# Identification of Accused who are under a Disability —a Lawyer's View

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## Introduction

I have been asked to speak about the identification of accused who are under a disability, and of course I can only address this topic as a lawyer. There are two obvious aspects to the issue of "identification": (1) how to do it, and (2) when to announce it. Each of those aspects of identification raises the consequential question of what to do next. Therefore I will need to mention the steps that should be taken by a lawyer who thinks that his or her client may be under disability to obtain medical assessments, and also what the lawyer needs to do by way of preparation for the disability hearing. That hearing is the means by which the state identifies and announces its identification of a person under disability.

## How a lawyer is alerted to disability

Needless to say, the signs of disability are easier to spot than they are to describe. However the law does provide a description of the symptoms which a lawyer should be alert for. They are set out in s 108 of the Criminal Justice Act 1985, in the three paragraphs to subs (1). At the earliest stage the lawyer need not be concerned with the initial part of the subsection, because the first thing to do is to recognize the alarm signals.

Where there is a risk that difficulties in communication with counsel will not be apparent to the medical practitioners who will eventually be giving evidence at the disability hearing, it may be necessary to arrange for a lawyer to give evidence on this point. Rule 8.07 of the Rules of Professional Conduct should be borne in mind: "A practitioner must not act as both counsel and witness in the same matter." This problem is considered in the article by Brookbanks cited in para 2.1 below, but it is useful to remember that the court will be sensitive to the existence of communication difficulties, and an indication by counsel from the bar should normally be sufficient to raise the issue.

### 1 *An important guideline: ability to participate*

A trial gives the accused an *opportunity* to answer the allegation, so the accused must be *capable* of exercising that right. The accused is liable to being held *responsible* for the crime, so he must be able to *respond* to the accusation (see Duff, "Fitness to plead and fair trials: (1) a challenge" [1994] Crim LR 419). As far as disability is concerned, the relevant time is now, at court, rather than before, at the time of the offence. This is one of the points on which disability differs from the insanity defence (see Brookbanks, "Judicial determination of fitness to plead—the fitness hearing" (1992) 7 Otago Law Review 520).

2 *Interpreting the criteria*

The sorts of things to look out for when considering paragraphs (a), (b) and (c) of s 108(1) are as follows:

- does the client appreciate his presence in relation to time and place, apprehend that he is charged with an offence and is going to appear in a court, understand that there is a judge, a prosecutor who will try to convict him, defence counsel to help him avoid conviction, a jury to decide guilt or innocence? (from *Wieter v Settle* 193 F Supp 318(WD Mo 1961), cited in Hitchen, "Fitness to stand trial and mentally challenged defendants: a view from Canada" (1993) International Bulletin of Law and Mental Health 5.

- is the client capable of some level of abstract reasoning so as to be able to understand the possible consequences of the proceedings? Can he interpret the implications of testimony and the judge's decision? (see Mickenberg, "Competency to stand trial and the mentally retarded defendant" (1981) 17 (3) California Western Law Review 65, cited in Hitchen, loc cit)

- is the defendant able to recall and state the relevant events and able to explain the facts to counsel? Is this done rationally, and does it include the making of critical decisions based on counsel's advice? Would he be able to give evidence? Is the defendant *capable* of making reasonable decisions (even if the decisions he actually makes do not seem reasonable)?

- should a second legal opinion be sought? Just as it may be in a patient's best interests to seek a second medical opinion before agreeing to serious surgery, so too a lawyer's client may best be protected by a second legal opinion.

**Should the difficulty be disclosed?**

Once a lawyer decides that one or more of the alarm signals set out in the three paragraphs to s 108(1) have been triggered, a decision has to be made about what to do. A client who is under disability will not necessarily be totally unable to make legally effective decisions. For example, a mentally ill patient may be able to give effective consent to treatment. So, what is the lawyer's duty when the client who may (note, at this stage, only *may*) be under disability doesn't want a medical assessment and doesn't want the question of disability raised in court? See *R v Carrel* (1992) 8 CRNZ 220 for an illustration of such a case, where the inquiry was initiated by "a responsible and very experienced counsel" against the client's wishes.

