CA on appeal from High Court (Mr Justice Holland) before Ward LJ; Arden LJ; Hallett LJ. 7th February 2006.

JUDGMENT : Lady Justice Hallett :

INTRODUCTION:

1. This is a renewed application for permission to appeal rulings made by Holland J on 12th November 2004 in relation to the Applicant's claim for damages for personal injury and consequential loss suffered as a result of a road traffic accident on 3rd May 1998. On that date the Applicant and a friend were crossing a road in Stockport when they were struck by a car driven by a Mr Matthew Warren. The Applicant suffered severe head injuries from which he made a good physical recovery to the extent that he was able to return to work in October 1998 albeit on light duties. However, his injuries resulted in permanent damage to his cognitive functioning upon the extent and severity of which the experts disagree. In February 1999 he returned to his former duties as a machine operator but in March 1999 he developed post traumatic epilepsy. He no longer works.

2. Throughout, the Applicant has been represented by solicitors and has received help in the conduct of this litigation from various members of his family. He is a man who has always lived with his parents even as an adult. He first contacted and instructed solicitors in June 1998. They applied for Legal Aid on his behalf and began investigating his possible claim for damages. An undated letter before action was sent to Mr Warren in 1999.

3. By letter dated 24th March 2000 Mr Warren's insurers wrote to the Applicant's solicitors offering to settle the question of liability on a 50% basis. At that time, the quantification of the Applicant's damages had not yet been investigated fully if at all. Counsel (not counsel presently instructed) advised in August 2000 in strong terms that the offer of settlement should be accepted. In September 2000 the Applicant was informed of the offer during a lunch break from work. He wished to consult members of his family. A family conference was held which included the Applicant, his father and a Mr Tweedale, the Applicant's step brother. Thereafter, Mr Tweedale nominated by the Applicant to speak on his behalf, contacted the Applicant's then solicitors giving his approval to the compromise.

4. In November 2000, liability was agreed on a 50/50 basis. Proceedings were commenced in April 2001. There was no Reply to the Defence in which the agreement was asserted, and on 4th December 2001 judgment was entered for the Claimant for 50% of the full liability value of his damages to be determined. It seems to be common ground that no-one acting on the Applicant's behalf thought to question at the time whether or not he required the intervention of a litigation friend. At that time, therefore, he was not suing as a patient. His advisers were no doubt heavily influenced by the fact that Mr Bailey continued to be monitored and treated by Dr J Downton a Consultant in Rehabilitation Medicine who described his recovery as "excellent".

5. In a report dated 16th January 2003, a Professor Neary a Professor of Neurology was the first person to express the view that Mr Bailey lacked mental capacity. The court ordered that an application be made for a litigation friend to be appointed. In August 2003 the Applicant's present solicitors took over the case. They had concerns not only about the Applicant's capacity but also about the extent of the investigation into the accident carried out by their predecessors and the level of settlement. Both they and Mr Ullstein Q.C. argue that had the Applicant been properly advised and his case properly presented he would have received a far more favourable award than one based on a 50/50 division of responsibility. Indeed, in his written submissions, Mr Ullstein appeared to argue that on the facts of this case the Applicant was likely to succeed in full against the Respondent.

6. By order dated 13th October 2003, Mr Donald Bailey senior, the Applicant's father, was appointed his litigation friend. He has subsequently been replaced by the Applicant's sister. On 13th October 2003 the question arose, therefore, as to the effect in law of the agreement reached as to liability back in 2000. District Judge Gregory ordered that the Claimant issue and serve applications to set the judgment on liability aside and posed two preliminary issues for the High Court:
   i) Has the Claimant at any time from the accident been a patient within the meaning of CPR and if so, when and for what periods?
   ii) As a matter of law, what effect does the agreement as to liability between the Claimant and the Defendant have in these proceedings?

7. Holland J considered evidence on the issue of the Applicant's mental capacity from the Applicant himself, members of his family and a number of experts. In the light of the medical evidence which substantially pointed one way there was no real contest before Holland J that the Applicant is currently a patient for the purposes of present and further conduct of the litigation and he so found. He also ordered as follows:

"The Claimant was similarly a patient as at 4th December 2001.

The Claimant was not a patient in November 2000 for the purpose of agreeing a 50/50 apportionment of liability.

Pursuant to CPR 21.3(4) I direct that the agreement to apportion liability on a 50/50 basis be approved and that the judgment entered on the 4th December 2001 do stand."

THE ACCIDENT

8. The accident occurred sometime after 10.00 p.m. on the night of 3rd May 1998. Mr Bailey and his companion Mrs Williams, who had been drinking, were crossing a 4 lane urban dual carriageway along which the Respondent Mathew Warren was driving. According to Mr Warren the road was lit and his speed was about 30 to 35 mph. Mr Warren said he moved from the nearside lane out to the offside lane to avoid another vehicle and then back to the nearside lane. He was driving towards a green light in his favour. He never saw the two pedestrians. They had left the central reservation to his right and he had just started to move back into the nearside lane when the collision occurred. On his account the two pedestrians simply walked out in front of his vehicle.

9. As a result of the accident, Mrs Williams was also hurt and pursued her own claim for compensation through different solicitors. She too compromised her claim on the basis of a 50/50 division of liability. Unfortunately, neither she nor the Applicant has any memory of stepping into the road and therefore cannot help as to the cause of the accident. On advice, the Respondent decided to plead guilty in the Magistrates' Court to an offence of driving without due care and attention. In his witness statement he said that he now has little recall of the events of 3rd May 1998 having tried to put the accident behind him.

10. Holland J had before him the police report into the accident, photographs and three witness statements, two from the Respondent driver and one from an independent witness, Carol Winfield, who did not see the collision and could take the case little further. She did not, however, criticise the Respondent's driving, in effect describing it as normal. The layout of the junction had changed by the time the matter came before Holland J. He heard no oral evidence or submissions on the circumstances of the accident itself. There were, however, written submissions before him. Having reviewed that material, he described the driver's lookout as inadequate and suggested that his speed could have been in excess of the 30 mph limit. He described the Respondent's plea of guilty as "***sensible***" and effectively conclusive in establishing liability. There remained, however, the very real issue of contributory negligence upon which he made some observations for which he has been criticised by Mr Ullstein QC.

11. At the conclusion of his judgment at paragraph 30 Holland J said this: "*whereas in December 2001 I like to think I would have queried an apportionment less favourable to the Claimant than say 60/40 it might have been difficult to resist a strong submission in favour of 50/50.*" Mr Ullstein submits that in the absence of oral argument such observations should not have been made and may prejudice any claim the Applicant may have in negligence against his former legal advisers.

THE MEDICAL EVIDENCE

12. As a result of the accident Mr Bailey suffered multiple anterior fossa fractures, bilateral extradural haematomas, and a fractured left humerus. He was transferred to Manchester Royal Infirmary for bilateral craniotomies and plating of the right orbital margin. In June 1998, the medical team responsible for his care reported that he had a low average IQ and good visual/spatial skills. His memory was impaired but he had no "***obvious executive difficulties***". In July 1998, a Clinical Psychologist Mr Gorman felt that he was making a good recovery from his head injury. He described Mr Bailey as "***slow***" and with difficulties in delayed recall and orientation.

13. In October 1998, Dr Downton reported that he was still suffering from the effects of his head injury in that he was aware of an increased sensitivity to noise and a degree of irritability. She suggested a return to work but to lighter duties. In January 1999 she noted that he continued to make progress. Mr Bailey believed that his day to day memory was fine though he still had problems with his pre accident memory. The irritability had become less of a problem but he remained sensitive to noise. She described his recovery as "***excellent***".

14. In March 1999, the fact that the Applicant was suffering from fits was noted. In July 1999, a Mr McIntosh, Consultant Neurosurgeon, found that the Applicant had made a good recovery but there remained residual problems for example impaired memory, sense of smell and hearing and epilepsy. By July 1999, Mr Gorman found considerable improvement but there were still problems with his memory and increased irritability. At that time Dr Downton commented that the Applicant "*seemed fairly well in himself and is now managing to work 40 hours per week. He has had no further fits….a bit irritable with his parents ….but there don't seem to be any other major problems at present.*" Three months later she described him as "*relatively well in himself and is coping reasonably well at work.*" He did however complain of a new symptom namely episodic pain in his right eye.

15. By January 2000, the Applicant was "*generally rather better*" and "*much calmer*". His cluster headaches had also improved to some extent. He described what sounded like 2 minor fits. The fits and the headaches continued and he was referred back to the Manchester Royal Infirmary for investigation. In her referral letter dated 26th May 2000 Dr Downton described Mr Bailey in this way: "Despite quite severe injuries he actually made an extremely good recovery with relatively little in the way of cognitive impairment and this has continued to improve since his discharge from hospital."

16. In October 2000, Professor Neary saw the Applicant in relation to his fits and prescribed increased medication if they persisted. On 3rd November 2000, the day the settlement of liability was agreed, Dr Downton saw Mr Bailey. Mr Bailey himself reported that he was "*not too bad*" and his cluster headaches were less frequent. Dr Downton decided a review 6 months later was in order. Thereafter, the Applicant was reviewed on a regular basis in relation to his fits and possible sleep walking. At one stage it was felt that his problems might be exacerbated by excessive alcohol consumption. In March 2001, Mr Goodman an Ear Nose and Throat Specialist opined that there had been no "untoward effect" on the Applicant's senses of taste, smell or hearing.

17. There are then notes about problems at home which fortunately had eased by February 2002 when he was described as "*generally well*". However, the death of his mother that same month affected him badly. He felt his memory deteriorated. This was possibly because his mother had played a large part in organising his life for him. By October 2002 Dr Downton described him as having made a very good recovery from his brain injury but "*has some residual cognitive difficulties and post traumatic epilepsy*".

18. On 15th January 2003, the Applicant presented to Professor Neary complaining of dizziness, reduced sense of smell and taste, tinnitus, double vision, epilepsy, poor concentration and memory, poor communication, and cluster headaches. Professor Neary noted that he was fully capable of all daily activities but was thought to be unsafe in the kitchen because of a poor sense of smell and bad memory, for example he might leave the gas on or a pan on the gas ring. He could do domestic activities and basic shopping. His judgement was described as impaired and he was said to be very disorganised in his daily activities. Members of the applicant's family felt that the Applicant was incapable of living on his own and certainly was incapable of managing his financial affairs.

19. Professor Neary informed the judge that the crucial injury in the Applicant's case was to the frontal and temporal lobes of the brain and it was of great severity. He was of the opinion that it was highly likely that the brain damage had led to "frontal lobe syndrome" manifesting itself in "cognitive breakdown" and "behavioural disorder". "Cognitive breakdown" could result in poor concentration, impaired memory, slowness in thinking, difficulties in abstract reasoning and understanding, poor judgment, and reduced insight. "Behavioural disorder" might feature irritability, moodiness, verbal aggression, disinhibited social behaviour and obsessive repetitive conduct. Professor Neary decided Mr Bailey suffered a personality change as a result of the accident which meant he required supervision by others and was "*incapable of managing his financial affairs as defined by the Mental Health Act 1983*". He later added that, in his opinion, Mr Bailey was a patient for litigation purposes in both 2000 and 2004.

20. Dr Ghadiali, Consultant Neuropsychologist, examined the Applicant three times in January 2004. He noted deficits in recent and remote memory, impaired verbal intellectual ability, verbal reasoning, verbal expression, patchy executive dysfunction, moderate anxiety and personality changes. In his opinion, the Applicant's cognitive impairment significantly impacted on his daily functioning so that he will always need supervision, prompting and support. Dr Ghadiali questioned whether Mr Bailey's impairment at the time of settlement was to some degree masked by the help given by others. The doctor was of the firm opinion the Applicant was, in 2000, and remains incapable of managing his own affairs.

21. Dr Coughlan, Consultant Clinical Psychologist, examined the Applicant in February 2004 and interviewed his father. He felt that Mr Bailey's weak verbal and fluency skills appeared to be longstanding. His performance on memory tests was patchy and might therefore raise the possibility of mild impairment of memory due to brain injury. In relation to the issue of capacity Dr Coughlan asked Mr Bailey a number of questions to which he provided "good answers" particularly in relation to settling the claim on a 50/50 basis and what considerations should be borne in mind when deciding whether to accept a sum of money offered now or a larger sum of money in the future. He decided on the basis of his examination and Mr Bailey's "***sensible***" responses that he showed "*insight into his situation, understands the need to take advice when faced with a problem, is aware of appropriate sources of advice, can explain himself sufficiently clearly to convey the problem to his advisor and can understand explanations and questions when provided in simple language*". He found "*no convincing evidence of cognitive impairment on formal tests but he probably suffers mild impairment in daily life (as regards memory, expressing his thoughts quickly and managing money) as a result of brain injury. He appears to suffer mild personality change as a result of brain injury tending to get annoyed more easily and to be somewhat childlike in conversation. He also lacks confidence….. Although independent in activities of daily living he relies on his family for management of his finances for help with his epilepsy and because of lack of confidence. He would probably require some external support should his family be unable to continue their support*". Dr Coughlan did not think there had been any significant change in Mr Bailey's condition between 2000 and 2004. Any variations in his performance in the various tests could be attributed to Mr Bailey's confidence and effort on the day the tests were conducted and to the fact that different tests were conducted at different times. Dr Coughlan considered, therefore, that Mr Bailey had the capacity to conduct proceedings in 2000.

22. Having reviewed the solicitors' file, he noted that Mr Bailey had contacted his solicitors on occasions when he felt puzzled by what was happening to his claim and knew he needed advice. He was able to take appropriate action (for example by contacting the Legal Aid Board to find out why his contributions had been assessed at a high level). Taken together and with other evidence he felt the notes showed that Mr Bailey had an appreciation of the claims process at that stage. This confirmed him in his opinion as to capacity in 2000. He remained undecided as to whether Mr Bailey lacked capacity as at 2004.

