ACTING FOR THE INCAPABLE – A DELICATE BALANCE

The Hon Justice P L G Brereton AM RFD

Address to the Law Society of NSW & Carers NSW CLE Breakfast:
How to Care in 2011
Thursday 30 June

Introduction

The ageing of the Australian population means that increasing numbers and an increasing proportion of Australians suffer from dementia and other mental illnesses that impact on their capacity to engage in everyday transactions and, more particularly, to engage in complex transactions such as instructing legal practitioners in litigation.[1] Once upon a time, this type of problem was largely accommodated by the families of those affected. In the rampant individualism of the early twenty-first century, however, families provide such support less and less. That leaves an increasing burden on social and governmental support organisations.

Solicitors have an obligation, as fiduciaries[2] and pursuant to professional rules, to act in their client's best interests, to the extent that their acts do not defeat the ends of justice.[3] On the other hand, solicitors are but agents of their clients, and are bound to adhere to their client's instructions.[4] That means that, in cases where a solicitor suspects or believes that a client does not have capacity to give instructions, or to manage any monetary award obtained in court proceedings, there is a potential for conflict between a solicitor's paramount obligation to the administration of justice, the general rule that a solicitor must follow a client's instructions, and the duty of a solicitor to act in the best interests of the client.

Persons under a legal incapacity

(NSW) Uniform Civil Procedure Rules (2005), r 7.14, provides that a person under a legal incapacity cannot commence or carry on legal proceedings, except by tutor. This rule is reflective of the ordinary rule that an incapable person cannot commence or carry on legal proceedings except by a tutor or guardian.[5] *Myers v Nominal Defendant*[6] made clear that the requirement that a tutor be appointed to carry on proceedings on behalf of an incapacitated person was more than a mere procedural

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[1] The New South Wales Legislative Council Standing Committee on Social Issues published a report on 25 February 2010, which found, at page xi, that in 2008 an estimated 227,000 people in Australia suffered from dementia. By 2050, that number is estimated to increase by 330%, whilst the Australian population is estimated to increase by less than 40%. Additionally, the Commonwealth Productivity Commission in its 2005 report on *Economic Impacts of an Aging Australia*, at pages 1 and 5, projected that by 2044-45 one-quarter of Australians will be aged 65 and over and five percent of Australians will be aged 85 and over.

[2] *Tyrell v Bank of London* (1862) 11 ER 934, 941 (Lord Westbury LC), *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 (Mason J).

[3] Solicitor's Rules, Statement of Rules 1-16.

[4] *Sargent v ASL Developments Ltd* (1974) 131 CLR 634, 659 per Mason J, where his Honour stated that 'The solicitor is to be regarded as the alter ego of the client'.

[5] *Rudeforth v Crawford* [1926] VLR 303.

[6] (1966) 1 NSWR 659

rule, but a requirement of substantive law. This requirement is a consequence of the law not conceiving that incapable persons can bind themselves by instituting or subjecting themselves to legal proceedings.[7] Thus proceedings involving an incapable person, whether plaintiff or defendant, are only validly constituted if a tutor is appointed to manage the proceedings on behalf of that person, and in the absence of a tutor, the incapable person is not bound by the outcome.
This rule achieves three things: first it ensures that proceedings are under the control of a responsible person; secondly, it ensures that the parties are bound by the outcome of proceedings; and thirdly, it ensures that the successful party, in the event that it obtains a costs order, has someone against whom that order can be enforced.[8]

Whether a solicitor knows it or not, a solicitor who acts in proceedings when the client is not capable, without the appointment of a tutor, is acting without instructions and without a retainer,[9] and is personally liable for the costs of those proceedings,[10] just as if the solicitor had instituted proceedings in the name of someone without instructions. The effect of an appointment of a tutor is that someone other than the incapable person has the conduct of "the specific piece of litigation".[11] It is not an appointment to generally manage the affairs of the client, but an appointment to manage that piece of litigation.

Legal incapacity defined

The law presumes people to be competent and to have legal capacity until the contrary is established. For the purposes of the Courts, a person is under a legal incapacity, so as to require the appointment of a tutor, if he or she is: a child under 18; an involuntary patient; a forensic patient or correctional patient within the meaning of the *Mental Health Act;* a person under guardianship within the meaning of the *Guardianship Act;* a protected person within the meaning of the *NSW Trustee and Guardian Act;*[12] or an incommunicate person, being a person with a physical or mental disability that precludes them from receiving communications or expressing their will as to their property or affairs.[13] In addition, a person is under an incapacity if they are 'incapable of managing their affairs'.[14]