The problem of whether to raise the matter of disability against the client's wishes may seem especially difficult where the offence is not particularly serious. Of course no question of a disability hearing arises where the offence does not carry imprisonment (s 109 CJA), but for many imprisonable offences the offender can expect a non-custodial sentence. The lawyer may wonder whether it is really worth raising the issue of disability in those circumstances.

The problem seems more acute where the case is such that the defence can properly be put to the court without the client giving evidence. There may be other defence witnesses

who are available and whose evidence seems plausible and likely to raise at least a reasonable doubt about the client's guilt. Circumstances such as these may suggest to the lawyer that, even in a serious case, the issue of disability need not be raised.

Also, at the other extreme, there is the client who is clearly guilty but because of the relatively minor nature of the offence and the client's previous good record, diversion may be available. Again the lawyer may wonder whether raising the issue of disability is an unnecessary complication in those circumstances.

Put in terms of the client's right to participate in the hearing of the allegation, and the need for him or her to be able to do so as central to the notion of fairness, the problem can be expressed as follows: should a lawyer take a case to trial in the face of the alarm signal, taking the risk that unfairness will be avoided by keeping the client silent while his or her case is put through other witnesses?

This risk is potentially great, although it is a subject which has not yet been explored by the courts here. If a lawyer leads the client into a trial which is unfair there will be a breach of certain rights affirmed in the New Zealand Bill of Rights Act 1990: s 25(a) (the right to a fair trial), s 25(e) (the right to present a defence). Breach of such rights could lead to an action for damages against the lawyer whose task it was to represent the client. Rule 1.12 of the Rules of Professional Conduct states that a practitioner must accept legal responsibility for his or her actions. Liability for such breaches of the client's rights would not depend on a contractual relationship and there seems to be no reason why in principle a barrister should not be liable where negligence or even deliberate (albeit well-intentioned) breach of the client's rights is proved.

1 *When there is a problem: the Rules of Professional Conduct*

As would be expected, a guide to the way to approach difficult ethical issues is provided by the Rules of Professional Conduct for Barristers and Solicitors. These have the force of law by virtue of s 17 of the Law Practitioners Act 1982 which gives rule making powers to the Council of the New Zealand Law Society. The current edition of the Rules is the 2nd Edition, published on 1 February 1993.

There are no rules specifically referring to the dilemmas created by the possibility of the client being under a disability, and it is difficult to find assistance in the technical literature dealing with legal and medical ethics. It seems to me that the best existing guide is provided by the following Rule:

> **Rule 8.01**: "In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client."

2 *The interests of the administration of justice*

This expression is one of those comfortable legal cliches which is used to give the appearance of substance in the law. However in the context of this Rule and the problems mentioned above the proposition emerges that from counsel's perspective, the overriding duty to the court is discharged by bringing the issue of disability to the attention of the court (even where client denies any disability). Once the issue is raised, counsel's duty

is to the client. The continuing duty not to deceive or mislead the court (Commentary (1) to Rule 8.01) is consistent with the need to avoid representing that there is no unfairness issue arising from the continuation of trial procedure.

Another consequence of this rule is relevant to a later stage, but I mention it here so it can be borne in mind. It is that, where a disability hearing is held, it would be wrong to attack medical evidence which counsel knows is accurate except insofar as it is in the client's interests to properly test the soundness of that medical evidence.

3 *The best interests of the client*

Opinions will vary as to what is in the client's best interests. There will be the client's opinion, counsel's personal opinion, counsel's professional opinion, the medical practitioners' opinions (personal and professional), not to mention the opinions of persons supportive of the client who may or may not be potential witnesses.

How should a lawyer decide what is in the best interests of the client? It is important to remember that at this stage a decision has been made, as a consequence of the Rule of Practice mentioned above, to ask the court to obtain an assessment of the client with a view to a disability hearing. It seems to me that the appropriate approach for the lawyer to take from then on is to assume that the best interests of the client are achieved by minimum (ie no) interference with his or her liberty. It is for the court to decide otherwise and the issue of interference will fall as a matter to be decided in the course of the administration of justice.