23. Dr Hyde, Consultant Psychiatrist, saw the Applicant in March 2004. He concluded that he had suffered a mild amnesiac syndrome and organic personality change now likely to be permanent. He accepted that he has a reasonable ability to understand things but because of his memory difficulties he may not retain information. His memory and other cognitive difficulties mean that he functions best in a structured environment. He believed that his apparent recovery and then deterioration is "*more apparent than real*" in that his family and colleagues have cushioned him from the harsh realities of life. This echoed the conclusions of Dr Downton recorded in her witness statement of March 2004. Dr Hyde, however went on to express the opinion that the Applicant is a patient within the meaning of the Mental Health Act and at the time of his report he felt that on the balance of probabilities "there is cause for concern that this gentleman did not have the capacity to manage his affairs" in November 2000. By the time of the agreed expert report he was of the firm opinion Mr Bailey lacked capacity in 2000.

24. Dr Jacobsen, Consultant Neuropsychiatrist, examined the Applicant on behalf of the defendants. He noted that the Applicant presented in different ways to different doctors. Dr Ghadiali for example found significant cognitive deficits but Dr Coughlan noted only possible mild impairment of memory. Dr Jacobsen also noted that the Applicant and his father both maintained that they were not informed about the settlement although the documents clearly showed they had been. He found them both to be unreliable historians but not deliberately so. He said in terms he preferred to rely upon the medical reports as to Mr Bailey's condition at the time of the settlement to the inevitably subjective reports of Mr Bailey senior and junior.

25. Initially, he was of the opinion that Mr Bailey lacked the capacity to manage his property and affairs in 2004 but not at the time of the settlement in 2000. However this was subject to further neuropsychological tests and the receipt of further objective information, if available, on how well the Applicant handled his financial affairs back in 2000. Further, he was satisfied that the Applicant could probably understand a simple concept of whether or not to settle his claim on the basis he was half to blame, provided it was explained to him in simple terms.

26. On further reflection and consideration of all the reports upon Mr Bailey, particularly the neuropsychological tests which showed much "milder deficits" than he had expected, he came to the conclusion that Mr Bailey did not lack the capacity to conduct his affairs in 2000 and may not lack capacity now.

27. He agreed with Dr Hyde that the Applicant has "*cognitive complaints*" and the most likely diagnosis of the Applicant's present state is organic personality disorder. He believed the disorder was only mild and improved partially in the first two years after the accident. He questioned whether bereavement may have contributed to a deterioration in Mr Bailey's condition.

28. Having assessed this evidence, and the evidence from Mr Bailey's family and his former employer, at paragraph 8 of his judgment, Holland J found: *"…the Claimant has happily some insight into his condition and his resultant need for advice and guidance. That history is all of a piece with his presentation to me, to his family, to his erstwhile employer and to the experts. I should interpose: during his inevitably short sojourn in the witness box, the Claimant presented as a polite, decent, realistic man. There was no obvious presentation as a patient, save for a patently seriously impaired memory. I had no reason to discount his insight. That said I note from lay witness statements that there have been instances of impulsive profligacy with money presumably without understanding of a potential problem and it would be rash to assume full insight."*

29. At paragraph 9 Holland J continued: *"with respect to the liability issue he sought and utilised apparently appropriate advisers and instructed them with sufficient clarity to enable them to give advice which should have been appropriate. However his instruction could in that context have been no more than ' I cannot remember the accident'. Plainly, seriously different considerations arise with respect to quantum and fund management…."*

30. He concluded the paragraph with a finding that Dr Coughlan's opinion that the Applicant does not lack capacity as far as the issues now confronting him are concerned as "*overly optimistic and wrong*". He considered that given the weight of the other expert evidence and the lay evidence the decision to treat the Claimant as a patient and appoint a litigation friend in 2003 was "*readily sustainable*".

31. However, Holland J drew a distinction between the issues of liability and quantum and at paragraph 26 he found, on the facts, that Mr Bailey did not lack capacity to agree a 50/50 apportionment of liability at the time of the settlement of that issue in November 2000. He decided to give the settlement his approval.

ISSUES

32. Mr Ullstein appeals Holland J's rulings on the following basis.
    i) The learned judge was wrong as a matter of law to separate the two issues of liability and quantum in deciding whether or not the Applicant had the mental capacity to agree the compromise on liability.
    ii) The learned judge applied the wrong test according to ***Masterman – Lister v Brutton and Co*** *2003 1 WLR 1511.*
    iii) The learned judge was wrong to find on the evidence that the Applicant was not a "patient" at the time of the compromise of liability in November 2000.
    iv) The learned judge was wrong to find that, if contrary to his ruling that the Applicant was a patient in November 2000, he would nevertheless have approved the settlement.

33. In summary, Mr Ullstein argued that the ***Masterman-Lister*** decision supports his contention that if a claimant is a patient for the purposes of the conduct of litigation into the quantum issue, absent a significant change in his condition, he must inevitably be a patient for the purposes of deciding whether or not to settle the issue of liability. Accordingly, if, as the learned judge found, the Applicant was entitled to the protection of the court in December 2001 and is still entitled to the protection of the court today then it is illogical, inconsistent with the evidence and wrong in law to find that he was not a patient in November 2000 when he agreed a 50/50 apportionment of liability. He argued that the evidence pointed to the Applicant's condition having remained substantially the same throughout this period and there has been no dramatic deterioration in his mental state. Accordingly the judge should have found that any settlement of liability required court approval pursuant to CPR 21 and that approval should not have been forthcoming.

34. CPR 21 states, where relevant:
    i) 21.1(2) "patient means a person who by reason on mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs".
    ii) 21.2 (1) "A patient must have a litigation friend to conduct proceedings on his behalf".

iii) 21.3(4) "Any steps taken before … a patient has a litigation friend shall be on no effect unless the court otherwise orders".

iv) 21.10(1) "Where a claim is made by or on behalf of a patient… no settlement, compromise or payment … shall be valid, so far as it relates to the claim, by or on behalf of …..the patient without the approval of the court."

35. Mr Ullstein argued that on the facts of this case no court would or should have approved the compromise. Without approval, any compromise entered into by a patient is invalid and the judgment should be set aside. Further, he argued that, in the absence of advice from the Applicant's present legal representatives and the support of his present litigation friend, the judge should not have found, as he did, that he had the power retrospectively to validate any settlement, if contrary to his ruling, the Applicant was a patient at the time of the settlement on liability.

THE MASTERMAN-LISTER TEST

36. Turning then to the issue upon which the parties focused their submissions before us: the decision of this court in ***Masterman-Lister.*** Mr Ullstein argued that the judge's interpretation of ***Masterman – Lister*** was simply wrong. It does not allow a court to draw a distinction between mental capacity to agree a settlement of liability and capacity to deal with complex issues of financial settlement and quantum generally. He argued that the test as formulated by the court in ***Masterman-Lister*** should be applied in the following way: *"For a person to be able to manage his or her property and affairs requires an ability to make and communicate and where appropriate give effect to all (his emphasis) decisions required in relation to them relating to the litigation."*

37. He criticised the Learned Judge for asking himself at paragraph 26 the following question - *"Whether the Claimant was a patient in November 2000 with respect to the making of any agreement as to the apportionment of liability."*

38. Mr Ullstein argued this was the wrong question because it was too issue-specific. He conceded, as he must, that the test is issue specific, but argued that the issue here was the conduct of the whole of the case from the offer of settlement before proceedings were issued to the resolution of the litigation both on liability and quantum. He relied upon paragraph 27 of ***Masterman-Lister*** where Kennedy L.J. said: *"What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage Plaintiffs in personal injury actions with capacity to deal with all matters and take all "lay client" decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the Plaintiff is to be regarded as a patient from the commencement of proceedings".*

39. Mr Ullstein invited this court to construe that passage in such a way as to find that Lord Justice Kennedy was there saying that there was a difference between capacity to conduct litigation as a whole and the capacity to administer a large sum of money. This he argued echoed what Boreham J. said in ***White v Fell*** unreported 12 November 1987. He said this: *"The expression 'incapable of managing her own affairs and property' must be construed in a common sense way as a whole. It does not call for proof of complete incapacity. On the other hand, it is not enough to prove that the plaintiff is now substantially less capable of managing her own affairs and property than she would have been had the accident not occurred. I have no doubt that the plaintiff is quite incapable of managing unaided a large sum of money such as the sort of sum that would be appropriate compensation for her injuries. That, however, is not conclusive. Few people have the capacity to manage all their affairs unaided… It may be that she would have chosen, and would choose now, not to take advice, but that is not the question. The question is: is she capable of doing so? 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 to make decisions based upon, or otherwise give effect to, such advice as she may receive."*

40. Mr Ullstein argued that Chadwick LJ dealt with the issue in the same way when he spoke of the question of mental capacity being related to "*the pursuit or defence of litigation*" at paragraph 62 of his judgment. Mr Ullstein emphasised that in ***Masterman-Lister*** Chadwick LJ did not hold that the test is more issue specific than that.

41. At paragraph 77 Chadwick LJ went on to consider *White v Fell* and said in relation to the female plaintiff in the last line:- *"She had had the necessary understanding to take the decisions which she needed to take in relation to a claim for compensation".*

Taken in context Mr Ullstein submits that this must mean all decisions and not as the learned judge held in this case the decision to settle liability on a 50/50 basis.

42. Mr Ullstein argued that if the issue specific test as applied by the learned judge was correct it would introduce serious uncertainty, if not actual chaos, into civil litigation. Solicitors would not know how to proceed and when to seek the appointment of a litigation friend.

43. Mr Ullstein further submitted that Holland J asked himself the wrong questions when he ruled on the issue of mental capacity. He maintained that the learned judge failed to address what he described as the eight questions set out in ***Masterman- Lister*** at paragraph 26 of Kennedy LJ's judgment. Kennedy LJ said this: *"So the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate the decision."*

This was in fact the approach suggested by counsel but Kennedy LJ accepted that approach later in the same paragraph.

44. Mr Ullstein contended that the learned judge in this case condensed the eight questions to three following the example set in ***White v Fell*** by Boreham J. At paragraph 26 Holland J said this: *"In great part, the merits of this submission turn upon my finding as to whether the Claimant was a patient in November 2000 with respect to the making of any agreement as to apportionment of liability. I turn immediately to the three considerations adumbrated by Boreham J. and adopted by the Court of Appeal in Masterman-Lister, op. cit. at paragraph 18, this time with reference to the evidence as already rehearsed. Thus,*

a. Did the Claimant then have the insight and understanding that he had a problem with respect to the disposal of the liability issue so as to need advice? The answer is plainly 'yes': such is the effect of the oral evidence and the inferences to be drawn from the solicitors' file.

b. Did he seek an appropriate adviser and instruct him with sufficient clarity? Again, the answer is plainly 'yes'; see, for example, the premises as recited in Counsel's Advice upon which Counsel advised.

c. Did he have sufficient mental capacity to understand and to make decisions upon or otherwise to give effect to such advice as he received? Inevitably it was principally to this factor that attention was given during the taking of evidence and the subsequent submissions. In the event I have to go on the evidence and in my judgment it points clearly to another 'yes'. As to this, the concept of apportionment is not complex, the Claimant correctly explained it to me, just as he appropriately discussed it with his family, with Dr. Coughlan and with the Solicitors. I draw attention to his communications with the latter, especially that of the 27th October 2000 which was made at 1.0 p.m. (see the file note), that is, from his employers in his lunch break. It has to be inferred that his memory and independence of thought were respectively adequate to allow him to make an obviously appropriate communication when unaccompanied by his family and some significant time after last seeing his advisers."

FINDINGS OF FACT

45. The next limb to Mr Ullstein's argument was that the learned judge's findings of fact on the question of capacity were, in any event, so against the weight of the evidence this court should intervene. He reminded the court of the evidence of Dr Ghadiali (whose evidence the Learned Judge accepted on certain aspects) to the effect: *"He says he understands 50/50, he does understand that, that concept. If you offer him to share a cake 50/50 with him and his brother he would understand that concept, he can make a telephone call, he understands that his solicitors are advising him, but he has spoken to his brother who has explained things to him but the key issue is his inability to take onboard different information, to weigh it up and arrive at sound judgment. That is the aspect which he lacks because of the head injury and the effect on his cognitive thinking…"*

There was a further passage upon which counsel placed considerable reliance:

"Q: You set out your opinion in relation to cognitive impairment, and then at 9.9 you conclude, although he recognises the need for assistance he may not be able to reliable (sic) follow and understand appropriate advice, you stand by that?

A: Yes.

Q: You believe he was capable of coming to a decision about litigation matters?

A: No.
Q: Do you consider he is able to receive, understand or retain relevant information needed to make the decision?
A: No.
Q: Or to weigh information and advice that is given to him?
A: No I do not believe he is capable of doing that." (**Transcript, Day 2, page 20F-G**).

46. Professor Neary, with whom Dr Ghadiali agreed, said the Claimant had a mental age of 12 or 13. The submission was advanced, therefore, that the Learned Judge was considering the matter from the wrong perspective. It was not simply a question of the Claimant understanding what the concept of 50/50 meant. The judge should have asked himself whether on the basis of the available evidence he was able to weigh up, understand and decide in an informed way whether he ought to accept that he was equally to blame for the accident. The Claimant had to take and be able to communicate that decision. The Learned Judge failed to analyse at all whether the Claimant was able to understand the basis of or the reasons for the advice given by his solicitors and/or counsel. For example, there is no analysis of whether he was able, in November 2000, to question the advice. Indeed, the evidence from Dr Ghadiali was that he did not do so.

47. Mr Ullstein complained that the learned judge failed to mention the medical evidence called on behalf of the Applicant in any sufficient detail when he gave his reasons for deciding the Applicant did have the necessary mental capacity to settle the liability issue. I can deal with that complaint immediately. I do not intend to rehearse the judgment in its entirety but it is clear to me from my reading of it as a whole that mentioned in detail or not the learned judge had the expert evidence very much in mind. I shall return to the question of the sufficiency of the evidence on capacity re liability later.

