

At full capacity

Farr v State of Queensland [2009] NSWSC 906

By Anna Walsh and Greg Walsh

The factors to be considered in assessing whether a plaintiff has capacity to carry on and settle proceedings and whether they are incapable of managing their affairs was recently determined in the Supreme Court of NSW. Here, the plaintiff brought a medical negligence claim against the state of Queensland, the South Eastern Area Health Service and the Sydney South West Area Health service, for her management and treatment at various hospitals between 1 February 1999 and 19 July 2006. She alleged that the defendants negligently made and maintained a diagnosis of myasthenia gravis and failed to treat her psychiatric symptoms, such that she developed a condition known as 'conversion disorder'.

'Conversion disorder' is a condition where patients present with neurological symptoms such as numbness, paralysis, or fits, but where positive physical signs of hysteria can be found. The plaintiff's expert psychiatrist was of the opinion that the plaintiff suffered from a very severe conversion disorder resulting in her claims that her significant injuries, including paraplegia, were of a physical rather than a psychiatric origin. This diagnosis of a conversion disorder was not disputed by the defendants' expert psychiatrist.

During the course of her case, the plaintiff's expert psychiatrist was asked to comment upon the plaintiff's capacity to provide legal instructions. The expert expressed the opinion that while the plaintiff had capacity to provide instructions to settle her claim, her injuries and the extensive hospitalisation during her teenage years meant that she was unable to manage a significant sum of money and was poorly equipped to make serious financial decisions to invest or use the money to ensure her future care in the longer term. He was concerned that the plaintiff was not 'worldly' and was at considerable risk of being influenced improperly by others, and potentially being exploited.

The expert opinion raised concerns as to whether the plaintiff could properly make use of any proposed settlement monies towards appropriate future treatment. The defendants' expert psychiatrist agreed that she had the required capacity to provide instructions in her legal case. Mediation was conducted during which the plaintiff instructed her lawyers to accept an offer of settlement as against the second and third defendants. The offer was considered by her legal team to be within a reasonable range of damages, considering the risks of litigation and

the potential quantum of damages she might recover if successful at trial. However, given the issues raised by the psychiatrist, the parties agreed that the issue should be resolved through a court hearing, to ensure that the plaintiff's interests were fairly protected.

The plaintiff therefore brought an application before the court seeking a declaration that she had the capacity to settle her case under UCPR rule 7.14. As an alternative, the plaintiff sought a declaration that her father be appointed as tutor, that the settlement be approved under s76(4) of the *Civil Procedure Act* 2005, and that there be a declaration that the plaintiff was incapable of managing her own affairs within the meaning of s41 of the *New South Wales Trustee and Guardian Act* 2009. The plaintiff consented to the application being heard by the court, although she did not agree that she lacked capacity to appropriately manage the settlement fund. The plaintiff also indicated in her affidavit evidence that she would not seek to challenge the decision of the court, even if a declaration was made that she lacked capacity to manage her financial affairs.

Justice Price heard evidence from both the plaintiff and her father and declared that the plaintiff was not under a legal incapacity for the purpose of settling her proceeding against the second and third defendants and carrying on proceedings against the first defendant. In coming to this decision, His Honour gave the following reasons:

1. The plaintiff had achieved a University Admission Index score of 85.90, was studying psychology at Macquarie University and was 25 years of age.
2. The plaintiff had commenced the claim without instructions from a tutor.
3. The plaintiff had participated in lengthy discussions with her solicitors and barristers.
4. The plaintiff understood instructions that she gave to her solicitor, which included providing verbal instructions to accept the offer of settlement, and also understood the information that her solicitors had communicated to her.
5. It was the opinion of senior and junior counsel that the plaintiff had capacity to give instructions as to the conduct of her case.
6. The plaintiff's father believed she had the required capacity and was present at the mediation where the settlement offer of the second and third defendants was explained to the plaintiff.

7. The plaintiff set out in her affidavit her understanding of the second and third defendants' offer of settlement, and the deductions to be made if the settlement proceeds.
8. It was the opinion of the defence expert psychiatrist that the plaintiff had no mental incapacity arising from her conversion disorder that would interfere with her capacity to make financial decisions.

In relation to the declaration sought that the plaintiff was incapable of managing her affairs, Justice Price referred to the test as set out in the decision of Powell J in *PY v RJS*,¹ in interpreting s18 of the *Mental Health Act 1958*, wherein his Honour noted that a person is not incapable of managing his or her own affairs unless at the least it appears that they are incapable of dealing in a reasonably competent fashion with the ordinary routine affairs of daily life and that by reason of that lack of competence there is shown to be a real risk that either they may be disadvantaged in the conduct of such affairs, or monies or property may be dissipated or lost. It was not considered to be sufficient to demonstrate that a person lacks the high level of ability to deal with complicated transactions, or that they do not deal with even simple or routine transactions in the most efficient manner.

Evidence before the court indicated that the plaintiff was a sensible young woman living with her parents who had the skills to manage her day-to-day affairs and to manage small sums of money. The opinion of the defendant's expert psychiatrist was that the plaintiff was no more naive or unworldly than any other 25-year-old woman. The plaintiff's expert, however, was concerned that the plaintiff's *belle indifférence*, which was described as a bland optimistic and inappropriate indifference in the context of considerable disability, was strongly linked with a lack of insight into the seriousness of her situation. This lack of insight was argued to be at the heart of decisions that she might make about

future treatment and that the appointment of a suitable person as a manager would be of assistance by providing objective advice as to treatment. During oral testimony, the plaintiff confirmed that while she believed that her disabilities were largely due to physical causes, she was prepared to accept that she may be wrong and was open to undergoing treatment recommended by the psychiatrist.

In order to make such a declaration, which would deprive the plaintiff of independence, his Honour noted that something more must be demonstrated than simply a lack of experience in making major financial decisions. His Honour considered that imposing a third person to act as manager would add complexity to the plaintiff's life to little advantage and that while she lacked some insight, it was not demonstrated that she lacked the competence to make reasonable decisions as to her future treatment, and that her future needs would be best served by giving her independence with the loving support of her family. Ultimately, the court was not satisfied that the plaintiff lacked competence to the extent that she ran a real risk that she might be disadvantaged in the conduct of her worldly affairs or that settlement monies might be dissipated or lost. ■

Note: 1 [1982] 2 NSWLR 700.

Anna Walsh is a Principal in the Medical Law Department of Maurice Blackburn Lawyers. **PHONE** (02) 8267 0934

EMAIL AWalsh@mauriceblackburn.com.au.

Greg Walsh is a lecturer in the School of Law at the University of Notre Dame Australia and a solicitor in the Medical Law Department at Maurice Blackburn Lawyers.

PHONE (02) 8204 4304 **EMAIL** gwalsh1@nd.edu.au.

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