An essential qualification on this is where the client has made a decision to accept that he or she is under disability and to consent to whatever the court may decide by way of disposition. If counsel accepts that the client has made those decisions responsibly, then they form part of the client's instructions and must be followed.

**Preparing for a disability hearing**

Once the lawyer recognizes any of the alarm signals set out in the paragraphs to s 108(1) of the CJA, the aim becomes the holding of a disability hearing where the court can make findings of fact. These may lead to the conclusion that the client is under disability, or they may lead to a finding of no disability. Even in the latter case there may be findings of fact which can form the basis of an application for a stay of proceedings, or of some other form of judicial intervention in the interests of fairness (exclusion of evidence, discharge under s 19 CJA or s 347 Crimes Act 1961).

The onus and standard of proof will have to be borne in mind. In *Carrel* (above) it was held that when the prosecution raises the issue of disability, the standard of proof is beyond reasonable doubt; but when the issue is raised by the defence, the standard of proof is on the balance of probabilities; and when the issue is raised by the defence against the wishes of the client, the standard of proof is again on the balance of probabilities.

A frequently used method of bringing the attention of the court to the issue of disability, although not an essential procedural step, is to invite the court to invoke its powers to require psychiatric examination of the client under s 121 of the CJA. This is not an essential step because a disability hearing can be initiated, pursuant to s 111, "on the

evidence of two medical practitioners that the defendant is mentally disordered", and such evidence can be obtained other than by a court-ordered report. However, where s 121 is to be used, the current practice is to have the client who is presently appearing in court stood down for an assessment by the forensic psychiatric staff; such an assessment may provide the judge with the material necessary to "satisfy" the court (s 121(1)) "that a psychiatric report would assist the court in determining (a) if the defendant is under disability ...". Strictly this only applies where the client is in custody, but that limitation seems to be overlooked in the interests of efficiently obtaining reports on legally aided clients. Of course the judge may release the client on bail with a condition that he or she attends as directed for psychiatric examination (s 121(2)(a)).

The result of a request for a psychiatric report under s 121 will normally be only one such report, and indeed the words of the section are in the singular. To obtain the necessary evidence that the client is mentally disordered so as to initiate a disability hearing pursuant to s 111, another medical examination will be necessary. It should be noted that there is a difference in terminology: s 121 refers to "psychiatric examination", while s 111 refers to the evidence of two "medical practitioners"; in an appropriate case (for example where the client denies being under disability) it may be necessary to consider whether a report under s 121 is properly that of a psychiatrist as distinct from that of a non-specialist medical practitioner.

1 *The legal issues: interpretation of the statutes*

As with preparation for any judicial hearing, counsel will need to bear in mind the court's approach to interpretation of the legislation governing the matter in issue. It is important to remember that "under disability", and the ingredients, including "mentally disordered" are legal, not medical, expressions. "Under disability" is a legal status not a medical diagnosis. The statutory definitions of "under disability" in s 108(1) CJA and of "mental disorder" in s 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 are therefore of paramount importance.

Having said that, and it was a point made by Brookbanks in the introduction to his article mentioned in para 2.1 above, it may nevertheless fairly be asked whether this distinction between medical diagnosis and legal status is really that marked. Certainly courts endeavour to apply the ordinary and natural meaning of the words of any statute that has to be interpreted judicially, but here the words are rarely—if ever—*ordinarily* used in the phrases and in the combinations of phrases in which they appear in the two sections just cited. It can therefore hardly be said that there is an ordinary and natural meaning of those words in those contexts which differs from a technical medical meaning.

Unfortunately things are not that simple in practice. What is often noticeable in disability hearings is that the medical practitioners giving evidence seem to be under various forms of misapprehension about what the legal issues are that the judge has to determine. I suspect that sometimes there is genuine ignorance about that, but there are also occasions where difficulties in communicating with courts arise from issues which are not settled in psychiatry. Medical jargon can differ from the ordinary and natural meaning of words as understood by courts, as the issue of whether intellectual handicap is a mental disorder illustrates. Apparently medical opinion tends to favour distinguishing between intellec-

tual handicap and mental disorder (of course a person may suffer from both)—see NZLC R30, paras 125–127—whereas judicial decisions have interpreted the words "an abnormal state of mind ... characterized by ... disorders of ... cognition" in the definition of "mental disorder" as including intellectual handicap: *R v T* [1993] DCR 600, where Judge McElrea applied a purposive approach to interpreting the statute, stressing the avoidance of unfairness. See also *Police v M* [1993] DCR 1119.

