

Loss of capacity – an issue for all advisers

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Three cases about solicitor duty to ascertain if their client has capacity to give instructions in the conduct of litigation are informative to other advisers.



It is old news that mental and cognitive disorders are on the rise across the population. This will not improve in our lifetime.¹

Those affected by the disorders are frequently undiagnosed or, having been diagnosed, continue to live fairly independent lives and to make important decisions, such as in relation to investments, business, tax affairs and legal matters.

A client with such a disorder (whether existing or new) poses extreme professional risk for advisers. Is the client able to retain the advice, evaluate it and give considered instructions to the adviser on the basis of it? Are the instructions reasonable? Are they based on informed evaluation? Are they given willingly and freely? Are the instructions appropriate in some contexts or on some questions, but irrational on others?²

Litigation lawyers have the benefit of being able to approach the court for a determination about whether their client has capacity to give instructions and in what contexts. Other advisers, such as lawyers in non-litigious matters, accountants and financial advisers, must fend for themselves when determining the level of acceptable professional risk and at what point the client requires protection from themselves and others.

Two significant and relevant cases are *Goddard Elliot v Fritsch (Goddard)*,³ and *Pistorino v Connell (Pistorino)*.⁴

In *Goddard*,³ a firm of solicitors was successfully sued by a former client for acting on his instructions when his mental health had declined to such an extent as to make him incapable of giving informed and voluntary instructions. The firm represented the client in a complex

family property proceeding over a long period of time and, as a result of his disorder (which was exacerbated by the stress of a pending trial), he accepted an unreasonably unfavourable settlement. When he recovered, he essentially sued his former solicitors for the difference between the reasonable financial position he should have maintained and what he actually received in the settlement. He said that his lawyers should have detected his mental deterioration, declined to act on his instructions, and protected him from himself and from his former wife. His huge legal costs were also the subject of dispute. The solicitors were represented by their insurer.

The court affirmed that a solicitor's primary responsibility is to be reasonably satisfied that the client has the mental capacity to participate in litigation and to provide proper instructions. If the solicitor is not so satisfied, the solicitor's authority is limited to making due enquiry with the court into the capacity of their client and, in such an enquiry, the solicitor's role is to assist the court in their role as an officer of the court. The solicitor has a clear duty to raise their client's questionable capacity with the court. In a cautionary statement, the court in *Goddard* held that:⁵

"If the party lacks mental capacity and the solicitor knew or should have known, the solicitor is at risk of having to pay indemnity costs even in the absence of impropriety ... A solicitor who persists with representing a client who has lost mental capacity is liable to have costs awarded against them on an indemnity basis even if there is no impropriety."

In *Pistorino*, the solicitor relied on the principles espoused in *Goddard*, applying to the court for a declaration that his client did not have capacity to give instructions in a complex and protracted estate dispute

due to age-related cognitive decline. The client opposed the application and refused to attend medical appointments to assess capacity. The solicitor gave evidence to the court of his client's confused behaviour and her inability to withstand pressure and influence from her family members (who were the other parties to the litigation). The court concluded that the client did not have capacity to give instructions for the conduct of litigation, and appointed a litigation guardian from whom the solicitor was to take instructions from that point.

The court took into consideration the complexity of the issues in the various litigations in which Mrs Pistorino was involved, and found that they were so complex and the legal principles so substantial that Mrs Pistorino was unable to:⁶

"... properly comprehend her position as an income beneficiary for life of her late husband's estate, of which her children are, effectively, the residual beneficiaries. I am satisfied that she does not properly understand the structure of the businesses and investments of the estate or of the parties, particularly trusts. Mrs Pistorino's incapacity is exacerbated by the complexity of the issues in these proceedings, especially the incidence of tax and debt ...

On a consideration of all of this material I find that while Mrs Pistorino is competent to give general and broad instructions, she is relevantly incapable by reason of physical and mental infirmity of managing her affairs in relation to the proceedings. I find for the purposes of Order 15 that Mrs Pistorino is a person under disability."

*Wembley & Wooten (Wembley)*⁷ is a recent decision of the Family Court which brings together the principles in *Goddard* and *Pistorino*.