Guidance as to exactly what is covered by that is to be found in the judgment of Powell J in *PY v RJS.*[15] His Honour enunciated a two-limb test: 1) the person appears incapable of dealing, in a reasonably competent fashion, with ordinary routine affairs; and 2) by reason of that lack of competence, there is shown to be a real risk either that

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[7] *Steinecke (bht Gardos) v Wayne* [2011] NSWSC 428 [3].
[8] *Steinecke,* above n 8, [3].
[9] *Ranclaud v Cabban* (Supreme Court of New South Wales, Young J, 9 February 1988, unreported)
[10] *Yonge v Toynbee* 1 KB 215. In that case, the defendant initially had capacity, but subsequently ceased to have capacity due to unsoundness of mind. His solicitors, Messrs Wontner & Sons, continued to act for him after he lost capacity, putting the plaintiff to costs. Buckley LJ stated, at 228, that "During all this time they were putting the plaintiff to costs, and these costs were incurred upon faith of their representation that they had authority to act for the defendant".
[11] *Doulaceras v Daher* (2009) 253 ALR 627, [155]-[156] (Campbell JA, Giles and Macfarlan JJA agreeing)
[12] S 25M of this Act allows the Guardianship Tribunal to commit the estate of a 'protected person', namely a person whose estate is subject to a financial management order under s 25E of that Act.
[13] (NSW) *Civil Procedure Act,* s 3.
[14] UCPR, r 7.13.
[15] [1982] NSWLR 700, at 702.

they may be disadvantaged in the conduct of their affairs, or that moneys or property they possess may be dissipated or lost. His Honour qualified the second limb of the test, observing that it was not sufficient that the person lack a high level ability required to deal with complicated transactions, or that the person did not deal with simple or routine transactions in the most efficient manner.[16]
A different test for capacity applies in Victoria. The Victorian test focuses on the 'subjective' circumstances of the person and requires that a person be incapable of managing their actual affairs, as they exist, and not simply 'ordinary routine tasks'.[17] Hence a multi-millionaire with complex affairs is more likely to be declared an incapable person in Victoria than a pensioner with minimal property interests.[18]

Clients who may be under a legal incapacity

Mental illness, of itself, does not equate to incapacity. In some mental illnesses, a person's capacity fluctuates. However, in the context of litigation, it is rather unsatisfactory to be appointing and removing tutors as the condition fluctuates. If there is a significant risk that at times during the conduct of litigation the client will be relevantly incapacitated, that that would justify the appointment of a tutor for the whole of the litigation. It would be unacceptable to have a situation where, in the context of a fluctuating mental illness, tutors were appointed and removed for a party who was well one day but not well the next.

When commencing proceedings, or even after proceedings have commenced, a solicitor may come to the realisation or the suspicion, that the client is incapable of giving instructions, or managing a subsequent judgment. In that situation – and this comes really to the nub of the issue – the solicitor has to consider whether it is appropriate to seek the appointment of a substitute decision maker in the form of a tutor to provide proper instructions, or whether an application should be made to seek appointment of a manager of the client's estate, to manage the client's affairs more generally.

If the client is not averse to such a course, then there is not much of an issue. Normally, a relative, friend, or an institution such as the New South Wales Trustee and Guardian may be appointed as a tutor, or as manager of the client's estate. The problem for the solicitor arises when the client is hostile to the proposal. In such a case, a solicitor will have to balance conflicting duties to the client and to the court.

McD v McD[19] was a personal injury case, in which the plaintiff had suffered psychiatric injuries as a result of two motor vehicle accidents. Powell J dealt with an application – originally made by the solicitor for plaintiff, who was later substituted by 'D' – for the appointment of the Protective Commissioner to manage the plaintiff's affairs. This was not an application for the appointment of a tutor, but one for the appointment of the Commissioner to manage the plaintiff's affairs more generally. The plaintiff, as a result of the accidents, suffered 'a severe reactive depression' that later became 'a schizophrenic disorder of the simple kind'.[20] On the basis of the

[16] [1982] NSWLR 700, at 702.
[17] *Re MacGregor* [1985] VR 861.
[18] *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501, [46], Young J.
[19] *McD v McD* [1983] 3 NSWLR 81.
[20] *McD v McD* [1983] 3 NSWLR 81, 83.

plaintiff's condition, the solicitor believed that she would no longer be able to furnish him with competent instructions.

