabilitation, predominantly consultants in rehabilitation medicine, neuro rehab, and also neuro psychiatrists and neuropsychologists with some therapists or in the related discipline, and we've been running for about seven years providing expert witness reports for the courts, both claimant and defendant, and the service is growing and becoming more widespread. We offer service across the UK. And of course, many of you who are attending will have used us. So without further ado, Hugh, who is a partner at Enable Law, and is a long standing friend of NRC Medical Experts has presented us a number of our internal meetings and CPD events for our experts, has kindly offered to give this this hour long session on capacity assessment, over to you.

Huw Ponting 07:15

Thank you, Ed. And hello, everyone. Thank you for joining today. Just a very quick introduction about me. I am predominantly a claimant lawyer, specialising in traumatic brain injury work, something I've been doing for a reasonable period of time. And I also have a quarter protection practice as well, which I've had for about 20 years. So I've got those sorts of dual perspectives. I also wear a volunteering hat, both with headway previously with a carer focused organisation in Wiltshire and prior to that at a hospital in in Bath, so a fairly sort of wide range of, of experience.

Huw Ponting 08:17

And we'll get into the real meat of today. So what are we going to do? Well, I thought it would be useful. First of all, to just recap, the important aspects of the Mental Capacity Act that we should all know. To share my experience of how I've seen experts deal with this historically. Then we'll look at some recent developments. And I want to particularly focus on health and welfare issues, as opposed to finance and property. Many of you will be aware that when it comes to Deputy ship, the vast majority of deputies appointed by the Court of Protection will have power vested in them to manage finance and property. Very few health and welfare. deputies are actually appointed. The traditional wisdom being that the court protection prefer health and welfare issues to come before them on a an ad hoc basis. I thought I

also thought it would be useful to look at how we as lawyers and experts address this area currently and going forward. And I know we've got quite a varied audience today. Some of you are coming from non legal or expert backgrounds which is great because I think this will be equally of interest to those who Whether they come from a case management background, or otherwise. And here's my, my spoiler alert my real sort of message in today. It isn't my litigation practice that has evolved the most over the last five years, but rather my core to protection practice. spilling over then into the litigation, which has become infinitely more complex in this in this area. We will have time I hope for questions at the end. And you've already heard that Ed is going to monitor that the chat as we go along. And it might be that I take the old question as we go through. So hopefully, we'll get some interaction throughout today's session.

Huw Ponting 10:51

So I think that it doesn't hurt ever, just to go back to the Mental Capacity Act, and have a look at some of the basics contained within it, which will sound quite straightforward on first reading. So we start within section one and the principles there with the assumption of capacity, that for someone unable to make a decision for themselves, or that might be all practicable steps have to be taken first to help them make that decision before intervening and seeking to make it for them. We shouldn't assume a lack of capacity merely because of an unwise decision. Although I have to say with my deputy hat on, that's often the bane of my life, in terms of a lot of my clients saying to me, Well, you've got to give me that money. Because what I want to spend it on, it's just an unwise decision rather than an indication of me lacking capacity, where acts or decisions under the Act are taken on behalf of P, the protected party has to be done in their best interests, and also has to be the least restrictive option, bearing in mind their rights and freedoms. And then in terms of the test, a person deemed lacking capacity to make a decision, if at all the material time or times. So time specific and also decision specific. They are unable to make that decision because of an impairment of or disturbance in the functioning of the mind or brain. So quite a prescribed test and certainly something that I would expect medical legal experts to be picking up on in their reports.

Huw Ponting 12:50

So going on section three, the inability to make decisions. And here we have that sort of extension, if you will, of the of the test. So how will a person be deemed unable to make a decision if they can't understand the information relevant to the decision decisions specific, retain that information, use and weigh that information as part of that decision making process. And then communicate that by any means could be oral, could be written could be using technology. And then when it comes to steps taken, decisions made for somebody lacking capacity, that they should also be always be in that person's best interests, never prejudiced by age, appearance, behaviour, that all relevant circumstances are considered cultural background, family background, etc. That somebody also might regain capacity. They may lack capacity today, but they could regain it tomorrow. So should we be delaying that decision? Until that happens to encourage where we can the participation of PII taking into account wishes, feelings, beliefs, and I've already touched upon the views of others.

