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Mental health issues in the courts

Paper by Tony Woodyatt[1]

This paper

In this paper I consider four questions regarding the issue of capacity in civil litigation, focusing on the role of the Supreme Court and with particular reference to the position of self-represented litigants:

1. How is the issue of capacity determined?
2. How is a litigation guardian appointed?
3. Who is best placed to decide the issue of capacity?
4. How is the issue of capacity raised?

I also discuss three case studies involving self-represented parties and suggest some possible changes that could improve the approach to capacity issues for self-represented litigants.

How is the issue of capacity determined?

The decision-making model of capacity

There is a presumption of capacity for an adult person[2], unless the presumption is rebutted on the balance of probabilities[3]. However, where there is doubt about the capacity of a person who is a party to litigation:

> Rules as to capacity are designed to ensure that the 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. [4]

A person with impaired capacity is defined as a person who 'is not capable of making the decisions required of a litigant for conducting proceedings'[5]:

> For the purposes of [the relevant rule] 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.[6]

In Queensland, once suspicions are raised in civil litigation, the Supreme Court and the Queensland Civil and Administrative Tribunal (QCAT) are responsible for making decisions relating to capacity of litigants.

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[1] Director, Queensland Public Interest Law Clearing House Incorporated. I am indebted to the assistance provided by Megan Renton and Madeleine Murphy in the research for and preparation of this paper.

[2] Schedule 1, Principle 1 and s 7 *Guardianship and Administration Act 2000* (GAA).

[3] Hawkes v Wilkie [2012] NSWSC 1039.

[4] *Masterman-Lister v Brutton* [2002] EWCA Civ 1889; [2003] 1 WLR 1511

[5] Schedule 5 of the *Supreme Court of Queensland Act 1991.*

[6] Masterman-Lister per Chadwick LJ with whom Potter LJ agreed at [75].

When the Supreme Court or QCAT finds that a party is a person with impaired capacity, they become a person under a legal incapacity[7] and pursuant to rule 93(1) of the *Uniform Civil Procedure Rules 1999* (UCPR) may only start or defend proceedings by a litigation guardian.

When a party to a proceeding becomes a person with impaired capacity during the proceeding, a person cannot take any further step in the proceeding without leave of the court and only then if the person follows the court's directions on how to proceed[8].

Jelicic v Salter and St Andrew's War Memorial Hospital[9] involved an action for damages for medical negligence arising from a hysterectomy. The plaintiff was unrepresented. Mackenzie J considered medical evidence submitted in the proceedings and concluded that the plaintiff was a person with impaired capacity but he did not think that appointment by the court of a litigation guardian was appropriate in the particular circumstances of the case for 'reasons which may be inferred from the medical reports'. Instead he ordered that no further steps may be taken until someone consented to being a litigation guardian. This case eventually proceeded to trial, with the plaintiff's husband acting as litigation guardian. He was not represented at the trial.[10]

Assessment of capacity

Consideration of capacity is a legal issue not a medical one.

In *Pratt v Dickson*[11], involving a claim for damages for negligence arising from a motor vehicle collision, the defendant applied for appointment of a litigation guardian (which was opposed by the plaintiff), on the basis that the evidence disclosed the plaintiff's severe brain injury. The plaintiff's solicitor gave evidence that he was satisfied the plaintiff had capacity. After examining the medical evidence, Mullins J ruled that the respondent was not a person with impaired capacity and dismissed the application.

Under Queensland's *Guardianship and Administration Act 2000*, an adult's capacity is specific to a particular matter, determined in the context of the matter[12]. An adult may lack capacity for one issue, but have capacity for another at the same time.

In *Pistorino v Connell & Ors*[13], Dixon J considered the decision of Edmonds J in *Owners of Strata Plan 23007* and noted that the following were relevant factors (although not an exhaustive list) when considering the issue of capacity:

- Whether the person had the ability to understand that he or she required advice in respect of the relevant legal proceeding;
- Whether the person had the ability to communicate this requirement to someone who could arrange an appointment with an appropriate advisor or, alternatively, whether he or she could arrange such an appointment of his or her own accord;

[7] *Plumley v Moroney and Hunt* [2014] QSC 3.
[8] UCPR r 72 (1).
[9] [2001] QSC 068.
[10] [2003] QSC 103.
[11] [2000]QSC 314.
[12] Gibbons v Wright (1954) 91 CLR 423.
[13] [2012] VSC 438.

- Whether the person had the ability to instruct the advisor with sufficient clarity to enable him or her to understand the situation and to advise the person appropriately; and

- Whether the person had the ability to make decisions and give instructions based upon, or otherwise give effect to, such advice as might be received.

Dixon J also approved further factors identified in *Slaveski v State of Victoria*, per Kyrou J:

- Does the plaintiff understand the factual framework for his or her claims and the type of evidence required to succeed in his or her claims;

- Is the plaintiff capable of understanding what is relevant to the proceeding and what is not relevant when these matters are explained to him or her;

- Is the plaintiff capable of assessing any settlement proposal on its merits, having regard to the state of the evidence, the parties' submission and other developments in the proceedings as at the time the proposal is made?