In *Wembley*, the solicitor had become increasingly concerned as to his client's

ability to properly give instructions. In August 2017 (five months prior to the application), he wrote to the husband's treating psychiatrist querying his client's capacity. In September 2017, the psychiatrist reported that their mutual client did "not presently present with prominent cognitive impairment".⁸

Nevertheless, the solicitor maintained his concerns, bringing an application before the court. The solicitor's evidence included the husband being affected by alcohol consumption, heavy chain-smoking and reluctance to attend the solicitor's office, the husband's belief that the solicitor's advice was incorrect, the husband's behaviour at the conciliation conference, and inappropriate email communications.⁹

Having regard to the above and his duties to the court under the provisions of the *Legal Profession Uniform Law Application Act 2014* (Vic)¹⁰, the solicitor brought an application for a case guardian to be appointed to conduct litigation on behalf of the husband.¹¹ The husband did not oppose the application and, counterintuitively, he "indicated to the Court that he proposes to continue instructing the applicant in this case",¹² regardless of the outcome.

The court reinforced that the solicitor was under a duty to bring his concerns about his client's capacity before the court for its determination and, having examined the evidence, said:¹³

"The husband in this case is not the first nor will he be the last litigant who thinks he is smarter than those advising him. Nor will the husband be the first or last litigant to make foolish decisions. That in my view does not make him a person with a disability."

The court concluded:¹⁴

"In all of the circumstances, I am not satisfied on the balance of probabilities that the husband is a person under a disability, as opposed to simply being a difficult litigant. I am satisfied that he understands the nature of the proceedings and even if he were to choose to ignore that advice, understands the consequences of the litigation, including the cost consequences which are likely to follow if he persists in pursuing a course which is found to be without merit. The fact that a litigant, such as the husband in this case, may not follow advice is unfortunately not an uncommon aspect of many cases in this Court and is the very reason the Court has the power to manage the proceedings before it and if circumstances justify it doing so, make orders for costs. I am also satisfied that the husband is capable of giving adequate instructions when and if he chooses to do so."

There is no adviser who has not come across an irrational, demanding, clamorous client. There is a presumption that such a client has capacity simply because they are an adult. However, such conduct can be exhibition of a cognitive or mental disorder, which may be extreme enough to prevent the person from being able to give rational and competent instructions to their adviser.

Historically, it has been succession and elder law practitioners who were predominantly concerned with, and educated on, issues associated with loss of capacity. Now lawyers and advisers across all practice areas are finding themselves faced with clients whose cognitive ability and mental health is in decline and the ability to take full and proper instructions comes into question.¹⁵

When faced with a client with questionable capacity, it is the adviser's professional and ethical duty to properly conduct themselves by appropriate enquiry into capacity and client circumstances and to protect the vulnerable client from the client themselves and from others. For lawyers, this is entrenched in case law.¹⁶ For non-lawyers, these matters have not been the subject of litigation as yet, but it is only a matter of time.

Lawyers in non-litigious matters and other advisers do not have the benefit of seeking the direction of the court on the question of their client's capacity. When in doubt, they may need to seek guidance from their experienced colleagues, professional bodies, medical practitioners, or to seek legal advice. To do this sensitively and discretely is a desirable skill, as is the ability to withdraw from a retainer where the client cannot give competent instructions.

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References

- 1 See https://blackdoginstitute.org.au/docs/default-source/factsheets/facts_figures.pdf?sfvrsn=8.
- 2 *Gibbons v Wright* [1954] HCA 17.
- 3 [2012] VSC 87 at [548]-[549].
- 4 [2012] VSC 438.
- 5 [2012] VSC 87 at [550].

- 6 Ibid at [26].
- 7 [2018] FamCA 334.
- 8 Ibid at [16].
- 9 Ibid at [22]. Much of the evidence was sealed due to client confidentiality.
- 10 Equivalent Queensland provisions are found in the *Australian Solicitors Conduct Rules 2012*.
- 11 [2018] FamCA 334 at [1].
- 12 Ibid at [32].
- 13 *Wembley & Wooten* [2018] FamCA 334 at [31].
- 14 Ibid at [34].
- 15 For useful reference material to assist with capacity concerns, see: Queensland Law Society's Ethics Centre, website at <http://ethics.qls.com.au/content/faq/doubts-client-capacity>; Queensland Public Guardian, *Guidelines for witnessing enduring documents*, 2013; and The Law Society of New South Wales, *When a client's mental capacity is in doubt: a practical guide for solicitors*, 2016.
- 16 *Legal Services Commissioner v Ford* [2008] QLPT 12; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v de Brenni* [2011] QCAT 340.