

Riskwatch is prepared by Law Claims to assist practitioners in identifying risky areas in practice and to highlight risk prevention strategies to allow for safer, more enjoyable practice. Riskwatch appears as a monthly column in the Law Society Bulletin as well as being distributed on a monthly basis to members of the Law Society's Professional Indemnity Scheme who do not receive the Law Society Bulletin.

Does Your Client Have the Capacity to Instruct You?

By Gianna Di Stefano, PII Risk Manager



The issue of a client's capacity can be an extremely complex one and practitioners need to assess whether their clients have the requisite mental ability to make decisions about their legal affairs and provide instructions.

If a client has an impairment or, is under a disability that impairs the client's ability to make decisions, the practitioner will have to assess whether the impairment is minor or, prevents the client from providing instructions or entering into binding legal relationships.

Impairments may be as a result of an intellectual disability, a mental illness, dementia, acquired brain injury, use of medication, learning difficulties or other conditions.

In some circumstances, a client's capacity can change over time or in different situations so this needs to be borne in mind by the practitioner assessing capacity of the client to make decisions.

To demonstrate capacity, clients need to be able to:

- understand the facts involved in the decision-making and the main choices;
- weigh up the consequences of those choices and understand how the consequences affect them; and
- communicate their decision¹.

¹ Jenna MacNab, "Capacity: A practical guide for lawyers" (2008), 46 No. 5 LSJ 68 at 71.

If a client's capacity is in issue, the following principles may provide a guide when dealing with such an issue²:

- **Always presume a person has capacity**

Under common law you must presume that a person has the capacity to make all their own decisions.

- **Capacity is decision-specific**

Apply the presumption of capacity for every decision a person makes. If a client can make some but not all decisions, then they have a right to make as many decisions as possible.

- **Capacity is fluid**

A person's capacity can fluctuate over time or in different situations, so you will need to assess their capacity for each decision whenever there is doubt about capacity. Even where a client lacked the ability to make a specific decision in the past, they might be able to make that decision later on. Clients might also regain, or increase their capacity, for example by learning new skills or taking medication.

Other factors such as stress, grief, depression, reversible medical conditions or hearing or visual impairments may also affect a person's decision-making capacity.

- **Don't make assumptions that a person lacks capacity because of their age, appearance, disability or behaviour**

A person's capacity should not be assessed solely on the basis of:

- the way a person looks;
- the way a person presents;
- the way a person communicates;
- a person's impairment;
- the way a person acts or behaves.

- **Assess a person's decision-making ability – not the decision they make**

A client cannot be assessed as lacking capacity merely because they make a decision you think is unwise, reckless or wrong. Individuals have their own values, beliefs, likes and dislikes, and the majority of people take chances or make 'bad' decisions occasionally.

- **Respect a person's privacy**

Assessing a person's capacity means dealing with personal information about them and there are a variety of legislative and ethically based privacy principles which are involved. In most cases, a client must consent to their personal information being provided to others.

- **Substitute decision-making is a last resort**

A client may be able to make a particular decision at a certain time because they have support during the decision-making process (assisted decision-making). Before concluding lack of capacity, ensure that everything possible has been done to support the client to make a decision. Only seek the appointment of a substitute decision-maker such as a tutor, guardian or financial manager as a last resort.³

Determining capacity / incapacity is not an easy task. It needs to be assessed in terms of an individual in a particular situation faced with a specific decision that needs to be made.

² New South Wales Attorney General's Department Capacity Toolkit: Information for government and community workers, professionals, families and carers in New South Wales, (Sydney, 2008) at http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_Diversitysrvc.es.nsf/pages/diversity_services_capacity_toolkit.

³ MacNab, above n1 at 68-70.

Warning signs that point to the need for further investigation on the issue of capacity include but are not limited to⁴:

- a client demonstrates difficulty with recall or has memory loss;
- a client has ongoing difficulty with communications;
- a client demonstrates a lack of mental flexibility;
- a client has problems with simple calculations which they did not have previously;
- a client is disoriented;
- there is a sense that “something about the client has changed”, including deterioration in personal presentation, mood or social withdrawal;
- a client is in hospital or a residential aged care facility when instructions are taken;
- a client has changed solicitors several times over a short period, particularly if there has been a change from a solicitor who has advised the client for many years;
- a client is accompanied by many other friends, family or carers to interviews with the solicitor but is not given the chance to speak for themselves;
- a client shows a limited ability to interact with the solicitor;
- a client shows a limited ability to repeat advice to the solicitor and ask key questions about the issues.

Consider whether you can act after having presented information in a clear and straightforward manner and having avoided complicated and overly legalistic language to your client.

If you believe a client to be incapable of giving instructions either decline to act or, alternatively, refer the client onto a medical practitioner to assess capacity. Capacity assessments can be undertaken by a number of medical practitioners (e.g. general practitioner, psychologist, psychiatrist or geriatrician). As a practitioner you will need to consider your client’s particular circumstances and possible disability before making the referral.

In any event, it is fundamental that practitioners ensure they take and keep detailed file notes of assessments of capacity. It is suggested that practitioners keep records of all steps taken in the assessment including all questions and answers. Ensure you also record the opinions of all persons present and any witnesses. The paper trail will prove invaluable if there is a subsequent claim made challenging the issue of capacity at a later date.

We have had two claims in the past 12 months where the issue of capacity gives rise to a claim.

For any queries about this, or other Risk Management Services offered by Law Claims, please contact the PII Risk Manager, Gianna Di Stefano on 8410 7677.

⁴ The American Bar Association Commission on Law and Aging and the American Psychological Association, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, Washington, 2005 at ABA