However, in consideration of, *inter alia*, *L v HREOC* and *Slaveski v State of Victoria,* Dixon J said:

> Each application must be considered on its own circumstances and the court's discretion cannot be constrained by 'rules' derived from other cases. Citing Slaveski, "the question of incapacity in relation to litigation must be examined against the facts and subject matter of the particular litigation, the number and complexity of the issues involved and the identity, number and interest of the other parties, particularly opposing parties. A person can have the requisite capacity for one proceeding and lack it for another.[14]

In Masterman-Lister, Kennedy 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 claimants 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.[15]

Kennedy J added:

> The conclusion that in law capacity depends on time and context means that inevitably a decision as to capacity in one context does not bind a court which has to consider the same issue in a different context.[16]

In Thompson v Smith[17], Muir J said:

> The concept of 'impaired capacity' concern's a person's ability to make decisions which must be made in the course of litigation. The existence of a condition or character trait which affects the quality or timeliness of such decisions would not establish 'impaired capacity' unless its extent was so gross as to compel the conclusion that the person was relevantly incapacitated. Imprudence or defective judgment, even if resulting from an obsession about the litigation or some aspect of it, normally would not constitute 'impaired capacity'.[18]

[14] at [15].
[15] at [27].
[16] At [29].
[17] [2005] QCA 446.
[18] at [132].

The recent case of *Randall v Phipps*[19] involved a building dispute that commenced in 1996 and the proceedings had been on foot for 17 years. The plaintiff and first defendant were unrepresented. The second defendant applied for a sanction of a settlement made between the second defendant and the plaintiff's litigation guardian. The plaintiff applied to challenge the psychiatric reports that concluded he was paranoid and incapable of giving instructions and the decision of QCAT that he lacked capacity. He argued that the litigation guardian and the litigation guardian's solicitor were not authorised by him to make the settlement.

North J commented that the plaintiff had appeared before him a number of times over recent years and had always conducted himself "politely, impressively and respectfully … but he had a fixed view of matters …"[20], and "a grossly exaggerated and quite unrealistic view of the damages that might be recoverable"[21]. North J declined to disturb the decision of QCAT and approved the sanction and noted that something had to be done to bring the matter to a conclusion.

Accordingly, in assessing whether a party has impaired capacity, it is difficult to take guidance from previous decisions on the degree of impairment that is needed to constitute a finding of incapacity and each case must be approached on its own facts.

In the case of a self-represented litigant, the difficulty in assessing capacity is compounded because their decision-making requires more than the factors outlined by Dixon J (particularly following Kyrou J - understanding the factual framework; understanding what is relevant; and assessing a proposal on its merits). Self-represented litigants must also understand the legal issues and the civil procedure rules and have the skills to communicate their case to the court. While these abilities may also be difficult for a self-represented litigant without impairment, the extra demands on such litigants with impairment may lower the threshold of the test for capacity.

> The cases do not consider the level of mental capacity required to be a "competent" litigant in person but it cannot be less than that required to instruct a solicitor. It should be greater because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.[22]

Unlike a represented litigant, a self-represented litigant does not have the usual access to "proper explanation by legal advisers and experts … as the case may require" (see note 6). Self Representation Services can potentially provide the proper explanation by offering advice and discrete task assistance.

How is a litigation guardian appointed?

A person under a legal incapacity can only start, defend or continue proceedings by their litigation guardian and a litigation guardian who is not a solicitor must be represented by a solicitor.[23]

A person becomes a litigation guardian by filing in the registry the person's written consent or by appointment by the court.[24]

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[19] Unreported Supreme Court decision in No WRT 178 of 1996.
[20] at [15].
[21] at [35].
[22] Murphy v Doman (2003) 58 NSWLR 51 at [35].
[23] Rule 93, Uniform Civil Procedure Rules 1999.

There are risks to accepting the role. The litigation guardian is personally liable for the costs of the other successful party if an adverse costs order is made and for their own legal costs, although they are entitled to reimbursement from the assets of the party they represent.

Self-represented litigants are often indigent and sometimes socially isolated. Accordingly, they can have greater difficulty in recruiting someone to act as litigation guardian and unable to afford a solicitor to represent the litigation guardian even if a litigation guardian can be found. However, there have been cases where a litigation guardian has not been represented (see note 10).

While under r 95 (2) a court can appoint someone to act as litigation guardian without their consent, it is unlikely to do so.

When a person does not have someone willing to be their litigation guardian, the Public Trustee cannot be appointed without its consent and is generally reluctant to be appointed as litigation guardian.[25]

In *Fowkes v Lyons*[26], Wilson J determined that the plaintiff did not have capacity to proceed and that she would be required to appoint a litigation guardian. The court noted that although the Public Trustee *could* act as litigation guardian, the Public Trustee had advised that "he is unwilling to do so in this case" pursuant to s 27 (3). On that basis, the court declined to appoint the Public Trustee as litigation guardian and the proceedings were stayed until a litigation guardian was appointed.

Accordingly, where no-one is willing to act as a litigation guardian and the Public Trustee refuses to act, the only outcome is an indefinite stay of proceedings.

This was overcome in the case of *Energex Ltd v Sablatura*[27], through an agreement by the plaintiff (Energex Ltd) to indemnify the Public Trustee for any costs incurred by it in acting as litigation guardian. However this is unusual and is not a possible option in many situations. Atkinson J, in this case, suggested that the statute needs amendment or the court might have to look to other public officials to undertake this important public duty. Her Honour suggested that this topic was one requiring law reform to clarify when the Public Trustee must act as litigation guardian and to consider whether conditions relating to costs may be attached to the appointment of the Public Trustee.

