

Lack of capacity

Kirsty Allen discusses the Official Solicitor's role in clinical negligence and personal injury proceedings



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'The Office of the Official Solicitor aims to be a "modern, dynamic organisation delivering high quality and efficient client focused services for vulnerable people"'

The Office of the Official Solicitor is widely known for its work representing patients in Court of Protection proceedings about critical medical treatment. However, the Official Solicitor also performs an intrinsic function of our legal system, by enabling access to justice for vulnerable people who want to bring a clinical negligence or personal injury claim, and who do not have a litigation friend to bring proceedings on their behalf.

Most personal injury and clinical negligence solicitors have considerable experience of representing the interests of children and vulnerable adults who do not have capacity and are well aware of the need to appoint a litigation friend under 21.2 of the Civil Procedure Rules. Fortunately, there is usually a family member or friend who is willing and able to be appointed as litigation friend to represent a protected party. However, for some individuals there is no-one to stand in for them. In these situations, the Official Solicitor can be asked to act as their litigation friend.

In the Official Solicitor and Public Trustee's 2012 Annual Report, the role of litigation friend is defined as "stepping into the shoes" of the client who lacks litigation capacity... to carry on the litigation on behalf of the client and in his best interests'. The Official Solicitor explains that 'the litigation friend must make all the decisions that the client would have made, had he been able'.

The need for the Official Solicitor to represent a personal injury or clinical negligence claimant might be clear from the outset, or it might arise as the case progresses. The litigation friend may become incapable of continuing in their role, decide to step down, or they may not be making decisions in the protected party's best interests. In

any of these situations there may be no alternative but to ask the Official Solicitor to step in.

It is also worth noting that the Official Solicitor can also represent the estate of a deceased person if no-one is willing to act, and where no grant has been taken out.

Background

The Official Solicitor is appointed by the Lord Chancellor under s90 of the Senior Courts Act 1981 and is independent of statutory office holders.

The current Official Solicitor is Alastair Pitblado. He leads a team of around 135 civil servants, of whom 22 are lawyers. The organisation, which had direct operating costs of £7,570m in the year ending 31 March 2012, is funded by the Ministry of Justice. There is a Memorandum of Understanding with the Ministry of Justice, although the 2012 Annual Report refers to this being replaced in the future by a framework document.

The Office of the Official Solicitor aims to be a 'modern, dynamic organisation delivering high quality and efficient client focused services for vulnerable people' (Ministry of Justice website). However, the tension with this is that the tax payer must be given value for money.

The role of the Official Solicitor is wide and varying. In addition to ensuring that the interests of vulnerable adults are protected in routine litigation such as personal injury or clinical negligence claims, the Official Solicitor can be appointed acts as solicitor and litigation friend to people who lack capacity in Court of Protection proceedings.

In respect of children, the Official Solicitor can be appointed to act as

an administrator of a child trust fund, including the Government's child trust fund scheme if there is no-one else suitable to perform this role. Another aspect of the Official Solicitor's role is to perform the operational functions of the Lord Chancellor through the International Child Abduction and Contact Unit and Reciprocal Enforcement of Maintenance Orders Unit.

The White Book observes that the Official Solicitor has additional duties as an officer of the Supreme Court, advising High Court and Court of Appeal Judges on legal and non-legal matters.

The breadth of experience within the Official Solicitor's office means that there is potential to add value in a personal injury or clinical negligence claim, especially when on-going Court of Protection involvement is anticipated, either in terms of a protected party's property and financial affairs, or where a health and welfare decision regarding treatment is, or could be required.

Appointment of the Official Solicitor in a personal injury or clinical negligence claim

The Official Solicitor can decide whether or not to accept a request to be appointed as a litigation friend under Rule 21.2 of the Civil Procedure Rules. The Official Solicitor's note on the Ministry of Justice website dated 21 February 2012 highlights that the following criteria must be met for the Official Solicitor to agree to accept the request, that there is:

- clear evidence that the party lacks capacity to litigate;

- no-one else suitable or willing to act as litigation friend; and
- there is security for the legal costs of the protected party's representation.

Practical considerations

If the Official Solicitor agrees to a request to be appointed as litigation friend, the case will be allocated to a case worker. This individual will be

properly represent the claimant. More generally, the Official Solicitor should be consulted as any litigation friend normally is, for example in selecting counsel or deciding on strategy.

Costs

The Official Solicitor recognises that in the vast majority of cases, his costs of representing a protected party cannot be recovered. However, as

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the instructed solicitor's point of contact throughout the claim.

The Official Solicitor sets a number of service standards, that it aims to meet once appointed. These include responding to incoming written correspondence within 20 days of receipt and quarterly file reviews of litigation matters.

Practically this means that the instructed solicitor will need to balance the requirements of a strict litigation timetable with giving the Official Solicitor sufficient time to consider and respond to written communication. There is potential for some difficulties to arise, for example with incoming Part 36 offers, so it will be a priority to ensure that any deadlines are clearly highlighted.

If the Official Solicitor is appointed mid-way through a case it is important to ensure that they are thoroughly briefed on all issues to enable them to

above, the Official Solicitor is likely to require that the represented party's legal costs are secured, such as by obtaining Legal Aid or by the instructed firm offering a conditional fee agreement.

Final thoughts

If instructed by the Official Solicitor, the starting point should be that the appointed case worker is no different to any other client, as they may have limited clinical negligence or personal injury experience.

The instructions given by the case worker may, on occasions, have a slightly different emphasis, both because of the caseworker's legal background and because of their wider experience of welfare questions. There is potential for tension to arise between any welfare issues and the wider aims of the litigation. If this arises, a delicate balance will need to be struck. ■

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