48. Mr Ullstein also submitted that the judge failed to analyse whether the ultimate decision to accept the apportionment of liability was made by the Claimant or by his family as a result of a family conference. In that respect he said it is important to note the evidence of Professor Neary who said:- *"Having taken all the evidence into consideration I think that Mr Bailey is pathologically dependent on his family, and I think the brain injuries reduced him to the state of a minor, in relation to decisions he had been reduced to that of a child. So taking all those factors into consideration I do think he lacks legal capacity now, and he would have been worse in his psychological condition in 1999 and 2000 for reasons I have explained. And therefore I think that he lacked capacity then."*

49. Mr Ullstein criticised the learned judge for failing to give this evidence the weight it deserved. A proper analysis of the family conference would have revealed that it was the family not the Applicant who made the decision. Again pausing there, I have some difficulty with the concept that because a litigant takes a decision in consultation with his family this is necessarily as good an indicator as Mr Ullstein appeared to suggest that he is a patient. Many a claimant will rely very heavily upon their spouse, partner or other members of the family before taking an important step in litigation and this particular Claimant was a man who was heavily reliant upon his family even before the accident.

50. Mr Elgot for the Respondent reminded the court that the evidence relevant to capacity came not just from experts who examined the Applicant in 2003 and 2004 but also from the treating doctors and from the parties themselves. The learned judge saw and heard from the Applicant and his father about the events of November 2000. Mr Bailey senior told him about what occurred at the family conference and this seemed to indicate that the Applicant had himself participated in it.

51. Mr Ullstein finally addressed the role of the court where litigants labour under a disability. He accepted that the general principles of contract law are to the effect that a mentally disordered person is bound by his contract, unless he can establish that owing to his mental incapacity he did not understand what he was doing, given the nature and complexity of the transaction in question, **and** also that the other party knew of the incapacity. In this case Holland J discouraged the calling of evidence upon the question of knowledge, rightly in my view, there being no suggestion that anyone actually knew of the Applicant's alleged incapacity at the time of the settlement.

52. Returning to Mr Ullstein's submissions, he argued that where the Applicant is a patient and the subject of a tortious wrong, the court is obliged to exercise a much more interventionist supervisory role to ensure that a person under a disability is protected against himself and the incompetence of his lawyers or advisers. He suggested that the court's role in tort litigation, as far as claimants suffering from a mental disability is

concerned, is exactly the same as its role in relation to infants. Accordingly, if a person enters into a compromise agreement with the other side and it later becomes apparent that he lacked the capacity to compromise, it will not be valid without the approval of the court, whatever the state of knowledge of the other contracting party. For this proposition, he relied upon the provisions of CPR 21 op cit as interpreted by the House of Lords in ***Dietz v Lennig Chemicals Ltd*** *1969 1 AC 170* and ***Drinkall v Whitwood*** *[2003]* EWCA Civ 1547.

53. In ***Dietz,*** summarising the facts as shortly as I may: a plaintiff widow purported to accept an offer to settle her and her son's claim under the Fatal Accident Acts "*subject to the approval of the court*". An originating summons was issued for the court's approval and the Master approved it. Before the consent order could be drawn, however, the offer was withdrawn. Their Lordships held that: *"the settlement so far as it related to the £9250 in which the infant was interested, was only a proposed settlement until the court approved it. Either party could lawfully have repudiated it at any time before the court approved it." (*Per Lord Pearson at pp 189-190.

54. In ***Drinkall,*** this court was concerned with the validity of an agreement to compromise the question of liability made on behalf of a minor claimant before proceedings were issued and where no order of the court was made upon it. Absent the approval of the court pursuant to CPR 21.10, the Court felt bound by the decision of the House of Lords in **Dietz** to hold that the compromise was invalid, albeit the party seeking to avoid the compromise was the defendant. Mr Ullstein argued that similar principles must apply to a settlement whole or partial agreed by a man who is later found to have been a patient. In the absence of approval the purported settlement is simply invalid, whatever the state of the other party's knowledge.

55. Mr Elgot reminded the court that both cases concerned minors rather than patients and argued that different considerations should apply, given the general principles of contract law, to which I have already referred, in relation to those labouring under a mental disability. He submitted in neither of the cases upon which Mr Ullstein relied was the court able to validate the compromise agreed because in neither case was the agreement embodied in a court order.

APPROVAL/VALIDATION

56. Mr Ullstein conceded that if the learned judge was right to hold as he did that the Applicant was not a patient for the purposes of agreeing the issue of liability, he was bound to validate the order of December 2001 pursuant to CPR 21.3.4. Had the judgment been set aside the Applicant would have faced an accord and satisfaction argument that he would have inevitably lost.

57. As far as retrospective approval pursuant to CPR 21.10 is concerned, however, Mr Ullstein argued that the judge erred when he stated that, had the Applicant been a patient at the relevant time and had the compromise required the approval of the court, he would have exercised his discretion in favour of approval. He submitted the judge should not have taken into account, as he said he did, the overall chronology; the position of the Respondent; and the likely situation as at the entry of judgment had the Applicant then had as a litigation friend his first choice namely, his father. Mr Bailey senior undoubtedly would have endorsed the compromise.

58. Mr Ullstein submitted that only where the settlement is manifestly in the interests of the party with a disability, should a judge exercise his power in such a way. In this case where both the current litigation friend and the Claimant's legal advisors are opposed to the settlement subsequent approval should not be given.

59. He reminded the Court of the observations of Kennedy LJ in ***Masterman-Lister*** at paragraphs 30 and 31 to the effect that if steps in litigation are taken on behalf of a claimant who lacks capacity but no-one realises it at the time, provided everyone has acted in good faith and there is no manifest disadvantage to the party subsequently found to have been a patient at the relevant time, the old Rules of the Supreme Court and the CPR both allow judges to regularise the position. Mr Ullstein emphasised the words *"and there is no manifest disadvantage*". Mr Elgot on behalf of the Respondent emphasised the final words of paragraph 31: *"However finality in litigation is also important and the rules as to capacity are not designed to provide a vehicle for reopening litigation which having been properly conducted whatever the wisdom of the individual decisions in relation to it has for long been understood to be at an end."*

60. Mr Ullstein took the court through the provisions of the Practice Direction to CPR 21 at paragraph 6.3(1) which states that where a patient's claim is compromised before the issue of proceedings the claim must be made using the Part 8 procedure and must include a request for approval of the settlement or compromise. The information the court will require includes the approval of the litigation friend to the compromise and an opinion on the merits of the settlement or compromise given by counsel or the solicitor acting for the person under a disability.

61. In the absence of the consent of the litigation friend and the support of a claimant's lawyers Mr Ullstein contended that the court would not be approving a compromise but imposing one. That would, if permitted, be a fundamental change to the way in which litigation is conducted. Such a change would necessitate a clear change to the rules (which has not been made) and/or a very clear statement by this court or the House of Lords.

62. He submitted that although the Applicant's legal advisers at the time may have supported the compromise, had any court undertaken a proper scrutiny of their faulty approach to the question of liability, it would have been bound to find that their advice was inadequate. As far as the attitude of the person who would have been the Applicant's litigation friend at that time is concerned, namely Mr Bailey senior, he was in favour of the compromise but only because he believed that the advice from the lawyers was sound. The Applicant and his family accepted the lawyers' advice because they were told that if he failed to accept the 50/50 offer, the Applicant ran a real risk of getting nothing. The advice was plainly wrong since the Respondent had pleaded guilty in the magistrates' court to driving without due care and attention. The Applicant was, therefore, bound to establish primary liability. Repeated requests had been made for an interim payment and Mr Bailey and/or his family had been erroneously informed that no interim payment could be secured until the issue of liability was resolved. Accordingly, Mr Ullstein submitted the lawyers were negligent, Mr Bailey senior and the family were misled, and it would be wrong now retrospectively to approve the compromise.

63. Mr Ullstein also criticised the judge for saying he could make no final judgment as to apportionment in the absence of any submissions on the point yet he went on to say he would have found it difficult to resist a strong submission that the Applicant might be held 50 per cent to blame for the accident.

64. First, Mr Ullstein argued the Judge ought not to have made any such finding in the absence of detailed submissions as to the apportionment of liability. That is, quite simply, a matter of fairness. Second, the finding that such apportionment was not manifestly to the disadvantage of Mr Bailey is plainly wrong. He queried how any blame could be laid at the door of Mr Bailey and Mrs Williams. They were pedestrians who, as he put it, had begun to cross the road when they saw a car travelling in the outside lane. They judged, correctly, that they could get into the nearside carriageway without danger had the Respondent not unexpectedly returned to his nearside. Again pausing there, the difficulty I have with that argument is that neither Mr Bailey nor Mrs Williams were in a position to say that is what they did.

65. Mr Ullstein also reminded the court of the decision of the House of Lords in ***Baker v Willoughby*** *[1970] A.C. 467* whereby the House restored the trial judge's assessment of 75/25 in favour of a pedestrian. More recently, in ***Eagle v Chambers*** *[2003] EWCA Civ. 1107* the Court of Appeal reversed the finding of the trial judge that a pedestrian was 60 percent to blame for an accident notwithstanding that the Claimant was walking backwards, facing the traffic, in a distracted manner. At paragraph 15 Lady Justice Hale, as she then was, giving the judgment of the Court, said:- *"The potential 'destructive disparity' between the parties can readily be taken into account as an aspect of blameworthiness".*

At paragraph 16 she said:- *"It is rare indeed for a pedestrian to be found more responsible than a driver unless the pedestrian has suddenly moved into the path of an oncoming vehicle. That is not this case. The Court has consistently imposed upon the drivers of cars a high burden to reflect the fact that the car is potentially a dangerous weapon".*

66. Mr Ullstein maintained, therefore, that the appeal would have a real prospect of success and that given the importance of the rulings generally and to the Applicant, on any view now a patient, there is a compelling reason why the appeal should be heard.

67. He invited the Court:
i) To give permission to appeal;

ii) To allow the appeal and set aside the finding of the Learned Judge that the Claimant was not a patient as at 2nd November 2000; and

iii) To set aside the judgment of 4th December 2001.

68. Alternatively, if, contrary to the Applicant's primary submissions, this court upholds the Learned Judge's finding that the Claimant was not a patient at 2nd November 2000 we should, nevertheless set aside the finding that the apportionment of 50/50 was not manifestly to his disadvantage. This, he submitted, would assist the Claimant in pursuing his claim in an action for negligence against his former legal advisers.

CONCLUSIONS

DISCUSSION OF ISSUES - MASTERMAN-LISTER

69. I turn immediately to the decision in ***Masterman-Lister*** which is at the heart of this appeal and upon which so much time has been spent in the course of argument. I do not intend to rehearse the very helpful exposition of the law as set out in the judgments and, in particular, in the judgment of Chadwick LJ. Suffice it to say that the test of mental capacity is plainly issue specific.

70. Under common law, as Chadwick LJ observed at paragraph 62 of ***Masterman-Lister***, the test of mental capacity "has to be applied in relation to the particular transaction (its nature and complexity) in respect of which the question of whether a party has capacity falls to be decided." In relation to each particular matter or piece of business transacted the party in question should have an understanding of the general nature of what he is doing. Thus, although an individual may, in law, lack the capacity to enter into some contracts or transactions he or she may still be perfectly capable of entering into others. As I understand the ratio of ***Masterman-Lister*** this court held that the same approach should be adopted for the test of mental capacity as far as the conduct of litigation is concerned. Thus, the court must focus upon the particular individual and the particular transaction.

71. As Mr Elgot rightly pointed out the question before this court did not fall for consideration in ***Masterman-Lister***. The court was not concerned with split issues of liability and quantum as here. All their Lordships remarks should therefore be read in that light. In my judgment, when, therefore, Kennedy LJ referred to "*all lay client decisions related to the actions up to and including a decision to settle*" he was merely highlighting the issue specificity nature of the mental capacity test. He was satisfied that although, in law, a litigant may be able to follow all the steps up to and including the resolution of the issues of both liability and quantum, yet he or she may still be found to lack the capacity to administer a substantial award of damages. Even if an individual had capacity to the extent of being able to cope with all the litigation, it did not mean he necessarily had the necessary capacity to administer a large award of damages. Thus, when Wright J, the judge at first instance in ***Masterman-Lister*** found, as he did, that the litigant was a patient for the purposes of administering his award it did not necessarily follow that he was a patient for all purposes. As Kennedy LJ said he could see no justification in those circumstances for the assertion that the claimant was to be regarded as a patient from the commencement of proceedings.

72. Similarly, I can see no justification for the assertion that if the evidence supports a conclusion that a claimant lacks the capacity to deal with matters of quantum that it necessarily follows that he lacks the capacity to decide whether or not he is prepared to accept he was equally to blame for a road traffic accident. All will depend on the facts of the case, the capacity of the individual and the nature and complexity of the issue to be decided. Issues of liability may themselves be complex. Issues of quantum for brain damaged claimants almost invariably are. In this case it seems to me that the issue of liability was relatively straightforward. The issue of quantum was not. In those circumstances, I fail to see why a finding that the Applicant lacked the capacity to deal with issues of quantum in December 2001 means that he must be taken to lack capacity from the very beginning.

73. For my part I cannot accept Mr Ullstein's construction of the words*" issue specific*" and "*transaction related*" so as to encompass the whole of the pursuit of a claim up to and including the resolution of all questions of liability and quantum. The word ***"issue***" is itself embodied in the CPR. By virtue of 3.1 (1) the court has power to direct a trial of "***any issue***", decide the order in which "issues" are to be tried and exclude "***an issue***" from consideration. It is becoming increasingly common for the issues of liability and quantum to be split and separate trials ordered. Thus, within the ambit of the CPR the word "issue" will often encompass the issue of

liability alone and the ethos of the CPR is to encourage issues to be dealt with separately if they can be done fairly and cost effectively.

74. In my judgment the construction Mr Ullstein seeks to put on the words *"issue*" and "*transaction*" would be to give ordinary English words an extraordinary meaning. Transaction is usually defined as "a piece of business done". In my view, in the present case, the issue was the issue of liability and the piece of business done was the compromise of the issue of liability not the conduct of the whole of the litigation.

