CASE NOTE

GODDARD ELLIOTT V FRITSCH
[2012] VSC 87

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This year in the Victorian Supreme Court, Justice Kevin Bell handed down the decision in *Goddard Elliott v Fritsch*.[1] This is a case that establishes the existence of 'capacity negligence' – a newly defined category of professional negligence.[2] The case serves as a warning to lawyers to make careful, ongoing assessments of their clients' decision-making capacity.

Mr Fritsch was sued for outstanding legal fees following a Family Court settlement that Mr Fritsch claimed he would never have agreed to had he been in good health at the time. He countersued, arguing that his lawyers and an accountant had been negligent in their preparation of his case, and negligent in accepting and acting on instructions he lacked the capacity to give. He settled with barristers Mr Ackman and Mr Rosen and with the accountant Mr Ferguson, but not with his solicitors, Goddard Elliott.

Paul Fritsch was a Vietnam veteran embroiled in a complicated dispute over the property settlement resulting from his divorce. The family law proceedings were characterised by repeated requests for discovery from his wife who was suspicious that her husband was hiding assets behind a series of trusts and family business arrangements. Mr Goddard, a family law specialist, described the case as 'one of the nastiest cases that [he] ever had'.[3] The case was in preparation and pre-trial mediation over a period of two years, during which Mr Fritsch's mental health was poor and increasingly in decline the closer the matter came to hearing.

Mr Fritsch's solicitor, Andrew Goddard, was keen for the matter to settle. He was particularly concerned about a letter Mr Fritsch had received from his accountant that Fritsch had failed to disclose on discovery but which was subsequently found by the

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1 [2012] VSC 87.

2 See also Paul Duggan, *Is your enemy's enemy your friend? Proportionate liability cases and the Rule in Jones v Dunkel* (2012) <http://paulduggan barrister.com/2012/04/25/is-your-enemys-enemy-your-friend- proportionate-liability-cases-and-the-rule-in-jones-v-dunkel-3/>; Paul Duggan, *Leading evidence from beyond the grave* (2012) at http://paulduggan barrister.com/2012/04/09/leading-evidence- from-beyond-the-grave/> at 15 June 2012.

3 *Goddard Elliott v Fritsch* [2012] VSC 87 [132] (Bell J).

wife.[4] However, the matter did not settle at mediation in December 2003 and, despite two years of preparation, the matter was still not ready to go to trial on the date it was listed for hearing in September 2004. Last minute forensic accounting advice was received and negotiations finally led to a settlement on the first day of the adjourned hearing. The settlement was described as being on terms that were 'overly generous to the wife' with the calculated loss of opportunity to Mr Fritsch being $900,000.[5] Mr Fritsch succeeded in establishing preparation negligence and capacity negligence. The loss was attributed to the capacity negligence on the basis that the lawyers ought to have known that Mr Fritsch lacked the capacity to give instructions to settle.

It was not disputed that Andrew Goddard knew that Paul Fritsch suffered from mental health problems. Mr Fritsch's ex-wife had mentioned his depression in her first affidavit in 2002 and Goddard Elliott had requested an expert's report on his condition as part of the family law proceedings. This request was supported by a letter from Mr Goddard outlining Paul's difficulty in giving instructions, especially under pressure. Doctor Sturrock's report of June 2003 diagnosed a 'major depressive illness' and was updated in 2004 at the request of Mr Goddard.

By May 2004, Paul Fritsch was being treated by a psychiatrist, Dr Velakoulis, who diagnosed him in July as suffering from 'a major depressive illness with chronic post-traumatic stress disorder'. Whilst the family law dispute was conducted over a two year period, it was the days and weeks leading up to the initial trial date of 13 September 2004, and settlement on 16 September, that were particularly important in relation to Mr Fritsch's mental health. Both Paul's solicitor, Mr Goddard, and one of the barristers, Mr Ackman, had serious concerns about Fritsch's mental health problems, which included thoughts of suicide. Mr Rosen, the barrister, was alone in stating that he saw nothing in Fritsch's behaviour to give him cause for concern; however his evidence on the matter was rejected by Justice Bell. In a report provided to Mr Goddard at Mr Ackman's insistence just a few days prior to settlement, Dr Velakoulis stated that Paul Fritch's 'current depressive illness and his Post-Traumatic Stress Disorder seemed to be impacting ... on his ability to attend to information, to concentrate, to 'digest' concepts and come to conclusions efficiently. As such, this needs to be considered during his court appearances.'[6]

Dr Velakoulis' opinion of Mr Fritsch's decision-making capacity was not conclusive and Mr Ackman was sufficiently concerned about Mr Fritsch that he sought an ethics advice from the Victorian Bar on the issue. Significantly, neither lawyer appeared to characterise Mr Fritsch as lacking decision making capacity at the time. Mr Ackman's letter to the Ethics Committee stated Paul Fritsch 'had significant psychiatric problems … but apparently he is able to provide instructions.'[7] However, in an apparent contradiction of this, he went on to state that even if Mr Fritsch accepted advice of counsel 'it is with extreme reluctance and without any apparent cognitive understanding of why he is so agreeing.'[8] In a later clarification, Mr Ackman stated:

4 Ibid [172] (Bell J).
5 Ibid [1103] (Bell J).
6 Ibid [722] (Bell J).
7 Ibid [336] (Bell J).
8 Ibid [337] (Bell J).

> Whereas the client may be literally capable of giving instructions according to his psychiatrist, Counsel is in no way satisfied that he comprehends or appreciates the decisions he must make … [W]hen he gives instructions it is impossible to have confidence that he understands the import and/or effect of these instructions.[9]

The advice received read in part: '[T]he Committee notes the information that the medical reports indicate that the client is capable of giving instructions and … considers that this request does not raise an ethical issue.'[10] Mr Ackman understood their advice to be that Counsel would be protected so long as they received written instructions from Paul Fritsch 'that he understood and comprehended the advice given.'[11] Mr Ackman concluded in a subsequent file note that 'the husband had understood the nature of the settlement and for a number of personal reasons had agreed to the settlement despite the fact that the settlement was unable to be recommended to him by Counsel.'[12]

Justice Bell did not comment directly on the advice of the Bar Association but his clear decision was that where lawyers are in any doubt about the decision making capacity of their client, they must bring the matter to the Court for a ruling. In this situation it was not sufficient for the lawyers to rely on the advice of the treating psychiatrist (which was somewhat equivocal in this case), nor on the advice of the Bar Committee, or their own observations given that they seemed to disagree on this point. Justice Bell indicated that the appropriate course in a situation where there is doubt as to the client's capacity is to bring the matter to the attention of the Court and seek a ruling.[13] In this instance, this would most likely have led to an adjournment to seek a capacity assessment and expert evidence on the matter. In a strongly worded judgment, Justice Bell opined that the decision as to capacity is 'not with the lawyers, not with the doctors, not with the client or party but with the court.'[14]

As noted by Justice Bell 'there appears to be no reported case in which a court has held it be a breach of a lawyer's duty of care to take and act on instructions from a client who the lawyer knew or should have known lacked the mental capacity to give instructions.'[15] Justice Bell found that lawyers do owe a duty to their clients to assess their capacity to give instructions, characterising this as 'an aspect of the general duty of care which a lawyer owes to their client, for it is always to be expected of a lawyer exercising ordinary skill and competence that they are reasonably satisfied of the client's mental capacity to instruct.'[16]

Whilst Justice Bell found that this duty of care was actionable in negligence, he was a little more circumspect in relation to whether this duty is also of a fiduciary nature. Justice Bell opined:

> [I]t might be thought the fiduciary obligations of a lawyer extend to not coercing a client to settle and to not knowingly or recklessly taking settlement instructions from a client lacking mental capacity. That view would dovetail with the obligations on the

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9 Ibid [342] (Bell J).
10 Ibid [343] (Bell J).
11 Ibid [373] (Bell J).
12 Ibid [376] (Bell J).
13 *Till v Nominal Defendant* [2010] QSC 121.
14 *Goddard Elliott v Fritsch* [2012] VSC 87 [562] (Bell J).
15 Ibid [418] (Bell J).
16 Ibid (Bell J).

> part of a lawyer to bring justified concerns about a client's mental capacity to the attention of the court and not to continue to act for a client lacking capacity without a next friend being appointed.[17]

The application of the advocates' immunity however, did not turn on whether it was characterised as a fiduciary duty or an aspect of the duty of care, but on the substance of the wrong – the capacity negligence.

Justice Bell applied the issue-specific approach to capacity decisions approved in *Masterman-Lister,*[18] and adopted in Australian cases,[19] whereby 'the focus should be on the capacity of the client to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given.'

As officers of the court, it is the instructing solicitors who carry 'primary responsibility for satisfying themselves as to their client's ability to instruct them and to understand their advice …'[20] The court has inherent jurisdiction to enquire into the capacity of those appearing before it. In the Family Court of Australia where the litigation guardian is known as a case guardian, the rule of incapacity and powers of appointment are to be found in rule 6.08(1) of the *Family Law Rules 2004* (Cth).

The required standard of capacity was set out by the High Court in *Gibbons v Wright*:[21]

> The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.

Justice Bell observed that the decision to deprive someone of the right to settle 'represents an interference with their civil rights and their personal autonomy in the conduct of litigation.'[22] However, he went on to state that whilst '[i]t is legitimate for a lawyer to apply considerable pressure on a client to settle a proceeding when it is in the client's best interests to do so',[23] his honour continued: '[i]t is likewise an invasion of that right and that autonomy to fail to recognise when a party is mentally ill and therefore lacks the capacity to make proper litigious decisions on their own behalf.'[24]

Justice Bell referred to the 'honourable candour' with which Andrew Goddard gave evidence, but noted that 'he was more concerned with Paul's distress than he was with his capacity', being extremely concerned as his lawyer and 'friend' about Mr Fritsch's suicide risk. However, Andrew Goddard chose not to give evidence on the question of how he accounted for his client's mental condition in the running of the case. On that basis, Justice Bell found he could not accept Goddard's evidence that Paul Fritsch had