Huw Ponting 14:26

So, and this is very much a personal perspective, and so comes with that caveat, but how do I or how have I seen experts historically deal with this and this is both claimant instructed and defendant

instructed experts. It often appears at the very end of a report, sort of, and finally, which I think sometimes gives the impression of it being a bit of an afterthought. Not Central perhaps to the issues that are being considered. That's not always the case. But I would say more often than not, that's sometimes the impression that that is given. And then the next point and of course, this will depend very much on the instruction that that expert has received, the consideration of capacity. So whether or not the individual has or does not have capacity tends to be restricted to matters of finance and property, sometimes also litigation capacity, does the individual have that capacity to give instructions in their own litigation, but often goes no further than that. Sometimes, I will see, when I read reports that there might have been limited capacity consideration of the evidence. I know, for example, sometimes on cases, I may have disclosed significant volumes of witness statements to defendants. But then when I see that list of documentation that the defendant expert has considered, the witness statements aren't listed. And I wonder whether that's a conscious decision on the part of those instructing the expert that they don't want them to look at them? Or perhaps there's another reason I see perhaps limited forensic analysis of this of this issue.

16:40

How do I pick that up, I might say to a client when they come back from seeing an expert. So how much time did the expert spend with you talking through the issues that go to capacity, of course, the client may not always appreciate that the questions being put to them relate to capacity, but often they will. And they might say to me, but it was five minutes, or 10 minutes at the end of that, that appointment. And I'll come back to that later in the in the webinar, in terms of the approach that I think should be adopted in terms of best practice, to considering the evidence, not just the evidence that's available, perhaps, but it doesn't prohibit the expert from going beyond that and asking other questions. And that's going to then be quite a time consuming exercise. And when I when I sometimes see that, experts haven't seen evidence, I wonder whether that's almost a sort of a strategy so as to enable them to say that they've not seen anything. Such the presumption of capacity, which we've already seen in the principles of the Act, has not been displaced.

18:10

So I mentioned that the, this area of my practice has evolved more than any other in the last few years, it for reasons I'll go on to it is infinitely more complex now than it was five years ago, very contentious, perhaps because of the, the money involved. And the next two bullets there, you know, we're increasingly seeing now, issues going well beyond finance and property, litigation capacity, testamentary capacity. Also many, many health and welfare issues, the ability to use social media care, accommodation, contact with others sex and, and more. So all of that, I think in terms of my practice certainly has a knock on effect in terms of the evidence gathering that's needed to enable an expert to give best opinion for the court. Let's not forget how the experts are instructed, but also where findings are arrived at in terms of, of Deputy ship. What that means then in terms of the of the costs and is a bit later on. I'm going to share with you a an anonymized case study, which I hope will bring some of these principles together.

Dr Edmund Bonikowski 19:41

A very interesting question come up from an expert. Can you please clarify the entitlement to see the other party's letter of instruction to the expert? He says, I am regularly asked by the other side to disclose my letter of instruction to my expert. Thank you.

20:25

Well, the answer to that is no. But where am I seeing the information that tells me for example, that certain key evidence hasn't been seen by the expert. That will be every expert will list in their report, the documentation they've seen, medical records, case management notes, support worker notes, maybe other documentation. Besides, if they have seen witness statements, I would expect them to say that they have seen witness statements. And if I know that I disclosed witness statements to an expert, six months ago, or sorry, to my opponent six months ago, but then their expert instructed two months ago is saying that they haven't seen them. Why, why is that? And that's probably something that I would then pick up with my opposite number. And of course, it may come up in the joint discussion between the experts as well, if one expert has seen all these witness statements, and the other hasn't, then perhaps that's not going to result in the most constructive discussion between the two of them.

Dr Edmund Bonikowski 21:39

So just to summarise from my own point of understanding it does the letter of instruction that you write to an expert, is that privileged? Is that part of that privileged?

Huw Ponting 21:50

Compact? Yeah, so it won't be it won't be seen by the other side? I've not had, of course been in the vast majority of cases don't go to trial. So I've not seen an incident where the judge perhaps has said, you know, I want to see the letter of instruction, but the letter of instruction wouldn't go, for example, in the in the trial bundle.

Huw Ponting 22:21

So, looking at some of these developments, and these are developments more around and the thrust of today, a lot of it is going to be around health and welfare issues, as opposed to finance and property. So not can this person manage this amount of money, or buy or sell this property, but rather these health and welfare type issues. And here's the case, re ACC that many will refer to frequently in this area. And so judge held up in that case refers to property and affairs, deputies authority, and quite categorically that it does not encompass seeking advice on welfare issues. And that those matters should be brought before the court. And it's a wide range. The list then that you see at the next bullet is not an exclusive list. It's the list that arises in the case study that I will share with you. But those issues will have to go before the court first one application be made to the court first, by a finance and property deputy before they can then go on and explore those issues further.