75. I am fortified in my approach to this interpretation of ***Masterman-Lister*** not only by the way in which the common law of contract in relation to those labouring under a disability has developed but also by the fact that legislators and courts alike have very properly insisted upon proper regard being paid to the rights of a vulnerable person.

76. I accept Mr Elgot's submission that, however much judges may wish to protect an individual from the ill advised consequences of his or her own actions, courts should tread very carefully and only interfere with an individual's rights when absolutely necessary. The right to take decisions on a claim for damages is an important one and not to be taken away lightly. A claimant may well wish to accept an offer to settle a liability issue in the certain knowledge that a trial on liability is thereby avoided and 50% of the damages is guaranteed at an early stage. If, as the learned judge, found here the claimant has in fact the capacity to take that decision he or she should be allowed to do so.

77. I question what the reaction of the Applicant and his family might have been in November 2000 had he been advised, as Mr Ullstein suggests he should have been to reject the offer, but decided for perfectly rational reasons of his own to accept the Respondent's offer. On Mr Ullstein's analysis, he should then have been told the matter was to be taken out of his hands and given to a court. The judge would have been bound to decline to give its approval because the lawyers did not support it. Given the Applicant's ability to function at home and at work at the time the offer was made and accepted, I suspect he might well have felt somewhat aggrieved.

78. I remind myself of the observations of Chadwick LJ at paragraph 78 to the effect: *"It is not the task of the courts to prevent those who have the mental capacity to make rational decisions from making decisions which others may regard as rash or irresponsible"*

79. In similar vein, Kennedy LJ in approving Boreham J's approach in White's case said: *"Capacity must be approached in a common sense way not by reference to each step in the process of litigation but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to intervene."*

I agree.

80. Using what I hope is a common sense approach, I fail to see why the court in this case should take away from the Applicant the right to settle the issue of liability essentially because, as Mr Ullstein would have it, he entered into a bad bargain. If he did, and if it was as the result of negligence on the part of his legal advisers, then the Applicant is not without remedy. The proper course is to sue the legal advisers, not attempt to reopen a simple issue long since settled between these parties, on the back of a finding that the Applicant cannot cope with more complex issues of quantum.

81. I do not accept that finding in this way would bring chaos to the world of civil litigation. If a legal adviser has good reason to suspect that his client may lack capacity to deal with an important issue, then he will no doubt immediately instruct an expert to report and that expert can advise on what is within or without the client's understanding and capacity.

82. Nor do I accept that by adopting this approach this court would be opening the floodgates, so that at every step of the way during the conduct of litigation reference would have to be made to the capacity of the claimant. I repeat and endorse Kennedy LJ's exhortation to legal advisers to approach the question of mental capacity in a common sense way and without incurring unnecessary expense either by instructing experts for no good reason or by involving the Court of Protection on matters well within the lay client's understanding.

83. Accordingly, I am not persuaded that Holland J misinterpreted *Masterman-Lister* and I turn to the test that he applied.

THE MASTERMAN-LISTER TEST

84. I have already rehearsed the three prong test adumbrated by Boreham J in ***White v Fell*** and considered by this court in ***Masterman- Lister***. I reject Mr Ullstein's submission that ***Masterman-Lister*** disapproved the Boreham approach. First, I remind myself that Wright J had himself applied that test and his findings were upheld in ***Masterman-Lister***. Second, although Kennedy LJ may have approved the slightly different formulation of the test as advanced by counsel, nowhere in his judgment can I find an expression of disapproval of the Boreham formulation.

85. In the light of those observations, I have considered very carefully paragraph 26 of Holland J's judgment and compared it with what Mr Ullstein called the eight stage test set out in the judgment of Kennedy LJ also at paragraph 26. Having done so, I confess I do not follow or accept the criticisms made of the learned judge. On my reading of paragraph 26 of Holland J's judgment he has addressed the appropriate questions. I paraphrase what he asked himself:

a) Did the claimant have the insight and understanding that he had a problem with respect to the disposal of the liability issue so as to need advice?

b) Did he seek an appropriate adviser and instruct him with sufficient clarity?

c) Did he have sufficient mental capacity to understand and to make decisions about the specific issue namely liability or otherwise give effect to such advice as he received?

d) Did he have sufficient memory and independence and was he generally capable of communicating his decision to his advisers?

Whatever the formulation one chooses, it seems to me that these questions addressed the right issues and adhered to the principles confirmed in ***Masterman-Lister***.

FINDINGS ON THE EVIDENCE

86. I shall not repeat Mr Ullstein's criticisms of the learned judge's findings on the facts which I note seem remarkably similar to those made of Wright J in ***Masterman-Lister***. In my judgment, they do not withstand close scrutiny. I gratefully adopt the observations of Mummery LJ in ***McNichol v Balfour Beatty Rail Maintenance Ltd.*** *2002 IRLR 711* that the approach a court should adopt when faced with medical evidence as to mental impairment is as follows: *"The essential question in each case is whether, on sensible interpretation of the relevant evidence, including the expert medical evidence and reasonable inferences which can be made from all the evidence, the applicant can fairly be described as having a physical or mental impairment."*

87. Expert evidence is, of course, of considerable assistance to a judge in this situation, but the expert's opinion, however authoritative, is not conclusive. The judge decides not the expert. Holland J plainly bore very much in mind the medical evidence called before him; in fact he accepted it as far as the Applicant's capacity to conduct a complex issue of quantum in December 2001 is concerned. But in relation to November 2000 he was dealing with a far more straightforward issue and he had the benefit of the opinions of the treating doctors at the time. To be fair to both parties the learned judge was obliged to consider the expert evidence based on examinations of the Applicant in 2003 and 2004 in the light of the totality of the evidence which in this case included evidence from the Applicant himself and evidence of how he was able to function at the relevant time.

88. Holland J saw and heard the witnesses. He bore in mind the fact that the Applicant was living and working in the community at the time of the settlement. Mr Bailey shopped, he cooked, he entertained himself, he had a bank account and knew the pin number for his cash card. He was seen by Dr Downton on the day the offer was accepted and she made no mention of his lack of capacity. On the contrary, he appeared to be coping well. He personally instructed his solicitors. He was able to communicate with them. He appeared to understand a relatively simple proposition of whether or not responsibility for the accident should be divided equally between him and the driver. He understood he faced certain difficulties in pursuing his case, having no memory of crossing the road at all. The Applicant told the learned judge that although he had very real problems with his memory generally, before accepting the compromise he had spoken to his father about the liability aspect of the case and that Mr Tweedale had helped him. He understood what they were saying to him. He understood that settling the case on a 50/50 basis meant that the accident was half his fault and half that of the driver. He was also aware that Mr Tweedale had tried to obtain an interim payment for him which he referred to as "*some money as the case was going on*". The Applicant presented to the learned judge as a

"*patient, decent, realistic, man*." He showed "*some insight*" into his condition and the need for advice and guidance. Apart from his appalling memory "*there was no obvious presentation as a patient*".

89. In addition, the learned judge had the solicitors' file in front of him in which attendance notes recorded communications between the Applicant himself and his legal advisers. He also took into account the evidence of Mr Bailey senior to the effect that the Applicant had participated in the family conference. The learned judge had the assistance of the sensible answers given by the Applicant to Dr Coughlan in which he appears to have understood as at 2003/4 what his former solicitors had failed to do and what his present solicitors were trying to do. Mr Elgot has also drawn our attention to other answers not summarised in the judgment which indicate a fair degree of understanding generally on Mr Bailey's part on the issue that faced him when the offer was made.

90. It was in the light of this evidence that Holland J considered the medical evidence and rejected the conclusions of the Applicant's medical experts. He may not have rehearsed in detail every piece of evidence in favour of one party or the other but he is not obliged to do so. In my judgment, the fact that he did not rehearse all the medical evidence to which Mr Ullstein has attached such importance is not a valid criticism given his overall approach to the evidence before him. The burden of establishing that the Applicant was a patient at the time of the settlement was upon the party making that assertion, namely the Applicant. This court will take some persuading to over turn a judge's findings on the facts. Despite Mr Ullstein's undoubted eloquence as far as I am concerned he has not got close to so doing.

91. Given the learned judge's findings of fact are, in my view, based soundly on the evidence I would reject this ground of appeal also.

VALIDATION/APPROVAL

92. As I have already indicated Mr Ullstein accepted that if he failed in persuading the court that Holland J was wrong in law or in fact in deciding that the Applicant was not a patient as at November 2000 for the purposes of agreeing the liability issue, any appeal must fail.

93. Accordingly, the other issues put before us in the course of argument do not, in my view, fall for decision. However, if I am wrong about that, I would, in any event, uphold Holland J's ruling that, had he found the Applicant was a patient at the time of the compromise, he would have approved the settlement.

94. I do not accept Mr Ullstein's argument that the provisions of the Practice Direction establishing the procedure to be followed when the court's approval is sought for a compromise pursuant to CPR 21.10 mean that if that procedure is not followed the judge is debarred from considering the issue. Nor do I accept that the judge may only approve a settlement retrospectively if a claimant's current legal team and his current litigation friend support and approve the compromise. Given the over riding objective to which CPR 21 is subject in the same way as every other rule, I am satisfied that, however the matter came before him, the judge had a very wide discretion to deal with the matter justly and proportionately.

95. Within CPR 21.3 (4) there are no restrictions whatsoever on the court's discretion to validate steps taken in proceedings before a litigation friend is appointed. A court can regularise the position retrospectively provided, as Kennedy LJ observed in para 31 of ***Masterman-Lister*** *"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 time"*. He could not envisage any court refusing to regularise the position because *"to do otherwise would be unjust and contrary to the over-riding objective…. The rules as to capacity are not designed to provide a vehicle for reopening litigation which having been properly conducted (whatever the wisdom of the individual decisions in relation to it) has for long been understood to be at an end."* I respectfully agree.

96. It is for the judge to consider all the facts of the case before him, therefore, and where as here, there is no suggestion of bad faith, decide whether or not the compromise is manifestly disadvantageous to the patient. This Holland J did and, for my part, I see nothing wrong with the approach he adopted. He considered the circumstances of the accident as best he could on the material before him and took account of the fact that this was a compromise reached many years ago upon which a judgment was entered. It was approved at the time by the Applicant himself, his family, the first litigation friend appointed and his legal advisers. This was not a compromise being forced upon anyone. It was a considered decision by all concerned governed no doubt by

a desire to settle this aspect of the case. The desire to settle is something the court is entitled and should bear in mind, along with the risks of litigation, in deciding whether or not to approve a settlement.

97. To determine whether or not the compromise was manifestly disadvantageous, therefore, Holland J could not avoid considering the basis of the legal advice given to the Applicant and his family to settle the case. It was in this context that the remarks to which Mr Ullstein takes such exception appear. As I have already rehearsed, the judge observed that 60/40 might have been an appropriate apportionment of liability in the Applicant's favour but in the light of a strong submission he might have been forced to accept 50/50. He concluded with the words: *" as of now the defects in the Advice cannot readily be impugned as being so overwhelmingly unfavourable to the Claimant as to demand a belated setting aside of a judgment and restoration of the contributory negligence issue"*.

98. These remarks cannot be overturned in the strict sense. Mr Ullstein, however, is anxious to have the observations disapproved by this court so that they may play no part in the litigation he wishes to pursue on the Applicant's behalf in an action for negligence against his former legal advisers.

99. This court has not had the benefit of considering the written material in any detail whatsoever, let alone hear submissions upon it. I do not intend to fall into the same error of which Holland J stands accused, namely of coming to conclusions in the absence of a proper consideration of the evidence and detailed submissions.

100. I will only say this: as Mr Elgot reminded the court, Holland J has vast experience in the field of personal injury litigation. He did his best on the limited material before him to estimate an apportionment of liability. He made no pretence that it was anything other than a fairly rough and ready calculation which it was bound be, so many years after the event, absent a full scale trial on liability. With those observations in mind, I agree with the learned judge that this case is far from being as cut and dried as Mr Ullstein submits. The issue of contributory negligence, if this issue were reopened, would loom large. No matter how critically the higher courts may regard motorists, an adult pedestrian is still expected to take some reasonable care of his or herself. Sadly, Mr Bailey cannot explain what he did and why. I note that Mrs Williams, who was in a similar position, also compromised her suit on the basis of a 50 % division of responsibility.

101. In any event, Holland J's comments are not binding on any court before which an action in negligence is brought against the Applicant's former legal advisers. So, there the matter must rest, as far as I am concerned. Holland J indicated the very broad approach he would have adopted to the exercise of his discretion, had it been required, which, in my judgment, was perfectly proper given the nature of the material before him

102. Finally, in case my silence should hereafter be taken as assent to the proposition advanced by Mr Ullstein on the effect of CPR 21 in cases of compromises made by people later found to have a mental disability, I should indicate I share the concerns expressed by Chadwick LJ expressed in ***Masterman-Lister*** at paragraphs 67-68 at the assertion that procedural rules have abolished, as it were, by a side wind, the well established general principle of contract law that a mentally disordered individual seeking to set aside a contract has to prove knowledge of his incapacity on the part of the other contracting party. The decision in *Dietz* may well provide the answer, but for my part I would wish to hear far more detailed argument specifically on this topic before coming to any final conclusion. It is not a matter which, on my findings, would fall for decision by this court and I, therefore, follow Chadwick LJ's example in ***Masterman-Lister*** and say no more.

103. Accordingly, even if Mr Ullstein had persuaded me that his interpretation of ***Masterman-Lister*** was the correct one, for my part, I would still have found against him on the facts of this case. I would therefore, dismiss this appeal.

Lady Justice Arden:

104. I am grateful to Lady Justice Hallett for setting out the facts, the submissions and issues in this case. I should state at the outset of this judgment that, while on some issues I have reached a different conclusion, I agree that this court should give permission to appeal and dismiss the appeal.

