THIS WEEK'S ARTICLES

Issue 16
24 May 2019

Can you detect mental disorders and testamentary capacity in your client? P1

Bullying and sexual harassment 'endemic' in legal profession. P3

Is it realistic, or even possible, to control social media? P5

ADLS
Connecting New Zealand Lawyers

LawNews

adls.org.nz

TRUSTS & ESTATES

Testamentary capacity: a new risk for lawyers

By Anthony Grant

The Supreme Court has recently considered whether a lawyer can be liable for "knowing assistance" when he or she drafts a will for an incapacitated person that harms the interests of another person: *Sandman v McKay & Others* [2019] NZSC 41.

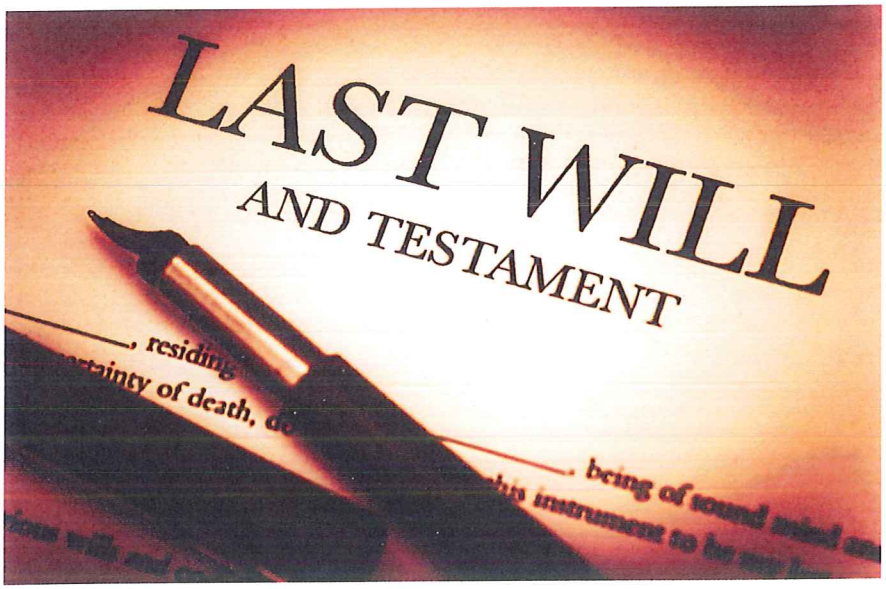
Elias CJ showed no restraint, saying, "a solicitor who knows a client to lack testamentary capacity

- would be obliged to withdraw from acting, and
- it would be a breach of the duties owed by the solicitor to the client for the solicitor to participate in the transaction." [132]

The other members of the court were much more cautious. They said:

> "Where the instructions are to prepare a will in circumstances where there might later be issues raised about capacity, the lawyer should carefully document the advice given and the steps taken. In this regard, it would be prudent for a solicitor to suggest that a medical certificate be obtained. It would also be prudent to document the reasons for the provisions of the Will and the process involved in taking instructions and in ensuring that the instructions have been correctly understood." [80]

> "It is certainly arguable that once the steps set out above have been taken it would not be up to the solicitor, who is not a medical expert, to decide whether a client has testamentary capacity and thus to decide whether to follow his or her instructions. The position arguably is that a solicitor even if he or she does not think a client has capacity, would nevertheless be obliged to prepare and arrange for the execution of the Will. The issue of actual capacity would then be decided after the client's death, on the basis of the evidence including expert medical evidence." [81]



© Welcomia | Dreamstime.com

Does your client have testamentary capacity?

If you step back and think, it is little short of extraordinary that the courts should assume lawyers have the ability to assess the presence or absence of testamentary capacity when our legal education doesn't provide us with any instructions or training on the subject

The majority's decision acknowledges the reality that lawyers have no medical training and are not qualified to assess the presence or absence of testamentary capacity.

Robert Hunter, when he was in charge of probate litigation at Herbert Smith in London, together with Dr Claire Royston, a consultant psychiatrist, conducted a lengthy test to learn whether lawyers and psychiatrists were able to detect mental disorders and testamentary capacity.

The results of their testing were publicised in 2012. Some 91 solicitors and 92 psychiatrists were shown two short films portraying an elderly "client" meeting with a solicitor, giving instructions for his will.

The films demonstrated two interview styles, one good and the other poor. After seeing the films the lawyers and psychiatrists were asked two

Continued on page 2

Testamentary capacity: a new risk for lawyers

Continued from page 1

questions: Did the client have a mental disorder? And did the client have testamentary capacity?

After seeing the "good" interview, 40% of the solicitors couldn't detect that the client had a mental disorder. When they saw the "poor" interview, only 2% could detect the presence of the mental disorder – a statistic so bad it is virtually a 100% failure rate.

So far as testamentary capacity was concerned, 66% of the solicitors who saw the poor interview believed the "client" was fully competent to make a will when, in fact, the client lacked testamentary capacity.