In its comprehensive review of guardianship in 2010, the Queensland Law Reform Commission (QLRC)[28] recommended that:

- The court is the most appropriate body to appoint a litigation guardian and should have exclusive jurisdiction to appoint a person as a litigation guardian, but only with their consent.
- It is appropriate for the court to refer a matter to QCAT to determine the issue of capacity.
- As well as making a declaration of capacity, QCAT should have power to make a finding about who would be appropriate to act as litigation guardian.

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[24] Rule 95, Uniform Civil Procedure Rules 1999.
[25] S 27(3) *Public Trustee Act 1978.*
[26] [2005] QSC 007.
[27] [2009] QSC 356.
[28] QLRC, A Review of Queensland's Guardianship Laws 2010 Vol 4 page 374.

- To protect the rights of adults with impaired capacity, the courts have the power, when necessary, to appoint the Public Trustee as litigation guardian without its consent in a proceeding relating to financial and property matters.[29]
- The courts have the power, when necessary, to appoint the Public Guardian as litigation guardian without its consent in a proceeding that does not relate to financial and property matters.

Recognising the costs liability that can be imposed on the Public Trustee and Public Guardian, the QLRC also recommended that:

- A litigation guardian for a defendant should be immune from a costs order unless the costs are incurred through negligence or misconduct.[30]
- The Supreme Court be given a clearer jurisdiction to make a costs order against another party to pay the costs of the litigation guardian's own representation at any time in the proceedings.

Another issue for lawyers who first receive instructions from a person wanting to start or defend proceedings whose capacity they question, is that in urgent situations, it may be necessary to secure the client's position before settling the capacity issue. Once the proceedings are on foot, the party can be advised to apply to QCAT for a determination in order to continue the proceedings. This is a problem that particularly affects community legal centres who deal with disadvantaged clients.

Implementation of these recommendations will certainly impact on self-represented litigants who are found to have impaired capacity.

Who is best placed to decide the issue of capacity?

The Supreme Court

In its inherent jurisdiction as parens patriae, the Supreme Court has the power to make a determination of incapacity, and if it is satisfied that the litigant is a person with impaired capacity, can make an order that no further steps be taken in an action until a person files written consent in the Registry to be the plaintiff's litigation guardian (pursuant to r95 (1)).

The Supreme Court can decide the issue of capacity at any time, and this usually occurs when the party or their solicitor raises the issue and applies for a declaration of capacity and appointment of a litigation guardian, particularly when the party's condition is the subject of the proceedings. Alternatively, the court may refer the issue to QCAT for a declaration of capacity. The party or their solicitor may also approach QCAT directly and then apply to the Court for appointment of a litigation guardian. Both court and QCAT can transfer the proceedings to the other at their own initiative or on the application of an 'active party' to the proceeding.[31]

When the issue of capacity arises either directly or indirectly from the subject matter of the proceedings, the courts and legal representatives can be guided by assessments of neuropsychologists

[29] In South Australia, the requirement for consent does not apply to the Public Advocate or the Public Trustee: *Guardianship and Administration Act 1993* (SA) s 51.
[30] See rule 277 (3) *Court Procedures Rules 2006* (ACT).
[31] S 241 GAA.

or psychiatric reports submitted in evidence about the party's capacity to provide instructions, to make decisions and to understand the nature of the proceedings.

However, the courts and legal representatives do not always have access to expert reports, for example where the party's psychological condition is not an issue in the proceedings, and a judge is not always in a position to make a decision on capacity from only what they see in the court room and the documentation provided. An unrepresented party whose capacity is in question is also unlikely to have the funds to pay for a medical report even if they want to present one to the court.

When the issue is not raised by a party or their representative, from our observation, the court can be justifiably hesitant to either consider the issue itself or refer the matter to the tribunal for assessment, except in the most obvious of cases, as removal of a person's decision making autonomy is not taken lightly.

In the case of *Till v Nominal Defendant*[32] an application was made under s241(1) of the Guardianship Act by the plaintiff's counsel to stay the proceeding and to have the matter transferred to QCAT, as both counsel and solicitor had become concerned about their client's capacity to provide instructions. The defendant opposed the application. McMeekin J considered the parens patriae jurisdiction of the court to protect and assist the plaintiff and considered that while the plaintiff had a clear psychotic illness, he would not make a declaration himself. He stayed the proceeding and ordered transfer of the matter to QCAT to determine capacity in its exclusive jurisdiction to appoint a guardian.

Specialist tribunal

The jurisdiction of the Queensland Civil and Administrative Tribunal (QCAT) is established under a separate statutory scheme[33] which also defines and deals with capacity and the appointment of an administrator and guardian for a wide range of matters, including civil litigation in Queensland. The *Public Trustee Act 1978* ("Public Trustee Act") and the *Guardianship and Administration Act 1999* both rely on the definition of capacity set out in Schedule 4 of the *Guardianship Act*, which provides:

> "Capacity, for a person for a matter, means the person is capable of –
>
> (a) Understanding the nature and effect of decisions about the matter; and
>
> (b) Freely and voluntarily making decisions about the matter; and
>
> (c) Communicating the decisions in some way."

This definition is broader than the definition in the *Supreme Court of Queensland Act 1991*. Adoption of this definition for all jurisdictions would simplify and clarify the law and would benefit litigation guardians to have only one set of provisions which define their role as guardians.