The court's approach to issues of capacity

105. The issue at the heart of this appeal is whether Mr Bailey was a patient at the time of the compromise in November 2000. What is now said is that he did not have capacity to enter into that compromise. Capacity is an important issue because it determines whether an individual will in law have autonomy over decision-making in relation to himself and his affairs. If he does not have capacity, the law proceeds on the basis that

he needs to be protected from harm. Accordingly, in determining an issue as to an individual's capacity, the court must bear in mind that a decision that an individual is incapable of managing his affairs has the effect of removing decision-making from him. The decision is not made lightly: as Kennedy LJ put it in ***Masterman-Lister v Brutton*** [2003] 1WLR 1516, "*no court should rush to interfere*" (para. 27). This is so even though, if he were declared to be incapable for the purpose of any decision, his advisers could maximise his contribution to that decision-making process by seeking and taking into account his views so far as he was able to express them. It is surely necessary in a democratic society to maximise an individual's contribution in this way, and the law should encourage this to be done. Although no court should rush to interfere with the power of an individual who is competent to make decisions, it must not shirk the duty of intervening where an individual is not so capable and needs to be protected by the law. Finally, it should be noted that the law presumes that a person is competent. Accordingly, the burden lies on those who seek to assert that an individual is not competent to manage his own affairs.

Relevant provisions of the Civil Procedure Rules

106. This appeal centres on the question whether the judge was correct to hold that Mr Bailey was not a patient in November 2000. The framework within which that question has to be answered is provided by the Civil Procedure Rules ("CPR"). Part 21 of the CPR and the practice direction supplementing that Part specifically deal with children and patients. CPR 21.1 provides that for the purposes of Part 21 a "patient" means: *"a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs."*

107. CPR 21.3 (4) provides: *"Any step taken before a child or patient has a litigation friend shall be of no effect, unless the court otherwise orders."*

108. CPR 21.10 provides for compromises by or on behalf of a child or patient;-

"(1) Where a claim is made –

(a) by or on behalf of a child or patient; or

(b) against a child or patient,

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, without the approval of the court.

(2) Where –

(a) before proceedings in which a claim is made by or on behalf of, or against child or patient (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 (alternate procedure for claims); and

(ii) include a request to the court for approval of the settlement or compromise.

(Rule 48.5 contains provisions about costs where money is payable to a child or patient.)"

109. A number of observations must be made about CPR 21.10;-

i) CPR 21.10(1) specifically provides that a compromise of a claim belonging to a patient without the approval of the court is of no effect.

ii) There is no saving for the case where the person is not known to be a patient at the time of the compromise. The position in that situation is one of the issues for decision on this appeal.

iii) The position in relation to the compromise of a claim may therefore be different from the usual position in relation to a contract made by a person who is not known to be a patient. In such a case, the contract is enforceable unless the other party was aware or ought to have been aware that the person was a patient. In that event, the contract is voidable: ***Imperial Loan Company v Stone*** [1892] 1 QB 599.

iv) There is no requirement in CPR 21.10 (1) that proceedings should have been issued. Thus approval is also required even if proceedings have not been issued: see ***Drinkall v Whitwood*** [2004] 1 WLR 462.

v) CPR 21.10 applies even where the compromise is of only part of a claim: ***Drinkall v Whitwood***.

vi) I f solicitors purport to enter into a compromise on behalf of a patient without obtaining the approval of the court, it seems to me, provisionally, that a question would arise as to whether the solicitors were in

breach of their warranty of authority to act on behalf of that person. However, I express no concluded view on this point because it was not argued on this appeal.

vii) The court may, however, approve a compromise to which a patient agrees although he has no litigation friend. The court's power is contained in CPR 21.3(4).

viii) There is no definition of the term "claim" in the CPR.

The decision in Masterman – Lister v Brutton

110. The decision of this court in ***Masterman-Lister v Brutton*** was a landmark decision in the field of mental incapacity, and this case requires the court to apply the law as there laid down and to consider how that decision applies to a compromise made before proceedings are commenced.

111. The ***Masterman-Lister*** case concerned a plaintiff who claimed damages for personal injuries resulting from an accident in which he had suffered a serious brain injury. He agreed to a compromise after proceedings had been commenced against the party alleged to be responsible for the accident. At the time of the compromise neither he nor his solicitors thought that he was a patient. The plaintiff later changed solicitors and asserted in the action again the alleged tortfeasor that he was a patient and that the compromise was not binding on him. He started a new action against his former solicitors. The court ordered a preliminary issue in both actions to determine whether he had been a patient at any time since the accident. The trial judge held that he had not been a patient at any material time. On appeal the plaintiff contended that the judge had been in error in the formulation and application of the legal test to determine incapacity. The case therefore concerned the test for incapacity and the assessment of incapacity.

112. The ***Masterman-Lister*** case establishes a number of important propositions. In particular it establishes that for the purposes of the definition of "patient" in the CPR, the "property and affairs" against which the person's capacity have to be assessed is the specific transaction of commencing the litigation in question. This is consistent with the considerations identified in the second paragraph of this judgment. Moreover, when that litigation is a claim for personal injuries of a substantial amount, the capacity in question is limited to capacity to make decisions likely to be necessary in the course of the litigation (per Chadwick LJ at para. 75). This would include decisions as to whether or not to settle but not the decisions which have to be made about the administration of an award of damages (see per Kennedy LJ at para.27 and per Chadwick LJ at para. 83). The court recognised that the administration of damages involves different considerations and should be treated separately. Accordingly, the test of capacity for the purposes of the CPR is specific to the transaction under consideration.

113. In the ***Masterman-Lister*** case, the other important question considered by the court was how to assess whether an individual has capacity. It was common ground that assistance was obtained from ***White v Fell*** (unreported, 12 November 1987). In that case Boreham J held that to be a patient a person need not have complete incapacity. He also held as follows: *"To have that capacity [viz the capacity to take advice as to what to do whether an award of damages] she requires first the insight and understanding of the fact that she has a problem in respect of which he 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 to make decisions based upon, or otherwise give effect to, such advice as she may receive".*

114. In the ***Masterman-Lister*** case, Kennedy LJ, with whom Potter LJ agreed, accepted the submission of counsel that the mental abilities required include the ability to recognise a problem, obtain and receive, understand and retain relevant information, including advice; the ability to weigh the information (including that derived from advice) in the balance in reaching a decision, and the ability to communicate that decision (judgment, para. 26). Chadwick LJ, having considered a number of authorities including the decision of Hoffmann J (as he then was) in ***Re K (Enduring Powers of Attorney)*** **[**1988] Ch 310,313, held that as a broad proposition a person had to understand the nature and effect of the proposed transaction. In the context of litigation, the test to be applied 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."* (judgment, para. 75)

115. Moreover Chadwick LJ accepted that the judge was right to find assistance in the views of the Law Commission that a person should be able both (i) to understand and retain information relevant to the

decision which has to be made (including information about the reasonably foreseeable consequences of deciding one way or another or of failing to make any decision) and (ii) to use that information in the decision making process (*Mental Incapacity*, (1995) (Law Com. 231) paras. 3.16 and 3.17). Chadwick LJ also held that the judge was right to have in mind what Chadwick LJ saw as a qualification on that view the views which the Law Commission had expressed in paras. 3.18 and 3.19 of that report, namely that a person should not be considered unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and in simple language. I would add that, for my own part, I would not call those views a qualification on the views expressed about the assessment of mental capacity so much as an integral part or development of them. It is, in my judgment necessary, consistently with the principles identified in the second paragraph of this judgment, to maximise the contribution that an individual can make to decisions that affect him, his property or affairs, and to do this it may be necessary for his advisers or family members to spell out for him in simple terms the considerations that he has to take into account or (for example) to repeat matters or explain them in a way to which he can relate. There is nothing wrong in this. On the contrary, it is the appropriate way to help such individuals, consistently with their individual dignity. To help them in this way empowers them.

116. The ***Masterman-Lister*** case did not decide the issue noted above, that is whether a compromise entered into by a person who is not known to be a patient at the time of the compromise is of no effect or whether it is binding or merely voidable. Thus Chadwick LJ, with whom Potter LJ agreed, drew attention to the position at common law as regards contracts made by a patient and held at paragraph 68: *"But it may well be that an important assumption which underlies the present appeal – that, if the plaintiff were under a disability in September 1987, the compromise into which he entered must be set aside- would prove, on examination, to be ill-founded."*

117. I will need to return to that point below.

118. Finally, for present purposes, the ***Masterman-Lister*** case shows that in determining issues as to capacity in relation to decisions purportedly taken the court is concerned with the quality of the decision-making and not the wisdom of a decision. A rational individual has in general the right to make an irrational decision about himself or his affairs. So if an individual was capable in law of making a decision, it will not be set aside because it was unwise or because its outcome is materially adverse to him.

Identifying the issue in the present case for the purpose of the test of capacity

119. So the ***Masterman-Lister*** case establishes that the test of capacity is "*issue-specific*". There is no doubt that if Mr Bailey was incapable of managing and administering his property and affairs for the purposes of CPR 21.1(2) (b) set out above, the cause of that disability was by reason of mental disorder within the meaning of the Mental Health Act 1983.

120. In the ***Masterman-Lister*** case, the issue (to which capacity had to be related) was held to be the conduct of the litigation, and that test was applicable to all the steps taken in the litigation, including the compromise which the plaintiff sought to impugn in his action against the tortfeasor. The principal factual difference between this case and the ***Masterman-Lister*** case is that in the present case, at the time the compromise was made, there were no proceedings in issue. Mr Bailey's solicitors had, however, written a letter before action as required by the pre-action protocol for personal injuries. Insurers made their offer to settle liability at 50% in June 1999. It was accepted in November 2000. At this point Mr Bailey's solicitors did not have legal aid for commencing proceedings. They did not apply to extend it until March 2001. In November 2000, Mr Bailey was in employment but by the time the order of the court was made in December 2001 he had ceased to be employed and has so remained. Mr Bailey now suffers from epilepsy.

121. It can of course readily be seen that at the time Mr Bailey agreed to the offer of compromise on liability the only transaction under consideration was whether to accept that offer. Mr Bailey did not have to decide whether to issue proceedings and indeed if he accepted the offer on liability it was possible that in due course insurers would make an offer on quantum as well and, if the amount offered was satisfactory and Mr Bailey accepted it, this would obviate the need for proceedings altogether. On this basis, the question of his capacity has to be related to the compromise. This is the analysis which Hallett LJ has preferred.

122. For my part, however, I do not think that a distinction can be drawn in this way. Obviously, where the transaction is self-contained and clearly separate from other matters, it is easy to determine the issue to which

capacity should be related. Examples would include the making of a gift or the making of a will. It may not be so easy, however, to determine the issue to which capacity should be related where the transaction is multi-faceted, and a choice exists as to whether to break the transaction down into its component parts, to which capacity is related seriatim, or to treat the transaction as a single indivisible whole. A will may consist of a series of gifts but on the authorities the question of capacity is assessed in relation to the will as a whole. A person making a will is not making a series of separate decisions as to gifts but is making a decision as to the nature and effect of the claims of all the persons who might have claims upon him. Thus the gifts are interdependent and connected. Likewise this court in the ***Masterman-Lister*** case considered that litigation down to the administration of any award of damages was to be treated as a single transaction and not as a series of individual steps. Kennedy LJ regarded this conclusion as one of common sense (para. 27).

123. It seems to me that the right approach must be to ask as a matter of common sense whether the individual steps formed part of a larger sequence of events which should be seen as one, or whether they were in fact self-contained steps which were not connected with each other.

124. There are a number of reasons why, in my judgment, the relevant transaction for the purposes of a compromise made at a time when legal proceedings are in contemplation should be treated in the same way as a compromise made in the course of those proceedings. First, there is the question of the context in which the compromise is made. The compromise was clearly made with litigation in mind. It was made after a letter before action, threatening legal proceedings, had been sent on Mr Bailey's behalf. The insurers only made the offer because of that threat. The whole context was litigation. The letter contemplated that if no offer to settle was forthcoming in terms acceptable to Mr Bailey that disposed of all the issues between the parties Mr Bailey's solicitors would (subject to an extension of legal aid) issue legal proceedings on his behalf. The second reason is pragmatic. The logical time for solicitors to consider the capacity of their client to litigate must surely be before the letter before action is sent not after it is sent and immediately before the proceedings are issued. In that event they could find that the client had no capacity to bring the proceedings that he had threatened without the intervention of a litigation friend. The third reason is that the compromise and litigation are connected in this further sense that an individual can only properly evaluate an offer to settle a claim if he has some idea of what would follow from his rejection. So the individual must therefore have some capacity to understand what might happen in the course of the contemplated litigation. So some at least of the issues involved in the decision to litigate are also involved in the decision to compromise a claim which would otherwise have to be litigated. Fourth, there is no doubt that where a compromise is made in the course of litigation the test is whether the individual has capacity to conduct those proceedings: see the ***Masterman-Lister*** case. In my judgment, it would be undesirable to have a different test of capacity dependent on whether the offer happened to be made while proceedings were in contemplation or after they had been commenced. For all these reasons I prefer the submission of Mr Ullstein QC that the judge, in relating the question of Mr Bailey's capacity just to the compromise, took too narrow a view of the case and thus applied the wrong test.

125. One of Mr Ullstein's submissions was that, if the judge were right, the solicitors would have to assess their client's capacity on a number of occasions in the course of litigation. A separate assessment might thus have to be made as to capacity to decide whether to issue a pre-action letter, whether to accept an offer on liability, whether to accept an offer on quantum and whether to issue proceedings and so on. The conclusion that I prefer avoids that result. I accept that, if an assessment of the client's capacity in relation to transactions occurring before the start of the litigation but closely connected with it, has to be in relation to each individual transaction, the law would impractical. That is one of the reasons why I prefer the conclusion that the appropriate test in this case is whether the client had capacity to start proceedings. That would include the question whether he would have capacity for the purposes of an offer of compromise. I would add that, in my judgment, where a client seeks damages for personal injury because he has suffered a brain injury, capacity is a question that ought in general routinely to be considered by those representing him. In cases of doubt, this will usually mean that the solicitor has to arrange for a medical opinion to be obtained.