Huw Ponting 23:52

So I don't intend spending much time on that the next few slides. But these are all examples of cases that we have. So when you see reference there two initials A R, that's the client, f a t c is the Trust Corporation that we use. So rather than an individual named deputy, all our deputy chips are held within a Trust Corporation. But the several examples that that you will be able to read in your own time after this. There are four in total. And as I say, I don't really propose that to go through them. But they're

all applications to the court protection by the Deputy to consider various health and welfare issues. And in some of the examples the court have come back and said, yes, the deputy can Commission reports on those areas. But in the very last one if we skip forward a few slides for example for a Um, in that one there, the court said that no, it had to be the local authority, who had to Commission reports and investigate these various issues. And then, as we go through, because this relates, then to the case study that we'll be looking at, you'll see just how problematic that became, quite quickly and also then protracted over a period of time. So, why do I mention these, only that the court protection itself, as well as taking many months to deal with these applications, which many will be aware of, they do have a varying approach from one judge to another.

Huw Ponting 25:50

So pulling out some of these, these, these issues, and I thought it would be useful to look at some examples to put it in, in context. So if we look at social media, and internet use, as well as then social media and Karen contact, because of course, a lot of people use social media, to open up their, their social opportunities, there is there is a risk there highlighted by these two cases. That on the one hand, you can generalise too much with these things. And that, again, I think goes back to expert reports when it's very easy to make a blanket statement about a particular aspect of capacity. But of course, if you drill down into it, there will be, for example, you know, with social media, there's, there's certain types of social media at one end of the spectrum, in terms of its complication, and perhaps risk. And there are other social media platforms that look very different. So just to say, that an individual does or does not have capacity in respect of social media and internet use, is a difficult thing highlighted then by the second quote that you see that a determination that an individual lacks capacity to access and use the internet in that example, would pose a significant restriction upon his or her freedom. And that perhaps demonstrates why the court protection wants these issues to come before them, rather than leaving them with the deputy. And it's quite clear now that a finance and property deputy does not have the ability to make decisions in this area. Beyond perhaps quite straightforward decisions day to day, but for the most significant decisions, you would expect an application to have to go to the court protection first.

Huw Ponting 28:15

So looking at internet and social media, and applying the act, and that ability to understand, retain, use way and communicate, I've set out there just some points again, from personal experience. And the Internet is a minefield, it's a minefield for young people, anyway, but particularly for our clients with traumatic brain injury. And a lot of clients, they, they won't understand the basics, that they think if they're talking to you know, Fred, that Fred may not be Fred, Fred could, in fact, be somebody, you know, very different. Fred might say that they're, you know, 15 years old, but Fred could be, you know, Bob, who is, you know, 45 years old, and in a different country. So, you know, these are, these are complex issues. And I will come back to, because I suspect maybe some of the experts listening this afternoon might be thinking, Oh, my goodness me, you know, does that mean that, you know, this is up to me to go through all these sorts of things in the course of my an hour long, two hour long time spent with the claimant? Maybe, but also, you know, maybe not, but these are these are complex issues for our clients.

Dr Edmund Bonikowski 29:53

A couple of questions have come up. Laura Raul who's an expert says it there is any doubt that an individual lacks capacity? Is there not a capacity assessment done on this client automatically, so that the expert could be aware prior to the assessment?

Huw Ponting 30:13

that's a very good question. And I will pick that up, perhaps when we're going through the case study that the answer is, you know, automatic No. Good practice? Yes, I would, I would say, but it depends again, on, for example, you know, these issues might be coming before an expert, where, if liability is still being disputed, maybe there have been no interim payments, maybe the rehabilitation code hasn't been triggered. And so there will have been no funds available to put in place, scaffolding around the clients such that some of these things can be tested. So sometimes the expert will be coming to these issues blind. And I think that's where the expert, having a proper discussion with those instructing them about, you know, how far they want them to go. Thinking as well about the experts duty to the court. In all this as well. You can see that all of a sudden, you know, it potentially becomes quite, quite complicated.

