

REPRESENT

Vulnerable and Incapable Clients

As lawyers, we are in a special position to help people who seek us out for advice and instill their trust in us. It is probably safe to say that when injury victims retain a litigation lawyer, they are likely going through one of the more difficult times in their lives. Some of them may have mental disabilities that make communication and decision-making difficult. Where clients are under a “legal disability” –lacking mental capacity, for example – they can be particularly vulnerable. It is essential that they be able to exercise their legal rights in the same way as anyone else. In order to enable them to do so, lawyers need to give these particularly vulnerable clients special consideration.

LITIGATING

BY ROBERT BEN

What is Legal Disability?

There is a tension in law between autonomy and paternalism. The latter is seen in the concept of legal disability which has its origins in the attitude that, in some circumstances, the law needs to act for the protection of those who are believed not to be able to do so for themselves. Such protective action is to be exercised in a manner to promote their “best interests,” with the underlying assumption being that the individual’s personal and economic affairs could be better managed by others – a substitute decision maker.¹

Our law generally requires that a person possess a requisite level of mental capacity or decision-making ability before engaging in certain activities.² This is seen in legislation and case law that addresses the threshold legal capacity³ for matters, including entering into enforceable contracts,⁴ consenting to personal and health care,⁵ granting powers of attorney,⁶ requiring guardianship over one’s person or property,⁷ making a will,⁸ and even giving evidence in court.⁹

And so it is in the realm of civil litigation where persons must have a requisite capacity to manage their own legal affairs. Persons are deemed to be under a legal disability if they are minors under the age of 18 years or “mentally incapable” under the Ontario *Substitute Decisions Act* in respect of an issue in the particular legal proceeding.¹⁰ Persons will be “mentally incapable” under the Act if they fail to meet the “understand or appreciate” test: that is, they are

not able to understand information relevant to making a decision concerning their property (which includes a legal claim), care or safety; OR, they are not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Effect of Legal Disability

Legal disability has very real consequences for a client. It results in a near total loss of autonomy in the legal process. The client cannot pursue a legal claim except by and through a Litigation Guardian.¹¹ The Litigation Guardian is empowered to do “anything” required or authorized to be done by a party to litigation¹² and who alone “instruct[s] the lawyer in the conduct of the [legal] proceeding”¹³ having regard to the best interests of the person under legal disability.

No settlement, whether or not litigation has been commenced, is binding on the person under legal disability without the approval of a judge.¹⁴ The Litigation Guardian must swear to the reasons in support of any proposed settlement.¹⁵ Only in the case of a minor over 16 years of age, is the minor’s consent to the settlement even required, although that too can be dispensed with if the Litigation Guardian demonstrates the child is not acting in his or her own best interests.¹⁶ In every case, the court may ask the Children’s Lawyer or the Public Guardian and Trustee, as the case may be, to state any objection or provide any recommendations with respect to any settlement of a claim.¹⁷

The court controls the use to which any money payable in a proposed settlement or judgment will be put. By default, any money payable to a person under legal disability shall be paid into court unless a judge orders otherwise.¹⁸ If a lump sum settlement or award is for personal injury damages arising from a motor vehicle accident, that portion representing pecuniary loss shall, in certain circumstances, be paid periodically by way of a structured settlement annuity.¹⁹ In most cases, a Guardian of Property will be appointed to distribute the funds in accordance with a court approved plan of management, which itself is subject to periodic review.²⁰

Determining Mental Capacity

Given the consequences of a finding of legal disability, it is imperative that lawyers be able to distinguish between clients who truly lack capacity and those who may have other mental disabilities merely requiring accommodation.

The starting point is the legal presumption that a person has capacity until proven otherwise.²¹ This is because the right to make one's own decisions and conduct one's own affairs is a fundamental one that should only be displaced where it is established that a person lacks the mental capacity to do so.²²

In general terms, capacity is demonstrated by the ability to "understand" and "appreciate." To meet the test for capacity to instruct counsel, persons must: (1) understand what they have asked the lawyer to do for them and why; (2) be able to understand and process the information, advice and options the lawyer presents; and, (3) appreciate the advantages, drawbacks and potential consequences associated

with the options with which they are presented (i.e. be able to assess risk).²³

Clients are not incapable simply because their decisions may appear questionable or because the lawyer might not agree with those decisions.²⁴

The incapacity must affect the party's decision-making in relation to the issues in the litigation. A person may be capable of making a basic decision while being incapable of making a complex decision. The courts have recognized

It is only after
a person is found
incapable that the law
concerns itself with
protecting his or her
best interests.

It is only when clients appear unable to understand information provided to them, or to appreciate the consequences of a decision, good or bad, does their capacity come into question.

When evaluating a client's capacity, it is therefore irrelevant whether or not a particular decision or activity is in the client's "best interests" – after all, capable people have the right to take risks and to make what others might consider bad decisions.²⁵ It is only after a person is found incapable that the law concerns itself with protecting his or her best interests.