126. The assessment of capacity to conduct proceedings depends to some extent on the nature of the proceedings in contemplation. I can only indicate some of the matters to be considered in accessing a client's capacity. The client would need to understand how the proceedings were to be funded. He would need to know about the

chances of not succeeding and about the risk of an adverse order as to costs. He would need to have capacity to make the sort of decisions that are likely to arise in litigation. Capacity to conduct such proceedings would include the capacity to give proper instructions for and to approve the particulars of claim, and to approve a compromise. For a client to have capacity to approve a compromise, he would need insight into the compromise, an ability to instruct his solicitors to advise him on it, and an understanding of their advice and an ability to weigh their advice. So far as Mr Bailey was concerned, the receipt of damages could have a substantial impact upon him. He would need to know what he was giving up and what would happen if he refused to accept the offer of compromise.

127. There is a limited analogy which can be drawn between determining whether an individual is a patient and determining whether an individual under the age of sixteen years has capacity to consent to medical treatment. In the latter context, Lord Scarman held that, in relation to the question whether a girl under sixteen years could seek contraceptive advice without her parents' consent: *"It is not enough that she should understand the nature of the advice which is being given: she must also have a sufficient maturity to understand what is involved."* (***Gillick v West Norfolk AHA*** [1986] AC 112 at 189).

128. I turn again to the question of human rights. Mr Elgot has not submitted that to apply a wider test to a pre-action compromise than did the judge in this case would of itself violate the rights of Mr Bailey under the European Convention on Human Rights. He has not therefore sought to argue that the restrictions on access to court involved in my conclusions exceed the boundaries permitted by article 6: c.f. ***Ashingdane v United Kingdom*** (1985) 7 EHRR 528. Although this point has not been argued, in my judgment, the restrictions on compromise, imposed by the law as I have interpreted it, are imposed by law, namely CPR 21.10. In addition, such law serves the lawful object of ensuring that patients receive appropriate protection and such law is no more than is necessary to serve that purpose.

Does CPR 21.20 apply where a person was not known to be a patient at the time of the compromise?

129. As I have explained above, this is the question left open in the ***Masterman-Lister*** case. Chadwick LJ, with whom Potter LJ said at paragraph 68 of his judgment: *"Order 80, rules 11 10 and 12 must be read in the context of rule 2. The hypothesis underlying rules 10 and 12, as it seems to me, is that the plaintiff who is under a disability will bring his claim by a next friend, as rule 2 requires; so that the defendant, and the court, will be on notice that rules 10 and 12 are engaged. To my mind it is not self evident that rules 10 and 12 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. The question does not arise on this appeal; and will not arise in these proceedings if, as I would hold, the appeal should be dismissed. It is unnecessary to decide it. But it may well be that an important assumption which underlies the present appeal – that, if the plaintiff were under disability in September 1987, the compromise into which he considered must be set aside – would prove, on examination, to be ill-founded."*

130. It is not suggested that the respondent or his insurers knew or ought to have known that Mr Bailey was a patient at November 2000 if that is what he then was. If a compromise made by an individual or on his behalf at a time when he was a patient, but was not known to be a patient, is valid and binding on him, then, subject to the power of the court to approve the compromise, the appeal in this case must be dismissed. There would be no purpose in a retrial of the issue of capacity. The question of the effect of the compromise, which is raised by the respondent's notice, has thus on my approach to be decided on this appeal.

131. There are two cases cited by Chadwick LJ but neither of them concerns the compromise of a claim which would fall to be pursued by court proceedings. They concerned a promissory note in the *Stone* case and a contract for the sale of land in the ***Hart*** case. They are not therefore authority on the question whether a compromise of a claim is also binding unless the other party knew of the patient's lack of capacity.

132. Our attention has however been drawn to two cases which were not cited in the ***Masterman-Lister*** case, namely ***Drinkall v Whitwood*** and ***Dietz v Lennig Chemicals*** *Ltd* [1969] 1 AC 170. In the latter case, a widow made a compromise on her claim and that of her infant child under the Fatal Accidents Acts arising out of the death of her husband. The other party sought to repudiate it before the court had approved it on behalf of the child. The power of the court to approve the compromise was then contained in Order 80 of the Rules of the

Supreme Court. The House of Lords held (so far as material) that the compromise was of no effect before the approval of the court had been obtained and (per Lord Pearson, Lord Pearce and Lord Wilberforce) that it made no difference whether the agreement was expressed to be subject to the approval of the court. The House rejected the argument that the relevant rule was ultra vires. In the ***Drinkall*** case this court applied this decision to a compromise made of part of a claim belonging to an infant before any proceedings were commenced.

133. From these authorities it follows that a compromise by a patient which has not been approved by the court is invalid unless it is approved by the court. The question which then arises is whether this conclusion is displaced where it was not known at the time of the compromise that the person in question was a patient. The answer to this question must depend on the interpretation of the CPR. As I see it, there is nothing in the CPR to suggest that this conclusion is to be displaced in those circumstances. Indeed, this would be contrary to the basis on which the ***Dietz*** case proceeds, namely that there is no binding contract at all until the court has given its approval.

134. I therefore conclude that a compromise made by an individual who is subsequently proved to have been a patient at the time of the compromise is of no binding effect until the approval of the court is obtained.

135. I turn to matters of practice. In the ***Dietz*** case, the party who sought to establish that the agreement was of no effect was not the widow or the child's guardian but the other party. To meet this risk, those representing a patient can take steps to ensure that the interval of time allowed for court approval is as short as possible. In the present case, it is Mr Bailey who seeks to reopen the compromise. This position can hardly be satisfactory to a respondent unless he has a representation of authority from the solicitors which gives him a remedy. The practical problems in a case like this need to be considered in the context of the CPR. There are various provisions of the CPR which permit an order to be made by consent of the parties: see CPR 40.6 (Judgments, Orders, Sale of Land etc) and paragraph 13.1 of the practice direction supplementing Part 52 ((Appeals). In the latter case, a party requesting an order to be made by consent must expressly state in his request that none of the parties is a child or patient. This is a useful reminder of the position. So far as I can see, this requirement is not replicated in relation to CPR 40.6. In the light of the experience in this and the ***Masterman-Lister*** case, I invite the Civil Procedure Rule Committee to consider extending this requirement to applications under CPR 40.6.

Appropriate relief

136. Mr Bailey's case is that, if the judge had taken as the appropriate test the question whether he had capacity to bring proceedings he would be bound to have found in favour of Mr Bailey because he found that Mr Bailey was incapable of conducting litigation in December 2001. Mr Bailey's case is that there was no deterioration in his condition between November 2000 and December 2001 when judgment was entered for liability on the agreed basis. His epilepsy for instance began in early 1999. The judge was satisfied that as at December 2001 Mr Bailey did not have a capacity to conduct proceedings. Unfortunately, the judge was not asked to make a finding about Mr Bailey's capacity on the footing that he needed capacity to conduct proceedings at November 2000. In addition, the judge's evaluation of the expert evidence on capacity as at November 2000 is very brief (see para 26 to his judgment). The judge, however, relies on a report by Dr Couglan, as to an interview with Mr Bailey. The judge does not make it clear whether, having rejected Dr Couglan's opinion as to capacity as at December 2001 earlier in his judgment, he also rejects or accepts his opinion as to capacity as at November 2000. It seems to me that the evaluation of expert evidence must form a substantial part of a judge's conclusions as to an individual's capacity. In the circumstances, I do not consider that a retrial of the issue of capacity can be avoided, unless the compromise is one which the court could and should approve retrospectively.

Subsidiary question (1): Did the judge apply the Masterman-Lister test correctly?

137. Mr Ullstein submits that, even if the judge was correct to ask whether Mr Bailey had capacity to enter into the compromise of his claim in relation to liability, nonetheless the judge did not apply the ***Masterman-Lister*** test correctly. In particular he did not consider whether Mr Bailey could weigh the information about the effect of a decision to settle or whether he could reach a decision without also understanding the amount that he could recover on his claim or whether he agreed to the compromise because that is what his family decided for him.

He also submits that the judge did not give sufficient weight to the evidence of Dr Ghadiali and that of Professor Neary (experts called on his behalf), or adequate reasons for rejecting their evidence.

138. In view of the conclusions reached above, I do not have to decide this question.

***Subsidiary question (2): Did the judge err in validating the compromise*?**

139. The appellants accept, that if Mr Bailey was not a patient at November 2000, when the compromise was made, the compromise should be approved by the court. The more difficult question is what should be the right approach if Mr Bailey had then been a patient. The judge expressed the view that the compromise should be approved by the court (judgment para. 29). Mr Ullstein submits that the judge was in error in doing this because that relief was not sought by Mr Bailey's litigation friend. He relies on ***Re Birchall*** (1880) 16 Ch D 41 at 43 where Jessel MR held: *"This is the first time that I have known a compromise enforced upon infants, against the opinion of their guardians or next friend and of their legal advisers, and I am of the opinion that the orders cannot stand."* James and Cotton LJJ concurred. I agree with Ward LJ that the ratio of ***Re Birchall***, namely that the court cannot force a litigation friend to enter into a compromise against his wishes, does not apply where the compromise was made by the patient himself in circumstances where the only objection to the enforceability of the compromise is that the approval of the court under CPR 21.10(1) is required. Moreover, there is no requirement in CPR 21.10(1) that an application for approval should be made by the litigation friend in all cases. It is unnecessary to decide whether ***Re Birchall*** applies to an application under CPR 21.10(1) in circumstances other than those arising in this case. I would add that if the approval of the litigation friend is required and it appears that the litigation friend is acting unreasonably in withholding his consent, steps can be taken to remove him and appoint another litigation friend in his place: ***Re Taylor's Application*** [1972] 2QB 369.

140. If the court is asked to approve retrospectively the compromise of a claim belonging to a patient, the question arises as to the test the court should apply. In the ***Masterman – Lister*** case, Kennedy LJ held:

> *"31. So a court can regularise the position retrospectively, and that was also possible under the Rules of the Supreme Court: see* ***Kirby v Leather*** *[1965] 2 QB 367. 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. To do otherwise would be unjust and contrary to the overriding objective of the Civil Procedure Rules, but in any given case the ultimate decision must depend on the particular facts. In the context of litigation, rules as to capacity are designed to ensure that plaintiffs and defendants who would otherwise be at a disadvantage are properly protected, and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained. However, finality in litigation is also important, and the rules as to capacity are not designed to provide a vehicle for reopening litigation which, having apparently been properly conducted (whatever the wisdom of the individual decisions in relation to it), has for long been understood to be at an end."*

141. Potter LJ and Chadwick LJ agreed with Kennedy LJ but the points made in the above paragraph were obiter as this court upheld the judge's finding that the plaintiff was not a patient at the time of the compromise. Moreover, neither Potter or Chadwick LJJ dealt with the question of retrospective validation expressly.

142. Although Kennedy LJ refers to "*no manifest disadvantage to the . . . patient*", paragraph 31 of his judgment, set out above, must, as I see it, be read in the context of the ***Masterman-Lister*** case (where no question of retrospective approval actually arose), and as proceeding on the basis that where a compromise has been made in good faith and treated as valid for some time, it will not in general be in the interests of the patient for the court to decline to approve it. In effect, in those circumstances the court should be inclined to give its approval unless the compromise is clearly not beneficial to the patient. I read paragraph 31 of the judgment of Kennedy LJ in this way because the overriding question on a retrospective application for approval of a compromise of a patient's claim is in my judgment whether the compromise would be in the interests of the patient. This is the test which the court applies on other applications made with respect to a patient's property: see for example ***Re E (Mental Health Patient***) [1985] 1 WLR 245. (Under the Civil Procedure Rules an application for approval must also be accompanied by evidence (practice direction supplementing Part 21, para. 6.1). In particular the court will expect to see an opinion on the merits of the compromise.) If the compromise is not in the interests of the patient, the court cannot, despite the passage of time for which the other party is not responsible, approve it. If, however, the court declines to approve a compromise, the other

party to the compromise will of course be free to pursue such other remedy as he may have against anyone who represented that the patient was competent to agree to the compromise (see para 109 (vi) above).

143. In my judgment, the judge did not, when considering the question of retrospective approval, apply the test of what was in the interests of Mr Bailey. Rather, he asked whether the compromise was one that the court might have approved at the time, and whether the compromise was "*overwhelmingly unfavourable*" to Mr Bailey (judgment para 30). As to the question of the time at which matters are to be judged, I consider that the judge, in asking that question as at November 2000, asked the wrong question. Matters have to be judged at the date on which the court is considering whether to give retrospective approval. I further consider that his second formulation puts the matter too high against the patient.

144. On that basis, the judge's exercise of discretion falls to be set aside and re-exercised by this court. As to the re-exercise of the discretion, the test is as I have said whether approval is now in the interests of Mr Bailey, on the footing that it would not be in his interests to disturb a compromise on which he and those advising him were prepared to act for some two to three years unless it was clearly contrary to his interests. Applying that test, I agree with Ward and Hallett LJJ that the compromise ought to be approved by this court. The compromise was supported by his father and step-brother, acting, as the judge put it, as quasi-litigation friends. The compromise provided for apportionment of liability on the same basis as the other pedestrian involving in the accident (though we do not, I think, know on what basis that compromise was made). Furthermore, despite the errors in counsel's opinion to which the judge refers, the basis of apportionment was within the range which the court would be prepared to approve in such circumstances. The compromise also disposed of the risk attached to the issue of contributory negligence and I agree with what Ward and Hallett LJJ say about that. Accordingly, I would exercise the discretion to approve the settlement in the way the judge did.

145. Further, I agree with Hallett LJ that the judge's observations about the 50:50 split would not be binding on Mr Bailey in any proceedings against his former advisers. He would still be able to argue in those proceedings that the judge was wrong if this court declined to deal with the point because it did not need to be decided on Mr Bailey's appeal in this action.