QCAT has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity. This does not affect the Supreme Court's inherent jurisdiction[34]. QCAT can make a

[32] [2010] QSC 121
[33] See sections 12, 81 and 146 *Guardianship and Administration Act 2000* (GAA).
[34] S 240 GAA.

declaration of capacity on its own initiative or on the application of the individual or another interested person.[35]

QCAT is empowered to direct a person to undergo a medical examination and to appear before it.[36] It may also direct that a party pay for the examination.[37] Under s 130 GAA, QCAT must ensure it has all relevant information and material in order to hear and decide a matter.

Appointment of an administrator by the tribunal does not make the administrator the litigation guardian for the court proceeding. The QCAT appointment is only for the administration of the adult's financial and property affairs. The Supreme Court retains sole jurisdiction to appoint a litigation guardian.

While QCAT's power to make a declaration of capacity under s 146 (1) of the GAA is complementary to the power of the Supreme Court, it's specialist guardianship and administration jurisdiction is better placed to assess capacity, unless the issue is clear and referral to QCAT may only serve to delay the court proceeding.

It is arguable that for the court to retain close supervision of civil proceedings and to maintain impartiality as between the parties, it should avoid the position where they have to assess and determine the issue of a party's capacity, particularly when there are lawyers, doctors and a specialist tribunal available. QCAT can more closely examine the party in a less formal, less intimidating and specialised setting.

The tribunal process allows for other interested parties to make submissions and for reports to be obtained for the particular issue at hand. QCAT's examination is preferable to a court's reliance on the information that may have been generated for other purposes or on their own observations of the party, or on the submissions of the lawyers for the other party who may have a conflict of interest.

The Queensland Law Reform Commission (QLRC) has recommended that one of the factors that should be taken into account by QCAT in determining whether a person has impaired capacity for the purposes of the UCPR is whether or not the person is or will be self-represented.[38]

The QLRC has also recommended extending the referral power to the District and Magistrates Courts and to clarify that a transfer can be for a discrete issue arising in a proceeding and that the Court is entitled to rely on QCAT's declaration.

Exercise of QCAT powers by Supreme Court

There are two specific situations in which the Supreme or District Court may exercise the powers of QCAT under Chapter 3 of the *Guardianship and Administration Act 2000* (Qld) as if it were the Tribunal. The Act confers the power on the court to appoint a guardian or an administrator for an adult with impaired capacity (1) where the court sanctions a settlement between another person and an adult with impaired capacity and (2) where the court orders an amount to be paid by an adult with impaired

[35] S 146 (2) GAA.
[36] S 114 (1) GAA.
[37] S 114 (4) GAA.
[38] Recommendation 28.6.

capacity (s245 GAA). However if the court does not sanction the settlement and the terms of the settlement do not involve a court order for the payment of an amount, then this section does not apply.

In the case of *Welland v Payne*[39], after looking at the facts, the court found that neither of these two circumstances applied and therefore the appropriate course of action was to transfer the proceeding to QCAT pursuant to s 241 of the GAA. In this case the plaintiff had suffered a head injury and proceedings had settled on the basis that the defendant pay the plaintiff $485,000 for damages. The plaintiff applied to the court for an order appointing his father-in-law as his administrator as medical evidence suggested that he did not have capacity to manage the settlement sum. However Mullins J considered that the court did not have the power to order the appointment of an administrator in these circumstances as it did not fall under the limbs of s 245.

How is the issue of capacity of a party raised?

There are several ways for the issue to be raised with the court: by the party's legal representative; by the opponent or their legal representative; and by the court itself.

The role of legal practitioners in assisting the court
The first people likely to face the issue of capacity are a client's solicitor and potentially barrister.

When instructed in civil litigation and concerns about capacity arise, a solicitor must consider questions like:

- Whether the client understands the advice given
- Whether the client can give instructions
- Whether the client can follow or take part in the proceedings, and
- To what extent and degree can the client participate?

The legal position is relatively clear, but I think the practical reality is more complicated.

Client's own solicitor
If a solicitor has a reasonable doubt about a client's capacity, it is their professional duty to satisfy themselves that the client has capacity before proceeding and not to accept instructions from a client who lacks capacity. Under Rule 8 of the *Australian Solicitors Conduct Rules* a solicitor can only accept competent instructions.

There are a number of publications that give guidance to a solicitor in considering whether a client has capacity to instruct. However, most of these relate to wills and powers of attorney rather than the conduct of litigation. QAI's forthcoming publication will provide greater guidance to the profession.

There is a strict view that a legal practitioner should withdraw immediately on suspecting his or her client lacks capacity.

However, a lawyer's first instinct is to help his or her client and it is not always easy to determine whether a client understands the advice and nature of proceedings, particularly in view of the issue-specific nature of the test and the range of client pathologies and circumstances.

[39] [2000] QSC 431.

While it may be safer to encourage an application for a declaration of incapacity or withdraw completely, and doing nothing could expose the client to harm or exploitation, the issue remains a problematic one. It raises serious ethical considerations for legal practitioners.

To raise a doubt with the client could cause offence, resulting in the client going without representation or distrusting their own solicitor, making resolution more difficult. If the doubt occurs during proceedings, to raise it with the court or other party could potentially be prejudicial to a client's case. While the solicitor may be accused of self-interest, they may be acting in their client's interest in not taking their client's matter away from them when the doubt is difficult to resolve[40].

