

Can lawyers assess incapacity?

The evidence would suggest not

Whether or not a person has testamentary capacity is outside the area of a solicitor's professional expertise



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Loss of cognition is so prevalent these days, and its consequences so important, that lawyers need to know how to recognise it and what to do about it.

The first and most important thing to say is that lawyers have no skill at identifying mental disorders or in assessing incapacity. In the course of our training at university, we do not receive one minute of training in these matters.

Despite this, some judges seem to believe that lawyers can detect mental disorders and testamentary incapacity.

For example, in *Sandman v McKay* [2019] NZSC 41 the former Chief Justice, Elias CJ, appeared to assume that lawyers would be able to tell when a client lacked testamentary capacity and when they did so, "it would be a breach of the duties owed ... to the client for the solicitor to participate in [the] transaction."

The other members of the court disagreed, saying if a lawyer suspected a lack of capacity, he or she should "carefully document the advice given and the steps taken" and "suggest that a medical certificate be obtained..."

The clearest statement I know of a lawyer's inability to assess cognition is one Justice Henry gave in *Knox v Till* [1999] 2 NZLR 753 where, in giving judgment for a strong Court of Appeal, he said: "Whether or not a person has testamentary capacity is outside the area of a solicitor's professional expertise."

The statement is short, simple and correct. It is incontestable that lawyers have no training in assessing testamentary incapacity and there is no evidence of which I am aware which suggests they can acquire it by default in the course of their careers.

Compelling study

The inability of lawyers to detect mental disorders and testamentary incapacity was revealed with compelling clarity in

a study Claire Royston, a psychiatrist, conducted several years ago in England with Robert Hunter, a lawyer.

Ninety-one solicitors and 92 consulting psychiatrists were shown two short films in which an elderly "client" gave instructions to a solicitor for his will. The films showed two different styles of interviewing – one good and one bad. After seeing the films, the lawyers and psychiatrists were asked to answer two questions:

- Did the client have a mental disorder?
 - Did the client potentially lack testamentary capacity?
- During the film, the "client" disclosed sufficient clues to reveal he had a mental disorder and lacked testamentary capacity.

The results of the test could fairly be described as astonishing. When the lawyers (who were experienced in preparing wills) saw the bad interviewing technique, only 2% of them detected that the client had a mental disorder. Two percent! What more convincing proof is needed to show that lawyers can't be trusted to detect a mental disorder?

When asked if the client lacked testamentary capacity, 66% of the lawyers who saw the bad interview technique came to the wrong conclusion! Two-thirds of the experienced will-drafters could not detect that the man lacked testamentary capacity.

The results were better for the interview which featured the good interviewing technique.

Sixty percent of the lawyers who saw the good interview were able to assess that the client had a mental disorder and 90% of them came to the correct conclusion from the good interview that he lacked testamentary capacity.

But even these figures are bad: 40% of experienced will-drafters couldn't detect that the man had a mental disorder.

It is unfortunate that this important study has not been published in a peer-reviewed journal. It has, however, been

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It is incontestable that lawyers have no training in assessing testamentary incapacity

It is too easy for solicitors to confuse social graces with mental ability

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summarised in *Testamentary Capacity, Law Practice & Medicine* by Frost, Lawson & Jacoby, OUP 2015 at pages 281-282.

Hard to spot

One of the reasons incapacity is so hard for non-experts to identify is that the part of the brain that provides “executive function” – a medical term that is sometimes described as “the management system of the brain” which enables us to set goals, plan and get things done – is contained in the frontal lobes, while the part of the brain governing speech lies elsewhere in the brain.

When the frontal lobes are damaged, depriving a person of his or her ability to make appropriate judgments, the person may nevertheless have impressive powers of speech that give the impression of mental competency. As Robert Hunter, the lawyer who devised the test, said: “it is too easy for solicitors to confuse social graces with mental ability”.

The compelling lesson from the research is that lawyers should consult an appropriate expert whenever they are confronted with a client who may lack sufficient cognition for the task he or she is to perform.

Who is an appropriate specialist? This is not straightforward.

Specialists in this area of work include neurologists, psychiatrists, psychogeriatricians, neuropsychologists and geriatricians. These specialists differ in the way in which they assess cognition.

In general, the experts who are most commonly engaged in New Zealand appear to be psychiatrists who specialise in the cognition of elderly patients.

Solicitors who practise in England are supposed to follow the “golden rule” when confronted by a client who may lack capacity.

Lord Templeman, who created the rule, explained it in these words:

In the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters may appear, and however difficult or tactless it may be to suggest the precautions be taken; the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding.

The results of the Hunter/Royston study show that lawyers in New Zealand would also do well to follow the rule. ■
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