Powell J observed that although not absolutely adversarial, proceedings in the Protective List of the Equity Division of the Supreme Court, where one person seeks the appointment of a substitute decision maker to manage the affairs of another, have an adversarial flavour, and while accepting that the solicitor had acted from the most altruistic of motives in bringing the application, his Honour stated that it was:

> "most undesirable that [the solicitor] should thus put himself in an adversary position [to the client]…

Recognising that there was no limitation on the persons who could bring such applications, his Honour continued:

> "While it may be that, on occasion, situations may arise in which there is no person, other than the intended defendant's own solicitor, who is either able, or willing, to commence proceedings for the appointment of a committee or manager of the intended defendant's property and affairs, I believe that, as there is no limitation upon the persons who may bring such proceedings, such cases ought to be very rare, indeed… [where] no member of the client's family is available or willing to make such an application, the preferable course… is… to invoke the good offices of a friend of the client, or even of one of the trustee companies".[21]

In *R v P,*[22] the Court of Appeal was concerned with an order made by Windeyer J appointing the Protective Commissioner receiver and manager of the appellant's estate for the purpose of conducting proceedings in the District Court in which the appellant was the plaintiff.[23] The appellant had been involved in a motor vehicle accident, and liability had been established. The question of damages remained. The plaintiff's solicitor had filed expert reports by psychiatrists and doctors as to the plaintiff's psychological problems, derived as a result of the accident. The solicitor had also arranged for further medical examinations of the plaintiff by professionals, who had compiled reports. The plaintiff – apparently irrationally – instructed the solicitor not to serve the reports that resulted from the examinations. This instruction prompted the solicitor to conclude the client was incapable of giving proper instructions and to apply for an order under the then *Protective Estates Act.* The client vigorously opposed the application before Windeyer J.

At issue before the Court of Appeal was whether Windeyer J had erred in entertaining an application by the solicitor, by reason that a conflict of duty arose by the solicitor prosecuting such an application against a current client.[24] It was submitted for the client that Windeyer J ought not to have heard the application because the client had opposed the order sought. [25] Additionally, the client contended that a solicitor should

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[21] *McD v McD,* 84.
[22] 53 NSWLR 664.
[23] *R v P,*666 (Hodgson JA).
[24] *R v P,*,672 (Hodgson JA).
[25] *R v P,*,678. Note that *Supreme Court Rules* 1970 Pt 25 are now contained in Part 23 of the UCPR.

not stray beyond approaching a relative of the client or a trustee company in relation to the client's capacity. [26] At most, a solicitor should have applied for a medical examination of the client.[27] In response, the solicitor argued that pursuant to the duty to act in the client's best interests and their duty to the Court, it was incumbent to make the application. [28]

Hodgson JA (with whom Mason P and Ipp AJA agreed) said:

> *McD* did not purport to impose any absolute rule against solicitors bringing such an action, and I do not think this Court should suggest that there is an absolute rule against such actions being brought. The bringing of such actions is extremely undesirable because it involves the solicitor in a conflict between the duty to do what the solicitor considers best for the client and the duty to act in accordance with the client's instructions; and also because of a possible conflict between the solicitor's duty to the client and the solicitor's interest in continuing to act in the proceedings in question and to receive fees for this. Of course, where as in this case the order sought is for the appointment of the Protective Commissioner to be receiver and manager of the client's estate and to have control of the Court proceedings, the Protective Commissioner may, if this is considered to be in the client's interest, then dismiss the solicitor and either give effect to the client's wishes in the matter or engage other solicitors.[29]

Notwithstanding the undesirability of the course adopted by the solicitor, his Honour concluded:

> … there being no absolute rule precluding solicitors bringing such an action, I do not think a ground is shown for interfering with the result at first instance on this basis.[30]

Hodgson JA, with reference to *McD*, noted that Powell J had said that such applications should only be brought by solicitors where no reasonable alternative existed.[31]

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[26] *R v P*,,678 (Hodgson JA), see UCPR, part 23.
[27] *R v P*,,678 (Hodgson JA).
[28] *P v R*,,678 (Hodgson JA).
[29] *R v P*, 683 (Hodgson JA).
[30] *R v P*, 683 (Hodgson JA).
[31] 683. In *P v R* [2003] NSWSC 819, Barrett J dealt with the substantive application for a protection order for the client under the *Protected Estates Act 1983*. The application was brought by the solicitor. Barrett J at [69]-[75] dealt with the issue of whether it was appropriate for the solicitor to bring the application. He noted that the solicitor had not served or notified any of the client's relatives, because the client specifically had told him not to contact any of her relatives for the purposes of the proceedings. Ultimately the client's eight siblings became aware of the proceedings, being informed by the client. Barrett J found, at [76], that the siblings believed the client capable of managing her affairs, were opposed to the protective order, but had not played a supportive role in relation to their sister. Barrett J was ultimately satisfied, at [77], that even if the solicitor had contacted the siblings, none of them would have been a suitable substitute applicant for the incapacitated person. Barrett J also canvassed other persons who may have been suitable applicants. These included social workers and persons connected with the client's church. The client had never seen a social worker and did not appear to have a close relationship with anyone from her church. Barrett J concluded that such persons were unrealistic alternative applicants [80]. His Honour held that given the 'special circumstances' of