Dr Edmund Bonikowski 31:23

I mean, very interesting that and there's a supplementary question from an anonymous attendee, which is a bit spooky, but anyway, it says, I don't often see capacity mentioned in instruction letters for CNP. edition prognosis reports, what would you routinely expect a solicitor to include in terms of capacity assessment requirements within a letter of instruction? So we come to that later, a bit more specifically, but I think these are, I have to say, in my own experience, as you pointed out, I think earlier, did the concept of making capacity assessment is often just tagged on at the end of a literal instruction, and oftentimes not. And in fact, sometimes whenever I have perhaps ventured to comment, I've been asked not to comment on it. But to wait until I'm asked. So I think this is quite a, it's quite a difficult area for it is,

Huw Ponting 32:20

it is it is a difficult area. And of course, you know, experts may be instructed by solicitors who for good reason or otherwise haven't identified that capacity may be an issue. I mean, certainly, capacity is something when I see clients that haven't done this work for a long time. It's right at the forefront of my mind. It's why I always see clients at home for that additional context. Very rarely the office, why I will also speak with other family members, because one of the classic sort of symptoms, or deficits presented as a consequence of head injury will be a lack of insight. So you say to that person, you know, do you think you have any problems with managing your money or making decisions? Or no, I'm absolutely fine. So it, it is it is a complex area, and it is becoming increasingly complex. But I think that the key relationship there is between the solicitor the instructing solicitor and the expert. And I think, if in doubt, certainly from the expert perspective, if you start to read things in the documentation that you've been sent, but not that alert you to the fact that there might be capacity issues, but they're not raised in the letter of instruction. You should perhaps be picking up the phone and saying, you know, I've read this what's the, what's the detail behind it? You know, has there been any examination of this? But usually, certainly, by the time I'm instructing experts, I've got a good idea of where I think capacity sits.

Dr Edmund Bonikowski 34:12

That's an expert, isn't it? Rather just purely passive and responding?

34:15

Exactly. And I see that and I see that is completely compatible with the experts duty to the court.

34:21

Well, thank you for that here, clarifying that.

34:30

So, and again, just in relation to IP and the internet and social media, the use of spyware, which is something that you know, I see increasingly come up with clients. Most social media platforms are available to those 13 years old and older, although, often youngsters will embark upon their A journey with social media before that. But the sort of the, the retort, which is sometimes thrown at this area is well, you know, of course, you know, one can look at spyware to monitor the use of social media, and perhaps offer some sort of protection against harm. We've already seen in terms of the principles of the of the Act enshrined within that, looking at the least restrictive option. But also, spyware, I've got to say, raises all sorts of GDPR and deprivation of liberty and human rights issues, and is something that should not be lightly skirted over. But I think that for the purposes of today, raising the flag is sufficient. But certainly something to be to be aware of

36:11

And, and then sexual relations, again, in terms of capacity assessments, and what experts you know, may be required to look at this is extraordinarily complex. And it would be useful, I think, for those that as practitioners have more exposure to this in terms of their day to day practice, go away and have a look at Reed JB, and some of the commentary on it went all the way to the Supreme Court. And it's, and the analysis of it since provides quite a lot of background and guidance to how consent to engage or consent to or engage in sexual relations should be should be considered. Again, coming back to the question that was posed earlier, you know, to what extent should these issues perhaps be ironed out before they come to the expert? This would be exactly one of those topics where, you know, I wouldn't be expecting an expert to start from scratch in trying to work out whether a client or a claimant does or does not have capacity to engage or consent to sexual relations at the point of the medico legal assessment.

37:42

So perhaps let's put some of this in context. Because I think that that does help. So, this is the case of Louie's accident in 2012, aged 12. severe traumatic brain injury, then discharged home into the care of the family. The family initially instructed solicitors, signposted to them but who weren't expert in this area. They did subsequently transfer their matter to us, although for two years refused to transfer their final papers, notwithstanding the usual assurances and undertakings that we gave very little progress that there was a deputy. So capacity was assessed early. So this is for a minor and let's not forget that when looking at capacity and those circumstances we're looking at whether or not capacity is still likely to be lacking when they reach 18. If that's not thought to be the case, then the courts will prefer to delay that decision until they do reach majority but with this particular client, pretty clear early on, that she was still going to lack capacity to manage financial affairs on reaching 18. By the time that came the

claim came to us seven years in there wasn't even an admission of liability that had been obtained. And none of the experts that have already been instructed will be able to retain just because they just weren't up to the task.