> There is risk that a person's right to make their own decisions will be interfered with inappropriately or excessively.[41]

Appointment of an administrator renders the person unable to make decisions about their financial affairs to the extent of the order, which often means a complete surrendering of those powers to their administrator.[42]

However, a failure to properly consider a client's capacity can be disastrous for the practitioner. In *Legal Services Commissioner v Ford*[43], a solicitor was found guilty of unsatisfactory professional conduct by the Legal Practice Tribunal for not making sufficient enquiries in considering a client's capacity in the context of witnessing a Power of Attorney. In relation to a power of attorney, Ford suggests that for a competent lawyer, indicators such as age, mental state, the person regularly changing wills etc, should trigger the lawyer to ask relevant questions and seek the advice of a GP or specialist to confirm or allay their suspicions.

In *Goddard Elliott v Fritsch*[44] the court held that if the party lacks capacity in circumstances where the solicitor knew or should have known, failure to address the issue could risk indemnity costs.

In addition, proceeding without revealing these suspicions raises the risk that any settlement agreement could subsequently be re-opened on the grounds of impaired capacity.

In *Masterman-Lister v Brutton & Co,* an application was made by a former client against a solicitor for the manner in which his personal injury claim was handled, alleging that the applicant did not have the requisite capacity to agree to the settlement which was reached in the personal injury matter. The settlement included a provision the effect of which was to bar reopening the claim. The settlement had not been sanctioned by the court.

At the time the claim was brought against the solicitor, the client presented evidence from a neuropsychiatric consultant to the effect that the client had been a "patient", meaning he was incapable by reason of mental disorder of managing and administering his property and affairs. The consequence of being a "patient" is that such a person may not bring a claim in any proceeding except by way of his next friend and that any settlement reached in proceedings claiming money is not valid without the approval of the court. Additionally, such "patient" status would have extended the limitation period within which an action could be brought against the solicitor.

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[40] Sections 5 and 6, GAA.
[41] Taylor, Andrew, *Representing clients with diminished capacity*, Law Society Journal Feb. 2010 p 56.
[42] Bergmann v DAW [2010] QCA 143.
[43] [2008] LPT 12.
[44] [2012] VSC 87, at [548] – [549].

As the infirmity was not recognised by any party prior to the agreement being settled, it was held that:

> 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.[45]

Yet, in the NSW case of R v P[46], the party's solicitor applied for a declaration of capacity and appointment of a substitute decision-maker. The court accepted that there was no-one else who could make the application and commented that, on the authority of McD v McD[47] there was no absolute rule against solicitors bringing such action. However, the court commented:

> The bringing of such actions is extremely undesirable because it involves the solicitor in 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; …

On the other hand, in the Victorian decision of Pistorino[48], the court is clear that in litigation, when a legal practitioner becomes concerned about their client's capacity to provide proper instructions, they have a duty to bring it to the court's attention.

These proceedings concerned the third application for the appointment of a litigation guardian for Mrs Pistorino (Mrs P). The application was brought by Mrs P's solicitor in relation to three claims Mrs P then had on foot. Mrs P did not instruct her solicitor to bring this application and the material before the court indicates that she opposed the appointment.

> Mrs P's legal practitioners have a clear and unambiguous duty to raise with the court the issue of her capacity to conduct this and related litigation. Once the matter is raised the court will inquire into the question. The focus of the enquiry is relevantly upon the capacity of Mrs P to give clear instructions and to understand and act on the advice which she is given. In the exercise of jurisdiction the court is acting both to protect the interests of the person with a relevant disability and to protect the court's own processes.[49]

Dixon J in Pistorino found that lawyers are trained and have the skills to assess the capacity of a litigant.[50] Yet the very fact that capacity is issue specific and fluid, makes appropriate and measured assessment difficult considering the range of 'symptoms' from a party's stressful reaction to litigation to a cognitive impairment that renders them unable to understand the proceeding and participate in it, especially where they may otherwise function in their daily lives and where their condition may fluctuate. I am not sure that lawyers are sufficiently trained to make such assessments.

The UK Bar's guidelines for barristers[51] provide that if a barrister declines to accept instructions in the belief a client lacks capacity, rather than withdraw, barristers should try to assist the client, considering their best interests, the time available and on provision of a full explanation to the client. They should try to obtain medical evidence from a GP if possible. They should seek the client's instructions to advise the court. If the client rejects that advice and the solicitor shares the barrister's view of the client's capacity, they have a responsibility to inform the court as an officer of the court[52].

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[45] Masterman-Lister at [31].
[46] [2001] NSWCA 473.
[47] [1983] 3 NSWLR 81.
[48] See note 12.
[49] Pistorino at [6].
[50] Pistorino at [18].
[51] http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/client-incapacity/
[52] [2012] VSC 87, at [548] – [549].

Encouraging a client to obtain a neuropsychological examination may enable the solicitor to satisfy themselves of their client's capacity. However, the client may be uncooperative or have insufficient funds to pay for the assessment.

These circumstances and differing approaches create a tension for lawyers trying to help those who are unrepresented due to disadvantage.