Incapacity must stem from a mental source such as mental illness, dementia, developmental delay or physical injury. It does not stem a lack of sophistication, education or cultural differences.

varying levels of capacity required for different decisions, and varying degrees of incapacity to make decisions.²⁶

Some lawyers would argue that assessing a client's capacity is a job that only a properly trained mental health professional can perform. This is true, but only to a point. Because lawyers are precluded from acting on behalf of an incapable client, they are necessarily under an obligation to assess their clients' capacity to instruct counsel. In this context, legal capacity is a legal determination, not a clinical assessment.²⁷

Lawyers continually make judgments about their clients' capacity, whether they realize it or not. An awareness that "something is not right" with a client is itself an assessment of the client's

capacity, albeit one based on intuition or conjecture.²⁸

While *Rules of Professional Conduct* impose an ethical duty on the lawyer to take steps to ensure that a legally disabled client's interests are protected and not abandoned,²⁹ they do little to provide any meaningful guidance about how a lawyer is supposed to determine a client's capacity. There is, however, helpful commentary elsewhere. The *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* by the American Bar Association, recommends that the first step is to conduct a "preliminary screening" to identify any "red flags" suggesting possible incapacity. If there are substantial (i.e. more than mild) concerns about diminished capacity, professional consultation or formal assessment may be warranted.³⁰ The *Capacity Worksheet for Lawyers*³¹ is a useful tool in this regard. It provides a more systematic, rather than intuition-based, approach to assessing client capacity:

- 1) Cognitive functioning:
 - a) Is the client demonstrating short-term memory problems (repeats questions frequently, forgets what is discussed within 15 minutes, cannot remember events of the past few days)?
 - b) Is the client demonstrating language/communication problems (difficulty finding words, vague language, trouble staying on topic, disorganized, bizarre reasoning)?
 - c) Is the client demonstrating comprehension problems (difficulty repeating simple concepts, repeated questioning)?
 - d) Is the client demonstrating disorientation (trouble

navigating office, getting lost coming to office, confused about the day, time, year, season)?

- 2) Emotional functioning:
 - a) Is the client in emotional distress (anxious, tearful, excited, pressured, manic)?
 - b) Is the client emotionally labile (moving quickly between laughter/tears, demonstrating feelings inconsistent with the topic being discussed)?
- 3) Behavioural functioning:
 - a) Is the client delusional (feeling others are "out to get" him, spying on him, fearful, unsafe)?
 - b) Is the client hallucinating (appearing to see, hear or talk to things or people not there, misperceiving things)?
 - c) Is the client's grooming or hygiene poor (unusually unclean/unkempt in appearance or inappropriately dressed)?
- 4) Mitigating/Qualifying Factors (Factors such as stress, grief, depression, reversible medical conditions, hearing or vision loss, or educational, socio-economic, or cultural background that can influence a determination of capacity)
 - a) Is the client under stress, grieving, depressed because of recent events?
 - b) Are there medical issues (nutrition, medication)?
 - c) Is time of day a factor (does client function better in mornings rather than evenings)?
 - d) Are educational, cultural or ethnic barriers at play?

After gathering all this information, the lawyer can then exercise professional judgment to determine whether there

is substantial evidence of diminished capacity that warrants consultation with or referral to an appropriate professional assessor, or whether, despite evidence of some diminished capacity, direct legal representation can continue.

Incapable Clients' Rights

Lawyers should not decline to represent clients only because they are unsure if clients are mentally capable. Although the *Rules of Professional Conduct* do allow lawyers a general right to decline a particular representation, this right must be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation.³²

The *Rules of Professional Conduct* go on to mandate that "when a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship."³³

The lawyer must, however, be prepared to ensure that an incapable client's best interests are protected. The *Rules of Civil Procedure* provide that "where it appears to the court that a litigation guardian is not acting in the best interest of the party under disability, the court may substitute the Children's Lawyer, the Public Guardian and Trustee or any other person as litigation guardian."³⁴ Such a step contemplates the lawyer disclosing information that is certainly subject to lawyer-client privilege, putting the lawyer in a dilemma. The *Rules of Professional Conduct* provide that "when a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances."³⁵

The *Rules* go on to say that “the client’s authority for the lawyer to disclose confidential information to the extent necessary to protect the client’s interest may...be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer’s belief that the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given to the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.”³⁶ The courts are also prepared, where necessary and appropriate, to deploy sealing orders to protect client confidentiality.³⁷

In cases where the lawyer must take protective action for an incapable client by appointing a Guardian of Property, for example, it has been suggested that the proposed guardian should be represented by independent separate counsel to avoid a potential conflict of interest.³⁸ Moreover, on any such applications (which must be served on the incapable person along with advice of his or her right to oppose the application), the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person and, for the purposes of the application, the person shall be deemed to have capacity to retain and instruct counsel.³⁹

Accommodating Clients with Diminished Capacity

It is important to recognize that some clients with a diminished mental capacity because of age, mental illness, brain injury, or the like, may not be under a legal disability. These clients may merely need accommodations for their disability so that they can exercise their legal rights like everyone else.