39:36

So, Louise, as I've called her, she's very much sort of walking wounded. She has some physical deficits that are not immediately obvious to the eye but they become increasingly so. So you could walk her down any high street in the in the country, and you wouldn't know you would start to know perhaps. Have you started to talk to her, and the more time you spend in her presence, the greater her range of deficits are revealed, she is subject to an HCP. She does have very significant cognitive executive and behavioural issues very vulnerable. And that certainly manifested itself in her use of social media. And at one stage, it became apparent that she was being groomed by an adult living in the Middle East. But posing as a teenager in this country. Not that much statutory support safeguarding and deprivation of liberty and issues, recent sex abuse by a family member and lots of capacity issues that we will look at going forward. Initially, the defendants put forward an offer of 1.5 million that's relatively recently gone up to 10. It's worth significantly in excess of that again, but imagine those circumstances where being under a duty to report offers to your client and a family members to litigation friend, to tell them that the defendants value your relatives injury as one warranting an award at 1.5 million pounds. Defendants you know, that does not help. It just further entrenches the party isn't you can see that six months later, an offer of 10 million pounds on the on the table.

41:46

Again, a little bit of history, which I'm not going to go into here, but so fancy Trust Corporation appointed in place of the existing deputy. And here's the crucial thing application made on the 11th of March 21. In respect of a broad range of issues that we suspected, the client lacked capacity in residence. So choosing where she would live care support, contact with others social media, internet sex relationships, contraception application made to the court came back and said no want the local authority to deal with those issues.

42:28

And here we are, almost 12 months later. And those capacity assessments are, are either still outstanding, in part, or we're very late in being dealt with.

42:51

So the social worker that looked at the matter, accommodation and care had capacity, although they've subsequently and change their mind, since social media lacks capacity, unsupervised contact with others lacks capacity, sexual relations lacks capacity. And where are we at the moment with all that? There are dolls issues, deprivation of liberty issues being addressed. Lots of dealings with the local authority. Still, it is it is extraordinarily complex, on a day to day basis.

43:40

And this is what it does to the costs in the second year. So this is the Well, the first management year second management year. This is when these issues were starting to be exported, those figures that you see on the screen in front of you 31,000 pounds in 2020 31. Effectively, again in 21. Those are

costs that have been assessed by the court. So those are not figures that have just been drummed up. That that's a that's following a scrutinization of the of the costs incurred with those then being deemed reasonable. And in the current management year. We're only a relatively short way in these issues are massive day to day taking up a huge resource and you can see cost to date, six and a half 1000 pounds annualized nearly 70,000 pounds per annum and going back to historically how perhaps capacity was dealt with by experts. Finance and property may be testamentary and litigation capacity in the report. And the deputy ship expert would often say, Well, you know, this is what the costs have been To date, but going forward, in your one post settlement, I think there'll be X amount, they'll be quite high, they always are post settlement, you might be buying a house investing the money, etc. But that they will then start to work to settle down? Well, you know, that assumes an awful lot. And actually, I suspect for this particular client, she will have ongoing issues around her capacity on these health and welfare issues requiring constant management scaffolding reassessment, such that the costs going forward will be very considerable, indeed.

45:43

So how, you know, should we be looking at the evidence gathering in this sort of case? And what should the experts expect? I've talked there about witness statements, they are so important, I think, as solicitors, they are one of the biggest differences that we can make. Also, it does help if these issues then when identified are explored in depth. And that, you know, we can't expect an expert I think, to deal with that just in the course of their instruction, and an hour, hour and a half, two hours, maybe more some time spent with the client. These on this particular case, you know, the experts are getting the advantage perhaps of understanding all that has happened to date in terms of the deputy ship issues on the on the matter and can see what forensic analysis has been undertaken of them. And of course, then can choose and I'll come back to this as my penultimate slide as to what they do with it in their report, do you defer to what's happened on the ground? Or do you perhaps, as an expert, decide you're going to yourself be more forensic, you might even reach up a different a different outcome. I see frequently. Defendant care experts saying, Well, you know, this is the sort of case where a pendant alarm is the is the answer. And this particular client doesn't need the care that's being suggested. They need the freedom, they can just have a pendant alarm to use whenever they think they're getting into trouble, doesn't work. It really doesn't work not for not for these sorts of clients.