Adoption of American Bar Association's Rule 1.14 may provide an answer to this problem. Rule 1.14 'Client with diminished capacity' provides:

> (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
> (c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Andrew Taylor[53], a solicitor at Legal Aid NSW, argues that in order to intrude into a "client's decision making autonomy to the least extent feasible", adoption of Rule 1.14 would:

- give greater guidance to solicitors and clarify their authority to act;
- demonstrate the profession's commitment to integrity and public service;
- ensure proper and efficient administration of justice consistent with a solicitor's duty to the court;
- reduce solicitors simply ceasing to act in face of ethical complexity and fear of complaint;
- encourage solicitors to explore a variety of options prior to making application for a determination of capacity;
- make it clear that action to determine capacity is acceptable;
- be consistent with legal authority (notwithstanding R v P); and
- provide authority to consult with others, including family members, professional services and adult protection agencies).

By the opposing party's lawyers

It is more difficult for the lawyers for the opposing party because the consequences for their client could be the freezing of the proceeding, preventing their client from prosecuting or defending the claim.

It is also difficult for an opposing party to establish they have an interest in the proceeding. *In Re MAD*[54], the defendant's solicitor in a court proceeding applied to the Guardianship and Administration Tribunal (GAAT, now QCAT) for a declaration of capacity after evidence was raised that the plaintiff was diagnosed with paranoid schizophrenia and associated paranoid delusions. The respondent was, at that time, engaged in litigation in the Queensland Supreme Court in relation to a claim against two medical professionals regarding their assessment of his capacity to engage in work.

The GAAT was required to determine two issues:

[53] See note 31.
[54] [2007] QGAAT 56.

- whether the applicant, being a solicitor for the other party in SC proceedings, had standing to bring the application; and depending on the determination of the first,
- substantively, whether the individual in question had capacity to conduct the legal proceedings.

The Tribunal determined that, in consideration of the definition of "interested person", a person by the Act entitled to apply for an order must be a person interested in the ongoing welfare of the individual (as distinct from the proceedings or litigation). The solicitor conceded that he did not in fact have a sufficient interest to make the application. While the Tribunal identified that it had the power to make an order on its own initiative, there was insufficient evidence to do so in this case.[55]

The issue of whether an opposing party has standing to apply for a determination about capacity does not apply where the application is made to the Court rather than to QCAT. For example, see *Pratt v Dickson* and by s 241, the opposing party can request transfer as an 'active party'.

Rules 12 and 25 of the *2011 Barristers' Rules* suggest that when a barrister suspects that a self-represented person may have impaired capacity, they or their client has an obligation to make the court aware of their suspicions.

On the other hand, such action can open the opposing counsel to allegations of using it as a tactic to undermine the other party's case and potentially prejudice their own client's case.

As allegations of a conflict of interest could arise, there should be no obligation on opposing lawyers to raise the issue.

On the court's initiative

As discussed earlier, the powers of the court are typically utilised when the court is faced with an application by a litigant's solicitor that relates to the capacity of their client. Indeed, the courts, seeking to remain impartial, can be hesitant to initiate an investigation into a litigant's capacity or make their own judgments about capacity where there has been no such application made, when it is not raised by the other party, when there is no documentation or when on brief appearances there is insufficient information to raise concern.

When a party whose capacity is under question is self-represented, it is not clear who bears the responsibility of raising the issue. There are occasions where the court has referred a matter to the tribunal for a determination regarding a litigant's capacity (for example, *Re CAC* [2008] QGAAT 45 and *Re MAE* [2008] QGAAT 34); however this does not appear to be standard practice.

Where the party is unrepresented, consideration of the capacity of an unrepresented party can continue for some time without intervention.

The Supreme Court's *Equal Treatment Benchbook* gives guidance to judges on the competence of witnesses and dealing with witnesses with intellectual and psychiatric disabilities and only refers briefly to the *UCPR* and legal incapacity and the *Guardianship and Administration Act 2000*. There is no practice direction that deals with capacity generally.

[55] See also Re EEP [2005] QGAAT 45.

In *Masterman-Lister v Brutton & Co*[56], the court stated that as a matter of practice the court should investigate where there is any reason to suspect the absence of capacity. Kennedy J said:

> Even where the issue does not seem to be contentious, a District Judge who is responsible for case management will almost certainly require the assistance of a medical report before being able to be satisfied that incapacity exists.[57]

There is no authority in Queensland that obliges the court to consider the issue on its own initiative.

Consideration could be given to creating a new uniform practice direction for all courts to give guidance to judges when concerns are raised about a party's capacity. Such guidance could assist the court in deciding:

- when it might be necessary to consider the issue of capacity – what indicators to consider;
- whether to determine the issue itself or refer it to QCAT for determination;
- how the court may go about making the determination and what orders they can make relating to capacity – could it be for discrete and complex issues only;
- when appointing a litigation guardian, what form supervision should take and at what times throughout the proceedings, not just at the point of sanction.

In addition, Practice Direction 10 of 2014 creates a special supervised case list for cases involving a self-represented litigant. This important development enables the court to identify cases involving a self-represented party whenever they become self-represented and to manage those cases throughout the course of the proceeding to ensure their efficient carriage.

This new procedure ensures that cases involving self-represented litigants have regular hearings, potentially making it easier to identify whether or not capacity is going to be an issue.

However, there are still cases that fall through the cracks (e.g. if a default judgment is granted) and the costs problems for self-represented litigants discussed earlier cannot be overcome simply by being aware that there is potentially a capacity issue.