Lawyers, like any other service providers, are legally obliged to provide accommodations to disabled clients who need them.⁴⁰ Lawyers can educate themselves about common mental disabilities and typical accommodations associated with such disabilities. However, every disabled client will have unique accommodation needs. Clients are ultimately the best resource in this regard – asking them what accommodations they need to understand, appreciate, and participate in the lawyer-client relationship is usually the best starting point.⁴¹

That said, clients with diminished mental capacity may benefit from some simple, common sense accommodations. Lawyers might consider one or more of the following during client meetings:⁴²

- 1) Provide advance explanation of the purpose of any meeting with the client.
- 2) Discuss one issue at a time.
- 3) Break information into small, manageable chunks.
- 4) Use simple, straightforward, non-legal language.
- 5) Speak at a slower pace to allow the client to process information.
- 6) Allow extra time for clients to formulate and ask clarifying questions.
- 7) Provide cues to assist recall rather than expecting spontaneous retrieval of information.

- 8) Repeat, paraphrase, summarize, and check periodically for accuracy of communication and comprehension.
- 9) Confirm understanding by asking the client to explain in their own words what has been said.
- 10) If information is not understood, incompletely understood, or misunderstood, provide corrected feedback and check again for comprehension.
- 11) Provide summary notes and information sheets to facilitate later recall, including key points, decisions to be made, and documents to bring to next meeting, etc.
- 12) Schedule appointments for times of the day when the client is at peak performance.
- 13) Schedule multiple, shorter appointments rather than one lengthy appointment.

In fact, these points would benefit many of our clients and, in particular, accommodate the vulnerable clients most of all.



Robert Ben is a Director on the OTLA Board and practices with Thomson Rogers

NOTES

¹ Michael Bach & Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity*, Law Commission of Ontario, October 2, 2010.

² Ibid.

³ An excellent “Capacity Checklist” can be found at welpartners.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf

⁴ *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, s. 2(1)

⁵ *Ibid.*, s. 2(2); *Health Care Consent Act*, 1996, S.O. 1996, c. 2, s. 4(2)

⁶ *Ibid.*, ss. 8(1) and 47(1)

⁷ *Ibid.*, ss. 6 and 45

⁸ *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.)

⁹ *Evidence Act*, R.S.O. 1990, c. E.23, s.18

¹⁰ *Rules of Civil Procedure*, Rule 1.03 d

¹¹ Rule 7.01

¹² Rule 7.05

¹³ Rule 7.05

¹⁴ Rule 7.08

¹⁵ Rule 7.08

¹⁶ Rule 7.08

¹⁷ Rule 7.08

¹⁸ Rule 7.09

¹⁹ *Insurance Act*, R.S.O. 1990, c I.8, s. 267.10; O.Reg. 461/96, s. 6(1).

²⁰ *Marcoccia v. Gill*, 2007 CanLII 33 (ON SC)

²¹ *Calvert v. Calvert*, [1997] O.J. No. 533 (Gen. Div.), aff'd [1998] O.J. NO. 505 (C.A.)

²² *Starson v. Swayze*, [2003] 1 S.C.R. No. 722

²³ *Costantino, supra*; *Torok v. Toronto*

Transit Commission, 2007 CarswellOnt 2834

²⁴ Ed Montigny, *Notes on Capacity to Instruct Counsel*, ARCH Disability Law Centre, 2010

²⁵ *Starson, supra*

²⁶ *Costantino, supra*

²⁷ Judith Wahl, *Capacity and Capacity Assessment in Ontario*, http://practicepro.ca/practice/PDF/Backup_Capacity.pdf

²⁸ American Bar Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*, Commission on Law and Aging and the American Psychological Association (2005)

²⁹ Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.2-9 and commentary

³⁰ *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, supra*

³¹ *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, supra*

³² Law Society of Ontario, *Rules of Professional Conduct*, Rule 4.1-1 and commentary

³³ Rule 3.2-9 and commentary

³⁴ *Rules of Civil Procedure*, Rule 7.06(2)

³⁵ Law Society of Ontario, *Rules of Professional Conduct*, Rule 3.2-9 and commentary

³⁶ Rule 3.3-1 and commentary

³⁷ *Murphy v. Carmelite Order of Nuns*, 2004 CarswellOnt 9965

³⁸ Nimali D. Gamage, *Conundrums and Pitfalls in Personal Injury Related Guardianship Applications*, paper and presentation, Law Society of Upper Canada, The Oatley-McLeish Guide to Motor Vehicle Litigation 2017; See also: *Piscione v. Borg*, unreported decision of Greer J. dated June 6, 1997.

³⁹ *Substitute Decisions Act*, *supra*, section 3(1)

⁴⁰ Law Society of Ontario, *Rules of Professional Conduct*, Rule 1.14 and commentary; Human Rights Code, RSO 1990, c H.19

⁴¹ *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, supra*;

⁴² *Providing Legal Services to People with Disabilities*, ARCH Disability Law Centre, December 2010

Errors on court forms happen— and it's costing you.

Efficiency. Accuracy. Timeliness. Consistency.

ACL5 helps more than 14,000 legal professionals at over 500 law firms produce thousands of court forms and letters faster, at a lower cost, and with less risk of errors.

Call or email for your firm's demo.
800-340-3234
info@korbitecinc.com



ACL5