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17 Ibid [542] (Bell J).
18 [2003] I WLR 1511.
19 *City of Swan* [2010] WASC 204 [72] (Murphy JA); *Owners of Strata Plan No 23007* (2006) 153 FCR 398, 412 [58] (Edmonds J).
20 *Borchert v Terry* [2009] WASC322 (6 November 2009) [69] (Martin J).
21 (1954) 91 CLR 423.
22 *Goddard Elliott v Fritsch* [2012] VSC 87 [560] (Bell J).
23 Ibid [561] (Bell J).
24 Ibid [560] (Bell J).

capacity to provide settlement instructions on 16 September 2004. This aspect of the judgment confirms that lawyers with concerns about their client's capacity should make detailed notes on their observations and particulars of client consultations at the time.[25]

Applying the finality principle of the High Court in *Giannarelli*[26] and *D'Orta-Ekenaike*,[27] Justice Bell rather reluctantly found that the actions within the final settlement were covered by advocates' immunity. It was submitted for Paul Fritsch that the case fell outside of the immunity because the matter was settled outside of court. However, Justice Bell concluded that the orders of the court in this instance involved a consideration of the merits by the trial judge. He ruled that where 'there is personal participation by the judge in the merits of the orders … they represent a final determination of the proceeding for the purposes of the application of the immunity.'[28]

Justice Bell examined two possible approaches in relation to the immunity being applied to capacity negligence. On one view, 'the negligence might be seen as intimately connected with the relationship between lawyer and client rather than as being intimately connected with the lawyer's subsequent conduct of the case in court.'[29] In this case, the immunity would not apply. However Justice Bell's approach was to characterise the 'intimately connected' test enunciated in *D'Orta-Ekenaike* as a very broad one.[30] Citing *Symonds v Vass*[31] with approval, he held that 'work done out of court which leads to a decision affecting the conduct of the case in court is work that is intimately connected with the conduct of a case in court' and is therefore covered by the immunity. So while taking instructions and acting on them to the client's detriment might be characterised as an aspect of the client-lawyer relationship, Justice Bell was also forced to conclude that it was *also* work done that was 'intimately connected with' the conduct of the case in court. Justice Bell provides a glimmer of hope for those hoping that the Australian High Court might one day abolish the immunity stating he found it:

> [h]ard to see what damage would be done to public confidence in the legal system by allowing a person lacking mental capacity to sue their lawyer for damages in respect of substantial losses caused by the lawyer's negligence in taking instructions from the person to settle a case, even given that court-approved orders were made.[32]

However, he felt forced to conclude, albeit reluctantly, that the capacity negligence in this instance was covered by the immunity, an aspect he found 'deeply troubling.'[33] The unhappy result was that despite the finding that the firm was negligent, not only was Paul Fritsch unable to receive any remedy for his loss, but he was also liable for

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25 See, eg, Law Society of New South Wales, *When a Client's Capacity is in Doubt* (2009) <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf>.
26 *Giannarelli v Wraith* (1988) 165 CLR 543.
27 *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR1.
28 *Goddard Elliott v Fritsch* [2012] VSC 87 [813] (Bell J).
29 Ibid [830] (Bell J).
30 *D'Orta-Ekenaike v Victorian Legal Aid* (2005) 223 CLR1.
31 [2009] NSWCA 139 (Ipp JA).
32 *Goddard Elliott v Fritsch* [2012] VSC 87 [822] (Bell J).
33 Ibid [835] (Bell J).

outstanding legal fees to the tune of $68,711.61. Unsurprisingly, this decision was followed by a raft of criticism in the media.[34]

Lawyers who wish to avoid claims of capacity negligence will need to pay close attention to their role in making ongoing assessments of their clients' decision-making capacity. It is easy for lawyers facing the daily grind of their work to overlook how stressful an impending court case can be for their clients. As this case demonstrates, a client may possess decision-making capacity at the time they provide their initial instructions, yet lack capacity when it comes time to settle or give evidence. Professional assessment of decision-making capacity will not provide a substitute for a lawyer's decision on the issue and any serious doubts should result in an application to the Court for a capacity ruling before lawyers proceed to act on instructions.

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34 ABC Radio National, 'Goddard Elliott v Paul Fritsch', *The Law Report*, 27 March 2012 (Damien Carrick and Linda Haller) <http://www.abc.net.au/radionational/programs/lawreport/goddard-elliot-v-paul-fritsch/3914880#transcript>; 3AW 693 News Talk, 'Lawyers a Uniquely Protected Species', 15 March 2012 (Derryn Hinch) <http://www.3aw.com.au/blogs/blog-with-derryn-hinch/time-to-scrap-advocates-immunity/20120315-1v7n2.html>; Bar Talk, 'Disputes Quelled', *Justinian* (online), 3 May 2012 <http://www.justinian.com.au/home/disputes-quelled.html>; Norrie Ross, 'Ancient Law Lets Negligent Firm Dodge $975K Payment', *Herald Sun* (Melbourne), 14 March 2012; Leonie Wood, 'Judge Questions Barrister's Immunity', *The Age* (Melbourne), 15 March 2012.