How are self-represented parties without funds dealt with?

A number of cases have been discussed so far involving a party who was self-represented.

QPILCH's Self Representation Service is a specialist service established to advise and assist self-represented litigants in the civil trial jurisdiction of the Supreme and District Courts and the Court of Appeal, the Federal Court and Federal Circuit Court and the Queensland Civil and Administrative Tribunal. The service draws on the skills and confidence of volunteer lawyers from private practice and staff lawyers to provide free, discrete task assistance to self-represented litigants throughout their proceeding. QPILCH does not represent a client or appear for them.

The clients of the service are overwhelmingly unrepresented because they cannot afford private representation and other free legal services do not have the time or expertise to provide the level of assistance required.

[56] [2003] 1 WLR 1511.
[57] at [17].

Since its inception, the SRS has identified a number of litigants who appear to lack legal capacity, or at least have impaired capacity, and yet are proceeding with their litigation without legal representation. This is of particular concern because these cases may result in summary judgment, default judgment and strike-out applications which do not necessarily reflect the merits of individual cases. The SRS has also witnessed the impact that a lack of assistance can have on a litigant who, for medical reasons, may not be able to adequately litigate their legal issue.

As noted earlier, self-represented litigants have particular difficulties navigating the court system. When capacity becomes an issue, difficulties are compounded for all parties and the courts.

I will discuss three case studies that expose these difficulties. The first case study is concerned with one party who had a number of cases in the courts and QCAT. QPILCH had no involvement in these cases, but reviewed them for a submission prepared for the QLRC review of guardianship. The other case studies involve clients of the Self Representation Service in the Queensland Supreme Court and have been de-identified.

Case study 1

In 2010, QPILCH reviewed in detail a number of cases involving a self-represented litigant named Maguire. Mr Maguire resigned from his employment in 1990 and was later diagnosed with paranoid schizophrenia.

In 2001, he initiated a workers compensation claim and from 2004 commenced various other proceedings over a number of years as a self-represented litigant in the Supreme Court and Court of Appeal. In 2012, another action commenced by Mr Maguire resulted in summary judgment against him and an unsuccessful appeal to the Court of Appeal in 2013.

In reviewing the decisions which have been published, it is apparent that the court routinely had difficulty determining the nature of the alleged legal dispute. The courts have commented that there is a significant increase in time and resources that must be devoted to a particular claim where a litigant is unable to adequately express their claim via proper pleadings. To the best of my knowledge, none of Maguire's proceedings have been successful.

Throughout his various proceedings, Mr Maguire has been opposed by legal counsel in 6 of the 11 proceedings. It is unclear whether Mr Maguire has satisfied the adverse costs orders which have been made against him.

Mr Maguire's case highlights the inadequacy of services which should be available to identify and assist a litigant when legal capacity is an issue.

The legal representatives in one case brought an application to the Guardian and Administration Tribunal (GAAT – the predecessor of QCAT) for a determination regarding Mr Maguire's capacity, which was unsuccessful. Although Mr Maguire did not attend the GAAT hearing, the Public Trustee did attend and made submissions (which were accepted by GAAT) that the legal representatives did not have standing to bring the application. The application was dismissed and Maguire's capacity was not considered.

The application to GAAT motivated Mr Maguire to bring another claim – a claim for damages for defamation against the solicitor who filed the GAAT application.

These cases and the following case studies from the SRS's experience highlight the uncounted costs of the system's current failure to adequately address capacity issues for self-represented litigants and the

practical difficulties which face these already vulnerable parties in achieving meaningful access to justice.

Case Study 2

In this case study, QPILCH provided significant assistance to our client but we were unable to achieve a satisfactory outcome for him or promote a timely intervention.

Our client was involved in a motor vehicle accident, suffering serious chest and head injuries resulting in a brain injury, causing memory loss, significant fatigue and concentration problems.

He engaged a firm of lawyers to bring a personal injury claim for damages against the CTP insurer, signing a no win no fee agreement.

After several years the solicitors advised him of a settlement offer and strongly encouraged him to accept. He had the awareness to request that everything be presented to him in writing so that he could give it proper consideration as he did not feel comfortable making decisions on the spot. A couple of months after advising him of the offer, he maintained that a solicitor had come to his home claiming that he needed immediate instructions otherwise the offer would lapse. Our client claims that during this discussion with the solicitor he was harassed and strongly pushed into accepting and as a result comments were made by him that ultimately terminated the client agreement.

The firm sued in the Supreme Court for its full costs. The firm then made an urgent application seeking declarations on the validity of the original retainer agreement, and in particular about the original retainer's terms of payment for work completed up until the date of termination. In the period between the engagement of the firm and the termination of the retainer, the law governing costs agreements had undergone significant change. The defendant approached QPILCH for urgent assistance and we considered he had good prospects in responding to the application.

We instructed counsel and assisted in finalising affidavits, liaised with the client and third parties to explain his options, strategies and justifications for our recommendations. The instructing QPILCH solicitor formed the view at this stage that the client may have impaired capacity.

During his initial contact with our staff it became clear that he was confused about the status of his claim and he was not able to tell staff what stage either claim had reached.