Disposition

146. For the above reasons I would give permission to appeal, and dismiss the appeal and the respondent's notice.

Lord Justice Ward

Introduction

147. I have read in draft the judgments of Hallett and Arden L.JJ. I gratefully accept their careful recitation of the facts and of the several arguments addressed to us. I have had carefully to consider, indeed reconsider, my own conclusions in the light of the differences of view expressed by them.

148. The focus of my attention has been sharpened by careful consideration of the two preliminary issues which Holland J. was deciding, namely:

"a. has the claimant at any time from the accident been a patient within the meaning of CPR 21 and if so, when and for what period;

b. as a matter of law, what effect does the agreement as to liability between the claimant and the defendant have in these proceedings?"

149. The Judge's answers were these:

"a. The claimant is now a patient for the purposes of this litigation.

b. The claimant was similarly a patient as at 4 December 2001.

c. The claimant was not a patient in November 2000 for the purposes of agreeing a 50/50 apportionment of liability.

d. Pursuant to CPR 21.3(4) I direct that the agreement to apportion liability on a 50/50 basis be approved and that the judgment founded on that agreement and entered on 4 December 2001 do stand."

150. There is no appeal or cross appeal against the first two findings. The Appellant appeals against the finding that the Claimant was not a patient in November 2000 and the grounds of appeal were first, that the Judge misapplied the test adumbrated in ***Masterman-Lister v. Bruton & Co*** [2003] 1 WLR 1511 for establishing whether an individual has the necessary capacity to manage and administer his property and affairs, secondly, that his finding was against the weight of the evidence and certainly that it was inconsistent with

his finding that the Claimant was a patient in December 2001. Ground 4 was that:- *"The Learned Judge was wrong in law in holding that, had the Claimant been a patient in November 2001, he nevertheless had a discretion whether or not to approve, retrospectively, the 50/50 apportionment in the teeth of opposition from the claimant's litigation friend and legal advisers."*

151. By his Respondent's notice, the Respondent contends that the judgment can be supported because even if the Claimant did not have contractual capacity at the date of the compromise agreement, the agreement was nonetheless valid and unimpeachable at common law in the absence of evidence that the Defendant knew of the lack of capacity.

The meaning of a patient

152. The more I reflected about this matter the more convinced I became that counsel have approached the case on the wrong basis. In my view the position is this. To decide whether the Claimant has at any time from the accident been a patient *within the meaning of CPR 21*, as the question rightly asks, one must, obviously, begin, and, I think, also end with Part 21 of the CPR. So far as material that provides as follows:

"**Scope of this Part**

21.1 (1) This Part -

(a) contains special provisions which apply in proceedings involving … patients; . . .

(2) In this Part – …

(b) 'patient' means a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs.

Requirement for litigation friend in proceedings by or against children and patients

21.2 (1) A patient must have a litigation friend *to conduct proceedings on his behalf*.

Stage of proceedings at which a litigation friend becomes necessary

21.3.(3) If a party becomes a patient during proceedings, no party may take any step in the proceedings without the permission of the court until the patient has a litigation friend.

(4) Any step taken before a … patient has a litigation friend, shall be of no effect, unless the court otherwise orders."

Who may be a litigation friend without a court order

21.4.(3) If nobody has been appointed by the court or, in the case of a patient, authorised under Part VII, a person may act as a litigation friend if he –

(a) can fairly and competently *conduct proceedings on behalf of the … patient*;

Compromise etc. by or on behalf of child or patient

21.10 (1) Where a claim is made –

(a) by or on behalf of a … patient; or

(b) against a … patient,

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 … patient, without the approval of the court.

(2) Where –

(a) before proceedings in which a claim is made by or on behalf of, or against a … patient (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 words in italics are given emphasis by me to make the point which I will develop later that the purpose of having a litigation friend is "*to conduct proceedings on his behalf*". The inference is that the party lacks ability to conduct the proceedings on his own behalf.

153. It seems to me to be self-apparent that *"**a patient**"* is a creature of the rules. A patient exists only within the rules and for the purpose of giving effect to the rules. The rules apply to and govern the conduct of proceedings. They are made under the s. 1 of the Civil Procedure Act 1997 and, in accordance with that provision, are to govern "*the practice and procedure to be followed"* in the County Courts, the High Court and the Court of Appeal. In my judgment the proceedings do not begin until the claim has been issued (or perhaps until an application has been made in respect of a claim about to be issued). It follows that the earliest moment at which a person becomes a patient within the meaning of the rules is at the point of commencement of the proceedings. Prior to the commencement of the proceedings a person may suffer or appear to be suffering from a mental disorder and so be a patient within the meaning of the Mental Health Act 1983 (s.145), he may be incapable, by reason of mental disorder, of managing and administering his property and affairs and so be subject to the control of the Court of Protection pursuant to Part VII of that Act, and he may lack the mental capacity to enter into a contract, make a will, marry and so forth but in none of those cases is he truly "a *patient within the meaning of the CPR"*. The term *"patient"* is a term of art and it is of limited application. A party may have all the attributes of being a patient before the proceedings have begun but until they are under way there is no such thing as a patient. As a matter of construction of the rules the first preliminary issue should have contained the answer that the Claimant could not have been a patient within the rules before the claim was issued on 27 April 2001.

154. It was common ground between counsel that the appeal had to be dismissed if he was not a patient at the time he compromised liability. I do not accept that that necessarily follows. Because he was held to be a patient at the time the judgment was entered, the step of entering that judgment was of no effect unless the court otherwise orders: CPR 21.3 (3). The court would be bound to give effect to the order if the compromise was valid and so it is necessary to consider the validity of that agreement.

The legal effect of the agreement compromising liability at 50/50

155. If he was of sound mind at that time then of course the agreement was valid. But, assuming for this purpose that the Claimant lacked the mental capacity to enter into the agreement at that time, the agreement was still valid at common law. That is well established. Lord Esher M.R. explained the rule in ***Imperial Loan Co. v Stone*** [1892] 1 Q.B 599, 601: *"I shall not try to go through the cases bearing on the subject; but what I am about to state appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."*

156. That statement of the common law must, however, now be read in the light of CPR 21.10(1) providing that no settlement or compromise shall be valid insofar as it relates to the claim by the patient without the approval of the court. The meaning of and the effect to be given to this rule is crucial in this case.

157. Several matters arise on the construction of that rule. The first is whether the settlement or compromise referred to in the rule can be a partial settlement. I ask that because almost identical words are used in CPR 10.2 which clearly has in mind the full settlement of the claim - liability and damages. That point was decided by this court in ***Drinkall v Whitwood*** [2004] 1 WLR 462. I respectfully agree with Simon Brown L.J who said in paragraph 18 at p.467: *"… plainly it would be intolerable were the requirement for the court's approval to be escaped merely because some issue remains to be agreed."*

158. The second and important question is whether the settlement or compromise refers only to one which was made during the subsistence of the proceedings or whether it also includes a settlement or compromise of the claim (or part of it) entered into before the claim was actually made. The position was clearer under the former R.S.C, Ord.80 r11 which was in the following terms:

> "*11. Where in any proceedings … money is claimed by or on behalf of a person under a disability, no settlement, compromise or payment and no acceptance of money paid into court, **whenever entered into or made**, shall so far as it relates to that person's claim be valid without the approval of the court"* (emphasis added by me).

159. Despite the absence of those words, the present rule must, in my judgment, be construed in like manner. The words cover the wide construction so that when a claim is being made by a person who is now a patient and the settlement relates to that claim, then the compromise needs the court's approval. It would make no sense

to restrict the ambit of the rule to post-commencement compromises. That could result in an agreement which is wholly disadvantageous to the patient being enforced against him. The overriding objective informs matters of construction and it would be manifestly unfair and unjust so restrictively to interpret it. Moreover, in ***Drinkall*** this court held in the case of a partial settlement made on behalf of a claimant who was a child that there was no valid and binding agreement until it had been approved by the court. Accordingly the agreement was held to be invalid and the defendant was entitled to withdraw his acceptance of the settlement of the apportionment of liability in the running-down case there before the court. ***Dietz v Lennig Chemicals Ltd*** [1969] 1 A.C 170 was applied.

160. ***Dietz*** also gives the answer to a third question of construction: what do the words "not valid mean"? In ***Dietz*** Lord Pearson said at page 90: *"In my view, "**not valid**" means having no legal effect. The settlement … in which the infant was interested, was only a proposed settlement until the court approved it. Either party could lawfully have repudiated it at any time before the court approved it. It had no validity by virtue of the party's agreement in the August settlement."*

161. In paragraph 68 of his judgment in ***Masterman-Lister*** Chadwick L.J. speculated whether the rule making body had power to change the substantive law expounded in ***Imperial Loan Co Ltd.*** That point was not pursued before us. My impression is that the power to make rules to govern "*the practice and procedure to be followed"* in the courts is wide enough to include the power to protect a patient by disapplying an agreement he had made unless the court approves of it. The suggestion that the rules were ultra vires was rejected by Lord Pearson in ***Dietz.*** He explained at p.189:- *"When the claim of an infant or other person under a disability is before the court, the court needs, for the purposes 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,"*

That opinion was not drawn to Chadwick LJ.'s attention. For my part I cannot ignore what their Lordships said. In my judgment the rules must be enforced according to their plain meaning. That means that however valid the agreement was at common law when it was made, now that the claimant is a patient and the compromise is caught by CPR 21.10, it must now be treated as invalid. I agree with Arden L.J. in this respect.

162. The result must be this: the claim now is being made by or on behalf of Mr Bailey who the Judge has found to be a patient at material times during the course of the proceedings, and certainly at the time judgment was entered on 4 December 2001. He remains a patient. The agreement of November 2000 is a partial settlement relating to that claim. Pursuant to CPR 21.10(1) the agreement is to be treated as invalid and of no legal effect unless and until the court approves it. Although the contentions advanced in the Respondent's notice are correct so far as they go, they do not go far enough for him to succeed on the point because he fails to take into account the invalidating effect of CPR 21.10.

Should the court approve the agreement?

163. Not having been satisfied that the Claimant was a patient for the purposes of instructing his solicitors to agree a 50/50 apportionment of liability (see paragraph 27 of his judgment) Holland J turned to the exercise of discretion as to whether or not to direct that the entry of judgment on 4 December should stand and held that it should. He said at paragraph 28: *"Given an agreement with the defendant's insurers that cannot now be impugned then the entry of judgment has to be approved per CPR 21.10(1) as being in the claimants best interests. Were I to set the judgment aside he would become engaged in an accord and satisfaction issue that he would inevitably lose. I therefore approve the entry of judgment and direct that it stand."*

In my judgment the Judge was wrong to find that the agreement could not be impugned. It is impugned by the operation of CPR 21.10(1), ***Dietz*** and ***Drinkall.*** It must be treated as invalid for the reasons I have endeavoured to explain. Without approval, a defence of accord and satisfaction would fail. Far from losing, the Claimant would be bound to win the point.

164. The Judge did, however, return to the exercise of discretion on the assumption that the Claimant was a patient when he agreed liability in November 2000. For reasons I have also explained the Judge need not have looked back to November 2000: it was enough that the Claimant was a patient when judgment was entered because that is when a decision has to be taken to approve the compromise or not. As I will explain later, I do not disagree with the judge's conclusion and the reasons he gives for approving the agreement in those

circumstances. He held in paragraph 29: *"Thus, the present reluctance of the claimant by Mrs Ashton as his litigation friend to seek approval of the judgment of 4 December 2001 is not the decisive factor, it is but one factor. Other factors are the overall chronology, the position of the defendant and a likely situation as at entry of judgment had the claimant then had his initial choice as litigation friend, his father. The latter would presumably have been supportive of the entry of judgment since he had been supportive of the acceptance of the insurer's offer when acting (along with Mr Tweedale) as quasi litigation friend in November 2000. Finally and importantly there is the real nature of the present litigation friend's stance: it is not so much that the claimant failed at any point to lack advice or to heed such, it is that the advice he was given, particularly from counsel, is open to criticism and the court should say that it is not in his interest to heed it."*

165. As I have indicated, the grounds of appeal challenged the entitlement in law of the court to approve a compromise which does not enjoy the support of the litigation friend and of his counsel. In his oral submissions, I understood, perhaps wrongly, that Mr Ullstein was contending not so much that the court ***could*** not approve the settlement in the teeth of opposition to it, but that the court ***should*** not do so. It is, I think, necessary to grapple with the court's jurisdiction in a case like this.

166. The foundation for the submission is *In **re Birchall, Wilson v Birchall*** (1880) 16 Ch.D. 41. The facts are important. In the administration of his estate the widow of the deceased took out a summons asking for a declaration that a large amount of personal property was held by the deceased as trustee for her and so did not fall into his estate. A compromise was suggested dividing the chattels between the widow and the estate. Counsel for infant beneficiaries refused to assent, the guardian being opposed to the compromise. That notwithstanding, the Vice-Chancellor approved it. In the argument on appeal Cotton L.J. observed:- *"This is not approving of a compromise, but compelling one. What jurisdiction has the court to do so?"*

167. Giving judgment Jessel, M.R. held:- *"In my opinion the course which has been taken in this case is quite unprecedented. The court can approve of a compromise on behalf of infants, but it cannot force one upon them against the opinion of their advisers. The practice . . . has been to require not only that the compromise should be assented to by the next friend or guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the infant, and that his counsel should give an opinion that he considers it to be so. … This is the first time that I have known a compromise enforced upon infants against the opinion of their guardian or next friend and of their legal advisers, and I am of the opinion that the orders cannot be sustained."*

168. Notwithstanding Cotton L.J.'s comment during the argument, I do not understand the judgment of the court to be laying down a rule that the court had no jurisdiction. All the court was saying is that it cannot make the agreement for the infant. That is quite a different case from the case before us where the agreement has been made, and at the time lawfully made, with the approval of the Claimant's family and on the advice of solicitors and counsel acting at the time. I do not regard myself as bound by ***Birchall*** to uphold the primary submission that the judge was wrong in law to approve the compromise in this case. He had a discretion whether to do so or not. The language of CPR 21.10 is permissive: the rule itself confers an unfettered discretion upon the court to give or withhold approval. The Practice Direction provides in 21PD 6.3(1) that an opinion on the merits of the settlement or compromise must be given by solicitor or counsel except in very rare cases. The Practice Direction no doubt envisages that ordinarily the opinion will be in favour of the compromise but nothing is said where counsel is opposed to it. The judicial function is not a mere exercise of ticking the boxes and ensuring compliance with the proper practice. There is still a judicial discretion to be exercised. It is incumbent upon the Judge to exercise a separate judgment about it bearing in mind the need to protect the patient. The opinion is there for his comfort. He can ignore it if he wishes to do so. He does not have to approve the settlement just because counsel thinks it is good enough. By the same token a change in representation and a change of opinion about the merits is a relevant matter, perhaps a very relevant matter, for the judge to bear in mind but counsel's unfavourable opinion is not conclusive and independent judgment must still be exercised. For my part I cannot see that the jurisdiction of the court is excluded in those circumstances.