Elias CJ's assumption that a solicitor can "know" a client "lacks testamentary capacity" may be true in an extreme case but such cases will be rare. In many circumstances, if not most, the solicitor's ignorant guess may be completely wrong.

If solicitors are so bad at detecting mental disorders and testamentary capacity, how can it be said they should be rendered liable for knowing assistance?

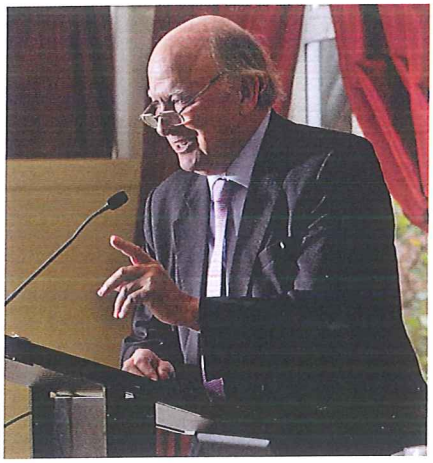
If you step back and think, it is little short of extraordinary that the courts should assume lawyers have the ability to assess the presence or absence of testamentary capacity when our legal education doesn't provide us with any instructions or training on the subject. We were taught law, not medicine.

The majority's decision in *Sandman* accords much more with the empirical evidence about lawyers' inability to assess testamentary incapacity.

If a solicitor has concerns about a client's capacity, the lawyer should carefully document the advice given to the person, and the actions taken in connection with the new will, and a capacity assessment from an appropriately qualified expert should be obtained.

The pitfalls awaiting solicitors who attempt to make capacity assessments are illustrated by two English cases: *Re AS & DS* (2004) case number 2120091/2 and *Re HW* (2005) case number 2122208 – see *Mental Capacity Law & Practice* 2nd Edition Ashton & Others 2012 pages 120-121.

Robert Hunter, who conducted the illuminating tests on lawyers and psychiatrists, is reported to have said of the study that it "confirms what many lawyers specialising in probate litigation have long suspected. It is too easy for solicitors to confuse social graces with mental ability... There is an unacceptable level of risk that some solicitors are letting the public down because they do not realise that inappropriate interviewing techniques can conceal their client's lack of mental capacity. In my experience, when solicitors do become aware of a capacity issue, basic safeguards requiring the seeking of medical opinion are frequently disregarded without good reason."



Anthony Grant

If solicitors are so bad at detecting mental disorders and testamentary capacity, how can it be said they should be rendered liable for knowing assistance?

What is the lesson from this? If you have any concerns about testamentary incapacity, don't assume you can make an appropriate assessment yourself. Go and get an assessment from a suitably qualified expert.

Obtaining Family Court judgments

Readers of my articles will know I had to write to the Family Court recently to obtain a copy of the decision in *Bell v Sutton* [2017] 5741 and I had to justify why I should be allowed to read it.

It seemed strange that the Family Court would not allow its decisions to be made available to everyone without the need to make an application and when I explained to the court why I wanted the case, I wrote:

"... I would be grateful to know why such a decision is not automatically available to the public. If there is a formal protocol concerning the topic, could you please let me have a copy of it. If there is no formal protocol I would like to know the factors that are taken into account when deciding whether a judgment should be made available to the public and who makes the decision.

....It may also be appropriate to inform readers... in a future article [in *LawNews*] about the Family Court's policies concerning the public's ability to see its decisions; the rationale for not making its judgments automatically available; and the reasons that the court is likely to accept under the present system as justification for making a copy of a judgment available to a member of the public."

I sent that to the Family Court on 8 April 2019.

I write this more than a month later and, although I haven't yet received a response, I remain hopeful the court will answer the query.

New Zealand is one of the world's shrinking number of successful democracies – all of which are governed by the principle that we submit to the rule of law.

For that principle to work, we all need to know the laws by which we are governed and with which we must comply.

Anthony Grant is a barrister specialising in trusts and estates

Capacity was one of the topics covered at this year's Cradle to Grave™ conference, including a session on testamentary capacity presented by Anthony Grant and Dr Jane Casey. To purchase the conference papers, please contact the ADLS bookstore: adls.org.nz, phone: (09) 306 5740, fax: (09) 306 5741 or email: thestore@adls.org.nz.

LawNews

LawNews is an official publication of Auckland District Law Society Inc. (ADLS).

Editor:
Jenni McManus

Publisher:
ADLS

Editorial and contributor enquiries to:
Jenni McManus, phone 021 971 598
or email jenni.mcmanus@adls.org.nz

Advertising enquiries to:
Chris Merlini, phone 021 371 302
or email chris@mediacell.co.nz

All mail to:
ADLS, Level 4, Chancery Chambers,
2 Chancery Street, Auckland 1010
PO Box 58, Shortland Street DX CP24001,
Auckland 1140, adls.org.nz

LawNews is published weekly (with the exception of a small period over the Christmas holiday break) and is available free of charge to members of ADLS, and available by subscription to non-members for $140 (plus GST) per year. To subscribe, please email reception@adls.org.nz.