The court ruled that the termination issue would proceed to trial to determine how the agreement would be construed and the costs the firm would be entitled to recover. After the hearing the law firm advised that they were keen to resolve the matter informally as they recognised that the cost of disputing it was not proportionate to the sum in dispute. We advised our client to accept the offer as it was most likely less than what he would be required to pay at trial regardless of what legal argument was accepted. Our client insisted that he wanted to take it to trial rather than consider an offer.

We suggested that he engage in mediation with the law firm to see if an agreement could be reached without going to trial. However he did not feel comfortable with mediation.

To preserve his rights, QPILCH assisted him with drafting a defence and suggested that he consider whether he wanted to add capacity into the defence.

As he was not willing to accept our advice regarding the merits of the case and insisted on proceeding to trial, we could no longer provide him with assistance.

The case was discontinued more than two years after QPILCH closed its file. Our client later informed QPILCH that he had settled the case as proposed by the law firm because he had run out of steam. He said he remained unhappy with the settlements, but could no longer bear the stress of the proceedings. The settlements were not sanctioned by the court.

This case highlights the difficulties in identifying if a person has impaired capacity . The solicitors who had represented him had obviously taken the view that their client had the requisite capacity or they believed that they could do their duty and help him appropriately.

Case study 3

Our client was a refugee who came to Australia after escaping her homeland, where she experienced severe trauma. She developed a psychiatric illness as a result of her earlier experiences and was under long-term psychiatric care. She had no support network.

She was visited by a real estate agent about selling her home where she lived with her children. The agent represented the purchaser of the neighbouring property who wanted both properties for a development.

During a hospital admission for a serious psychiatric episode, the agent picked her up from the psychiatric hospital, took her to the auction for the sale of her house and returned her to the hospital after the sale. When she realised she had agreed to the sale of her home, she refused to settle. The purchaser took action against her for specific performance of the contract.

She was self-represented as she had insufficient funds to engage a solicitor. She drafted her own defence and another community legal centre helped her settle it in a 20 minute interview. The CLC referred her to QPILCH.

After several appointments with volunteers and staff, it became clear that she was unable to complete the tasks that the court was ordering or comply with the court timetables. We were concerned that she lacked the capacity to deal with the complexities of the litigation. She appreciated the nature of the litigation, but was frozen in her ability to make the decisions necessary to progress it.

The plaintiff was pressing the court for the appointment of a litigation guardian. In one order, a deputy registrar asked the plaintiff to nominate a psychiatrist for an “independent medical examination”.

It was apparent that the court was uncertain how to handle her circumstances. We tried and failed to find a firm to represent her on a pro bono basis.

She was unable to find someone willing to act as her litigation guardian and in any event could not afford to pay for a lawyer to represent a litigation guardian.

We discussed the case with her carefully and she consented to making an application to QCAT for a declaration of capacity if the Public Trustee would act as her litigation guardian.

QPILCH ultimately convinced the Public Trustee to be her litigation guardian by arranging for a member law firm to provide pro bono representation to the Public Trustee as litigation guardian.

The Public Trust Office (PTO) agreed to two conditions we proposed – that it would be appointed as a limited administrator of her complex financial affairs only (that is, only for the purposes of the litigation), and it would not charge the client for its legal services in administering the post-settlement arrangements.

QPILCH instructed experienced counsel to appear at the hearing. At the QCAT hearing, the Public Trustee's representative argued that it should be appointed as full administrator, contrary to the agreement. A part of the hearing was taken up by argument on this issue. Our client's psychiatrist gave evidence that she had capacity for everyday living but could not make decisions of a complex nature, which was accepted by the tribunal, and a limited administration order was made.

Represented by a member firm, the Public Trustee ultimately took the view that it was in the client's best interests to settle rather than litigate. The settlement, subsequently sanctioned by the court, was very favourable to our client, although resulting in transfer of her property to the plaintiff/purchaser.

However, after the agreement was sanctioned, the PTO also did not initially abide by its agreement to not charge administrative costs, making it impossible for the client to purchase a home another arm of the PTO had helped her find. We had to remind the PTO of its agreement in order to obtain reimbursement of the charges.

In light of these circumstances, I suggest that it is essential that the court closely manage cases in the interests of the litigant when it appoints a litigation guardian, particularly where they are self-represented and may not have other social support.

Conclusion

In summary, I suggest the following possible solutions to the problems identified in this paper:

1. Implementation of the recommendations of the Queensland Law Reform Commission's 2010 Report of its *Review of Queensland's Guardianship Laws*, particularly those relating to the appointment of the Public Trustee and Public Guardian as litigation guardian and related costs provisions.
2. In accordance with the principle that an application for a declaration of capacity be a last resort, the Supreme Court develop a new practice direction to give judges clear guidance on when to intervene in proceedings when a party may not have the requisite capacity to conduct the proceedings if unrepresented.
3. That the Supreme Court (extended to the District Court and Magistrates Court as recommended by the QLRC) refer matters when an unrepresented party is strongly suspected of lacking capacity to QCAT for determination.
4. UCPR Rule 93 could be amended to allow a litigation guardian to receive legal advice through a direct access brief or on a discrete task basis.

5. In order to demonstrate the legal profession's commitment to integrity and public service, to ensure the proper and efficient administration of justice and to reduce ethical complexity, the Australian Solicitors' Conduct Rules be amended to allow solicitors to explore more options prior to making an application for a declaration of capacity, to give them authority to consult with others and to make it clear an application for capacity is acceptable. Adoption of ABA rule 1.14 could achieve these purposes.