169. I turn, therefore, to review the manner in which Holland J did exercise his discretion. To upset an exercise of discretion the Judge must be shown to have been plainly wrong, that is to say he must have exceeded the generous ambit within which there is reasonable room for disagreement. Here, for reasons I will expand later, the judge cannot be shown to have fallen into error. He held relevant facts in the balance. The weight to give

them was a matter for him. Some deference must be afforded to the trial judge who has heard the evidence and seen the witnesses especially bearing in mind the fact that he has vast experience in this field. Like Hallett L.J. I would not allow the appeal on that ground. It follows that in my judgment the Judge gave the correct answer though for the wrong reasons that the Claimant was not a patient in November 2000. He was also correct, or at least far from being plainly wrong, to have approved the compromise and consequently to have allowed the judgment of 4 December 2001 to stand. I would dismiss the appeal for those reasons.

The appeal as argued

170. I appreciate that the above reasons I have given as to when the Claimant became a patient were not based on arguments one way or the other addressed during the course of the hearing. They are the consequence of my own deliberations. Having enjoyed giving voice to my inconsequential musings, I know all are free to ignore them and it would be wasteful of time and money to call for further argument on them. So I turn to the case as it has been argued.

The proper test for the capacity to manage and administer one's property and affairs

171. The Judge applied the test adumbrated by Boreham J in ***White v Fell*** (unreported) 12 November 1987. He observed that those tests had been approved by this court in ***Masterman-Lister***. The Judge was correct to make that observation. That approach was conceded to be a correct direction for the trial judge to have taken in ***Masterman-Lister.*** For the reasons given by Hallett LJ. I consider this ground of appeal to be hopeless. In ***Masterman-Lister*** counsel did indeed seek to refine the generality of the usual test, which is whether the person had the mental capacity with the assistance of such explanation as he may have been given to understand the nature and effect of the particular transaction. Counsel suggested eight possible questions which bore upon that issue. In paragraph 26 of his judgment Kennedy L.J. was inclined to agree with the approach put forward by counsel but only insofar as it was an elaboration of the test expressed in other terms in other cases. Chadwick L.J. put it in this way in paragraph 58: *"The authorities are unanimous in support of two broad propositions. First, that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of the transaction when it is explained."*

I understand him to be applying much the same general test to determine whether or not a party has a capacity to manage his affairs and property.

172. A second point taken by Mr Ullstein Q.C. though not, I think, heralded in the grounds of appeal, relates to the first of those observations by Chadwick L.J. namely that the mental capacity must relate to the transaction in question. Kennedy L.J. said the same in paragraph 27 of his judgment, namely: *"What, however, does seem to me to be of some importance is the issue-specific nature of the test; that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made. It is not difficult to envisage plaintiffs in personal injury actions with capacity to deal with all matters and take all "lay client" decisions related to their actions up to and including a decision whether or not to settle, but lacking capacity to decide (even with advice) how to administer a large award. In such a case I see no justification for the assertion that the plaintiff is to be regarded as a patient from the commencement of the proceedings. Of course, as Boreham J said in White's case 12 November 1987, capacity must be approached in a common sense way, not by reference to each step in the process of litigation, but bearing in mind the basic right of any person to manage his property and affairs for himself, a right with which no lawyer and no court should rush to interfere."*

173. Thus there can be no argument but that the material capacity must be "*issue specific*", that is to say, directed to the transaction which is to be effected. The problem that arises is to define the ambit of that issue or that transaction.

174. It is perhaps interesting to note that when the Judge dealt with the question of capacity, both at the time of the hearing and as at the date of entry of judgment, he was dealing with a limited issue. He said in paragraph 7: *"Thus, as of now, I am concerned with the capacity to manage a necessarily sophisticated quantum issue and the resultant, inevitably substantial fund."*

175. There was no complaint about that approach. On that approach liability had already been resolved and quantum was the only remaining issue. When, therefore, the Judge turned to deal with whether the Claimant was a patient in November 2000, he did so *"with respect to the making of any agreement as to apportionment of liability".* Although Mr Ullstein is happy to hold his judgment on capacity after December 2001 (the limited

capacity to manage quantum), he not very consistently submits that the judge erred in narrowly concentrating on whether or not Mr Bailey had capacity to deal with apportionment when the liability issues were compromised.

176. I confess that when I read the judgment of Hallett L.J. I was very attracted to the reasons she set out in her conclusions in paragraphs 70 to 82 and especially paragraphs 73, 74 and 80. If I may say so, I could see the sense of her commonsense approach. Then I read the judgment of Arden L.J. She too appealed to commonsense and again I saw the force of her reasoning (in paragraphs 119 to 128, especially paragraph 125. Moreover I accept without question the matters she suggests in paragraph 126 would fall for consideration in assessing a client's capacity to conduct proceedings.

177. What then is the answer to this difference of view? As I indicted earlier in this judgment, I consider that the answer is provided by the terms of Part 21 itself and the several references in the rules, which I emphasised, to the purpose to be served by having a litigation friend, namely having someone able properly to conduct the proceedings on behalf of the patient. That is the capacity which the patient lacks. Thus the enquiry should be focused on the capacity to conduct the proceedings as Arden L.J. describes in paragraph 126. This it seems to me is totally consistent with ***Masterman-Lister***. In paragraph 22 Kennedy L.J refers to "*the capacity to litigate and compromise*". He referred to Denning M.R's judgment in ***Kirby v Leather*** [1965] 2 KB 367, 384 that the plaintiff "was not capable of instructing a solicitor properly". In paragraph 27 Kennedy L.J. refers to *"capacity to deal with all matters and take all "**lay client**" decisions relating to their actions up to and including a decision whether or not to settle"*, with the emphasis added by Mr Ullstein. In paragraph 62 Chadwick L.J. refers to the capacity *"in relation to the pursuit or defence of litigation"*. In paragraph 65 he says: *"The pursuit and defence of legal proceedings are juristic acts which can only be done by persons having the necessary mental capacity and the court is concerned not only to protect its own process but to provide protection to both parties to litigation which comes before it."*

He summarises his view in paragraph 75 saying: *"For the purposes of Order 80 – 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. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem (or as such a person as now described in the Civil Procedure Rules, a litigation friend)."*

Finally I observe that he said in paragraph 83: *"More pertinently, I reject the submission that a person who would be incapable of taking investment decisions in relation to a large sum received as compensation is to be held, for that reason, to be incapable of pursuing a claim for that compensation. I accept that capacity to pursue a claim requires capacity to take a decision to compromise that claim; and that capacity to compromise requires an understanding of what the effects of a compromise will be – in particular, an understanding that it will be necessary to deal with the compensation monies in a way which will provide for the future. But that does not, as it seems to me, require an understanding as to how that will be done."*

178. If, as it seems to me, the relevant capacity is capacity to conduct proceedings, then the client must be able to understand all aspects of those proceedings and take an informed decision, with the help of such explanation as he is given, which bears upon them. It cannot be judged piecemeal. If he has the ability to understand what is meant by a 50/50 split of liability but lacks the capacity to understand the concept of damages which results from that division of liability, then he lacks true capacity to conduct the proceedings. To return to my main thesis, all of this makes much more sense (I hesitate to use the word commonsense) where one is considering the capacity to conduct the proceedings at the moment when they are instituted and thereafter during their continuance and it makes less sense to consider the matter in the run up to the litigation even if litigation is a possible outcome in default of a fully successful settlement of the claim. If, therefore, it is pertinent to ask whether the Claimant was a patient in November, which is not my primary view, then I fear Holland J approached the matter too narrowly and Mr Ullstein makes good his attack on the judgment on that basis.

Should the appeal be allowed and the matter remitted back for re-hearing?

179. I think not. If we were to send this matter back because the Judge misdirected himself as to the approach he should take, there is absolutely no reason why he should not reconsider the question. He has all the evidence, he is familiar with the case, and there is no reason to think he cannot fairly revisit the questions of fact we

direct are to be retried. If he finds that Mr Bailey was not a patient in November 2000, it is, in the way the appeal is presented to us, common ground that that is the end of the case. If on the other hand he decides that there is a need for consistency in his approach so that if he was incapable of managing "a necessarily sophisticated quantum issue and the resultant inevitably substantial fund" (paragraph 7 of his judgment) then, there being no perceptible change in his mental condition between the time of the preliminary issue was tried in November 2004, the date of entering judgment on liability in December 2001 and the time of the agreement in November 2000, he might well decide that Mr Bailey was a patient at all material times. But that would lead him again to exercise his discretion whether to approve the compromise or not. We know what his answer is. He already has explained how he would have exercised his discretion on the assumption that he was wrong – see paragraph 29 of his judgment. I have already concluded I do not think he was plainly wrong in his approach to that question. I, therefore, see no point in sending the case back to him when he will either find as a fact for the defendant or exercise his discretion in the defendant's favour. Even if I am wrong about everything and we are required to exercise our own discretion then I would arrive at the same result for the following reasons.

Should we approve the compromise agreement on liability?

180. The discretion is an unfettered one. The purpose of the rule is undoubtedly to ensure the protection of the patient and ensure that his best interests are served. Questions of contributory negligence are notoriously impressionistic. Mr Ullstein submits with vigour that nothing less and possibly more than 75% is the correct apportionment. When this agreement was proposed, it is, however, noticeable that the insurers relied on ***Lidell v Middleton*** (1996) PIQR 36 where this court substituted a 50/50 apportionment for the trial Judge's 75/25. The view of Holland J, a Judge with considerable experience in this field, was set out in paragraph 30: *"Whereas in December 2001 I like to think I would have queried an apportionment less favourable than, say, 60/40 it might have been difficult to resist a strong submission in favour of 50/50."*

181. He had to form some impression as to whether or not 50/50 was so outside the bracket that the agreement produced an unfair compromise for the patient. He explained in paragraph 19 that he was making *"no final judgment as to [apportionment] in the absence of submissions"* but he needed to form some view about it to decide whether "*defects in the Advice*" were "*so overwhelmingly unfavourable to the Claimant as to demand a belated setting aside of a judgment*" (see paragraph 30). I agree with Hallett and Arden L.JJ. that his views are not in any way binding on any judge trying any future question of professional negligence. No appeal can lie against these observations and the least now said about it by me the better.

182. Other factors bear upon the patient's best interests. There may be a case for accepting less money for a quicker end to the case and here there is some evidence of anxiety to receive interim payments. Compromise avoids the necessity for a trial which is never a comfortable experience. He may have felt (I do not know whether he did or not) that if 50/50 was good enough for his companion that fateful evening, then it might be good enough for him. It had the backing of his family upon whose support he depended and whom he presumably would not wish to alienate. A myriad of facts bear upon a compromise and encouragement to compromise is a sufficiently powerful incentive of current practice that one should not ordinarily too readily question the wisdom of the settlement when the Court is asked to approve it.

183. Whilst the patient's interests do of course predominate, the Defendant is not without an interest which the court must protect. This agreement was openly negotiated and concluded after the patient had had the opportunity to take advice, even if, as it turns out, parts of that advice were, to say the least, of dubious quality. There was no reply to the defence pleading accord and satisfaction. There was no opposition to the entry of judgment over a year later. This question first emerged after new solicitors had been instructed in August 2003, nearly two years later. During this time memories would have faded. The evidence of the Defendant himself was that he had forgotten about the accident because he had deliberately put it out of his mind and he was entitled so to do given the compromise. To seek to re-open the matter after that delay must cause the Defendant prejudice.

184. Finally there are the interests of the good administration of justice. The certainty of outcome and finality of judgments are cardinal pillars which support the smooth passage of litigation through the courts. Setting this judgment aside undermines them.

185. I have regard to paragraph 31 of Kennedy L.J's judgment in ***Masterman-Lister*** where he said: *"So a court can regularise the position retrospectively … 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. To do otherwise would be unjust and contrary to the overriding objective of the Civil Procedure Rules, but in any given case the ultimate decision must depend on the particular facts. In the context of litigation, rules as to capacity are designed to ensure that plaintiffs and defendants who would otherwise be at a disadvantage are properly protected, and in some cases that parties to litigation are not pestered by other parties who should be to some extent restrained. However, finality in litigation is also important, and the rules as to capacity are not designed to provide a vehicle for re-opening litigation which, having apparently been properly conducted (whatever the wisdom of the individual decisions in relation to it) has for long been understood to be at an end."*

186. Here the parties did act in good faith, the disadvantage to the Claimant is alleviated by the fact he may have a strongly arguable claim against his former advisers. If the discretion is mine to exercise I would approve the original compromise for reasons which overlap those given by Holland J. and so I too would direct that the judgment stand.

Conclusion

Whichever way I go I return to the crucial issue in this case which seems to me to be the exercise of discretion to approve or not to approve the compromise. Since I am firmly of the view that it should be approved, I would, having made every other assumption in the Appellant's favour, nonetheless dismiss his appeal.

Augustus Ullstein QC & Shirley Hennessy (instructed by Alexander Harris Solicitors) for the Claimant
Howard Elgot & Roger Quickfall (instructed by Ricksons Solicitors) for the Respondent