47:45

And sometimes separate statements around discrete issues. So rather than these issues being buried in more broad ranging witness statements, perhaps to have witness statements that are more defined in terms of certain things. So for example, in this particular case, where we needed more suitable accommodation, and the family are now in more suitable accommodation, which will accommodate care, some specific statements around a search that was undertaken for that, that accommodation. We also have two experts for the deputy ship, and court protection evidence and costs, one to deal with finance and property costs and the other to deal with the health and welfare issues just because traditionally, those tend to be kept separate within firms. We have a finance and property team, we have a health and welfare team. And if you're an expert, you tend to come from one of those backgrounds or the other. It's a bit like asking medical experts otherwise to deal with sort of cross discipline issues, maybe not quite that extreme. But you, you perhaps take the point.

Huw Ponting 49:03

So from the from the experts perspective. You know, what are you being asked to consider, you might want to clarify your instructions and understand what the legal tests applicable are. We know that different tests applicable to managing finance to testamentary capacity to litigation capacity, but what about sex? What about social media, some of these other health and welfare issues? What's the evidence that sits behind it? What's been happening on the ground, useful in Louise's case that the experts have the benefit of albeit over a long period of time, mass In depth analysis of these, particularly health and welfare issues, where you're going to see the claimant dragging them all the way down to Harley Street may not be the best way of extracting the information that will enable you to best assist the court. How much time you're going to need? Will it take more than one visit to the client? What potential criticism? are you exposing yourself to if these issues aren't dealt with in the depth that you should be looking at them? And if you're not looking at these issues in depth? What does the court then do with the balance of the opinion in your in your report? And of course, what does it do to your cost estimate? When you're being asked to report are there these more complex features that mean that the cost estimate is going to need to be revised upwards? So add some things there to think about. And I'll just skip on then to my last slide. Sometimes, and this will be, I think, useful, I'm giving away a bit of a secret here perhaps to defendant solicitors present and also barristers that are instructed by defendants. It's tried to perhaps to say that, you know, capacity needs to be addressed early. But here's one of the bear traps. Once a defendant has served evidence as to a claimants retained capacity that has to be put before then the court protection if an application is then subsequently made to a point, so a first application to appoint a finance and property deputing. We can't mislead the court protection. And if there is a contrary view on capacity, they need to have it. And in those circumstances, what the court protection will usually do is say, we we're not going to make a decision, the High Court is going to have to deal with this dispute before we will be content to appoint a deputy. So better, as I say, to deal with these issues early on the litigation side, pass them over to your mental capacity team. If you're on the claimant side, if you've already issued proceedings, what could you do, or you're about to have to issue court proceedings. And you want this issue of capacity resolved. If you're issued maybe to have capacity dealt with as a discrete issue. Before anything else, obviously, if liability is otherwise admitted, if you haven't issued proceedings yet, and you don't want to maybe part eight proceedings, just to focus on resolving capacity. And another option, sometimes, it is very useful. For I find if case managers have got a concern around capacity, and I'm still away off, instructing my experts. So this is quite early on, I might say to the case manager. Well, if you've got concerns, you go ahead and commission an assessment of capacity in those circumstances, probably around finance and property, but could go further. That is my Whistlestop. Tour. I'm very happy to take questions, open it up to discussion. I hope, what I've been able to convey in a relatively short period of time, is just how complex this area has now become. And some of the things that as practitioners in this area we should all be thinking about.

53:51

Thank you. Yes, indeed, you have done that very comprehensive overview, which I found informative, as always, with your talks and helpfully detailed. Thank just my cup of coffee. In fact, we don't have very many questions, there seems the audience seems to be rather stunned by the content, hopefully. But if I can just ask a question of my own, which is I've got a question. And then a point I want to make. The question is about the hierarchy of experts who make capacity assessments, because I often involved in complex brain injury cases. And there will be a neuro rehab expert, that would be me.

There'll be a neuro psychiatrist of the neuropsychologist. And oftentimes everybody's asked to make an assessment of capacity. And then when we get to conference, there can sometimes be disagreement about that. And that leads to quite a lot of quite tricky debate, actually, it's really puts you on your metal. And so my question to you is, what is that hierarchy whose view would you rely on most out of those three, accepting that it isn't always medical doctors who do this All psychologists and social workers do it. I know other people quite able to do it. Let's take my live example of those three on a really major traumatic brain injury case. How do you resolve that? And who's viewed your lion?