Disclosure of confidential information

A related issue in *R v P* was the disclosure by the solicitor of confidential information, obtained from the client in the course of the solicitor-client relationship, for the purpose of ascertaining whether the client was a person 'under an incapacity'. The duty of confidentiality stems from the solicitor-client relationship.[32] It is an implied term of the retainer[33] and a core fiduciary duty owed by the solicitor to the client. The equitable doctrine of confidence entails that after termination of the retainer, which also heralds the conclusion of the fiduciary relationship, a solicitor must not disclose confidential information obtained during the course of the retainer. Additionally, the Solicitor's Rules prescribe that, during and after the termination of a retainer, the solicitor must not disclose confidential information.[34]

Nonetheless, an overriding legal duty may compel disclosure of confidential information. So much was recognised by Lord Denning in *Parry-Jones v Law Society,*[35] where the Master of the Rolls determined that a solicitor was compelled to disclose confidential communications with clients, pursuant to the relevant professional rules so that the law society could ascertain whether the solicitor was complying with the rules.[36] The Solicitor's Rules also provide exceptions to the general rule, allowing disclosure of confidential information where the client authorises its disclosure, or the solicitor is compelled by law to disclose.[37]

Applying these general principles to the case of a solicitor who assists in making or makes an application for the appointment of a receiver or manager for an incapacitated client's estate, Hodgson JA held that in instances where the solicitor's concern for the interests of their client was "reasonably based" and where the disclosure involves "no greater disclosure of confidential information than absolutely necessary", disclosure can be justified to the extent "absolutely necessary" for the purpose of the proceedings.[38] His Honour specifically endorsed the approach taken by Young J, as his Honour was then, in *Church v Price,*[39] which Young J had observed that in the context of an application for the appointment of a receiver and manager of a client's estate, a solicitor "concerned with the well-being of his or her client, must be at liberty to disclose to the person making the application sufficient details about the client and his or her affairs for that person to make a meaningful application".[40] In such instances, "there was a sufficient excuse for disclosing the information to the plaintiff and to the Court in the interests of justice."

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the case, the solicitor was an 'appropriate person' having "gained a close appreciation of the defendant's circumstances and difficulties generally in the course of dealing with her personal injuries claim" [81].

[32] *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831, 840, (Fletcher Moulton LJ).

[33] *Parry-Jones v Law Society* [1969] 1 Ch 1, 7 (Denning LJ), 9, (Diplock LJ).

[34] Solicitors' Rules, r 2.

[35] [1968] 2 WLR 397.

[36] [1968] 2 WLR 397, 401.

[37] Solicitors' Rules, r 2.

[38] *R v P,* 683-684 (Hodgson JA).

[39] *R v P,* 683-684 (Hodgson JA).

[40] *Church v Price,* [16].

Conclusion: overarching duties and avenues to avoid difficulties

In connection with the appointment of a tutor, it is worth noting that under UCPR 7.18, the Court can appoint a tutor on its own motion, or on the motion of any person including the proposed tutor. The cases to which I have referred indicate that while it is generally undesirable for a solicitor to act against the client in the context of an application for the appointment of a manager or a tutor, there is no absolute rule against doing so and that sometimes this will be the only course available. Thus, while a solicitor should try to find another course, if there is none other available, then the solicitor should make the application. In the not dissimilar situation that arises in another context in connection with persons under a disability, namely children, in proceedings concerning children in the matrimonial jurisdiction, it is well-established there that a lawyer's duty to a client is overridden by the obligation to ensure all relevant information is before the court so far as the welfare of the child is concerned, even if that is not in accord with the interests of the client. It seems to me that when this type of question arises, a similar position obtains. The lawyer's obligation to the court can override a lawyer's obligation to the individual incapacitated client.

Because UCPR r 7.18 allows the Court to appoint a tutor on its own motion, in the context of particular proceedings some of the difficulties of the solicitor being the applicant will be avoided if the solicitor draws the problem to the attention of the Court and effectively invites the Court to make an appointment on its own motion, perhaps proffering a solution, but without incurring the disadvantages of being the formal applicant. Where no friend or relative, or other person appropriate to be the tutor can act, then it may be appropriate to consider the appointment of the New South Wales Trustee and Guardian as tutor.

On the question of confidential information, the short answer is that to the extent that it is absolutely necessary to enable the problem of capacity to be dealt with by the court, then that operates as an exception to the obligation of confidentiality, and the solicitor may disclose the information to enable the making of a meaningful application in that respect. Obviously, discretion as to just how much information is disclosed is required and particular care must be taken to ensure that the client's case overall is not prejudiced.

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