Huw Ponting 55:14

Yeah, it's, it's difficult. And I don't think one can sort of really generalise because if you looked at neuro psychology and neuroscience, psychiatry, neuro, you know, rehabilitation, for example, you could take different experts in each of those, those disciplines, each of whom will have different experience of dealing with this. So I really do think it I really do think it varies. Where do I normally start anyway, in terms of the experts sort of reporting, often neuro psychology just sort of give me that, that idea of deficits as they present subject, of course, to thinking about things like the frontal lobe paradox, and the need for ecological validation.

Dr Edmund Bonikowski 56:26

How about neurology versus rehab medicine? Well, there's a there's a very interesting discussion there about the role of neurology and neurological rehabilitation, in in the appropriate to expert witness work in brain injury cases.

56:56

So I just pick up on should it not be the expert? Who's you know, got the most objective, detailed assessment? who perhaps, you know, takes the lead on this not just at a specific hierarchy? Absolutely. That, you know, as I say that there is no, there is no right or wrong. And when I'm pulling together, as I know, my defendant, colleagues will, you know, a number of experts on a particular matter? It will vary? Sometimes it'll be, you know, one, sometimes it'll be, you know, a different discipline, it depends, as well on what's been happening on the ground. Is it a case like Louise, where a lot of forensic examination has been undertaken looking at these issues? Or is it something that, you know, the experts are looking at afresh, we all need to approach every single case, I think, with a degree of objectivity, and that, you know, there is no one size fits all approach.

Dr Edmund Bonikowski 57:59

So, if I may just give you a very quick anecdote, my own, I was asked eight months ago, to undertake a life expectancy assessment of a gentleman injured with brain injury and record injury. He vacillated about whether he wanted this about three months ago, I was actually told he didn't want that. But he did want to the solicitor wanted a capacity assessment. So I had already asked for the medical records they hadn't been provided. And so I said, Well, you know, really, I don't know anything about this guy. I would really like to see at least his GP records. And eventually these arrived two and a half 1000 pages of them. And I trolled through them and found a lot of very, very interesting and relevant material. I was then stunned to find that I was being harangued by a firm of solicitors that was not involved in litigation. This is a settled case. And they had been contacted by this client to hurry the process along. I was then contacted by his social worker in a similar vein, and then the firm of solicitors who were the experts,

sisters in capacity instructing me, we're then contacted by the Office of the Public Guardian, admonishing them, for me taking my time reviewing the records. In fact, I'd only taken about a week reviewing all these records because they've been really delayed. And it was extraordinary questions are being asked why on earth does this doctor need to have a look at the medical history? It was the most extraordinary case. So eventually, I had to withdraw from it because the client was really quite hostile towards my involvement and indeed, the firm's solicitors involvement. So what's your what's your take on that view?

Huw Ponting 59:50

It's about one's professional reputation. Should an integrity and duty to the court should You know, should always trump those issues? And yeah, I think we've probably all seen or even maybe even had direct experience over the years of situations where you just have to say, look, you know, I'm really sorry, but you know, I can't continue.

Dr Edmund Bonikowski 1:00:19

Exactly. And that's what I did, unfortunately. So just, there's a question here. To summarise, as experts, can we simply just state in our report that we recommend certain assessments be undertaken due to the concerns we have addressed? And briefly during the assessment? We are not experts in every avenue. So yes. Can you can you suggest further assessment? My own view of that as Yes. What about you here?

Huw Ponting 1:00:49

Yeah, I'd completely agree. And I think that goes back to the duty that the expert has to the court. And, you know, rather than an I'm perhaps exaggerating for effect, but rather than, you know, stick a finger in the wind, actually, you know, if there is significant further work that that you as the expert thinks should be undertaken before determination can be reached. It's absolutely right to, to flag to flag that.

Dr Edmund Bonikowski 1:01:19

Okay, great. So we are now a minute and a bit away from concluding. I think what I'd like to do now is, thank you very much for a really energetic and detailed and expert presentation, very fluent, and very clear, , really, really helpful. And thank our audience for attending some very useful, interesting questions there. I would have liked to see a few more, but then again, you know, when is caught trying to answer them all at the end? Perhaps if anybody's attending any future events of ours, which there will be please chuck your questions in early so that I get chance to digest them. There are many people now, just messaging him to say thanks, and thank you very much, and so forth. So who I think you can regard that as a very, very well spent hour. We're grateful as the audience and we NRC medical experts are up to you. So I think without further ado, we'll wrap up there.