Another illustration of the overriding importance of judicial interpretation of the statutory definitions in the face of medical controversy concerns differences in medical opinion as to whether personality disorder (or psychopathic disorder) is a mental disorder or not. This will be resolved in court by application of the statutory definition of mental disorder so that sometimes mental disorder can include personality disorder, but not necessarily and not even usually: NZLC R30, para 211. The point here is that, at the end of the day, the decision as to whether the client is under disability is a legal decision, not a medical decision.

As was noted in para 2.1 above, the relevant time for assessing the question of disability is the present, rather than the time stated in the allegation of the offence. This is one of the respects in which the status of "under disability" differs from the defence of insanity. Counsel must be wary of medical practitioners putting too much emphasis on the alleged offence when forming their opinions on disability.

2 *Alerting the experts to the problem*

Where there are communication difficulties which concern the lawyer, yet the client denies being under disability and is apparently capable of giving responsible instructions on some matters (perhaps peripheral or unrelated to the charge) the problem of disclosure arises: how much should counsel reveal to medical practitioners? This problem is minimized because the medical practitioners can be expected to have reasonably full discussions with the client which overlap matters the lawyer has discussed and found of concern.

It would be appropriate to indicate to the medical practitioners whether the client is able to communicate adequately with counsel for the purposes of conducting a defence, and to tell them that this is a point on which they will be asked to give evidence.

3 *Other possible witnesses*

Central to the definition of "mental disorder" is the serious danger to the safety of the client or of others, and as an alternative, the seriously diminished capacity of the client to take care of himself or herself. If the client is opposed to being found to be under disability the lawyer will need to consider whether there are any witnesses who can assist the client on these points.

4 *Pre-hearing disclosure of medical opinions*

This has been considered by the Law Commission, which has advanced the following propositions:

> where the prosecution has called for the evidence, there should be a duty to disclose

> it to the defence before the hearing: Law Commission NZLC PP18, page 42 (1991), and NZLC R14 (1990).
>
> similarly, where the defence has called for the medical evidence, there should be a duty to disclose it to the prosecution (ibid).
>
> where each side has had its own experts examine the client, the experts should have an opportunity to exchange their views before the hearing (ibid).

In addition to those forms of disclosure, there is the matter of disclosure of the results of medical examinations to the client. Rule 1.09 of the Rules of Professional Conduct provides:

In most circumstances, a practitioner is bound to disclose to the client all information received by the practitioner which relates to the client's affairs. There are certain exceptions which include cases where:

> ... (iv) on humanitarian grounds, the practitioner should exercise a discretion not to disclose the information.

A parallel provision applies in respect of psychiatric reports to the court. Where the court has obtained a report pursuant to s 121 of the CJA, disclosure is governed by s 122 which empowers the court to order that there be no disclosure of any part of the report to the client where the court is of the view that such disclosure "would be likely to prejudice his or her physical or mental health or endanger the safety of any person".

5 *Preparing questioning of witnesses*

Analysis of the legal issues will reveal the questions that need to be asked. Brevity is always desirable, and especially so where technical evidence is being given.

Questions should be prepared following the wording of the statutory definitions. They can be kept quite simple. They should follow the sequence of the definitions, so prepare them in that order. For example (to a medical practitioner):

> "does the client have an abnormal state of mind?"
>
> (if so) "is it characterized by delusions?"
>
> (and) "is it characterized by disorders of mood?"
>
> (and) "is it characterized by disorders of perception?"
>
> [similarly re volition and cognition]
>
> (and) "is it of such a degree that it ... [etc, following s 2 of the 1992 Act]

Where an answer to any of these questions is to be challenged, explore the reasons for that opinion being given, including the materials available to the doctor and the time spent with the client and the conditions under which any examination occurred. Is this an area where experts may disagree in their diagnosis? How experienced in this area is the witness?

If you get the answers you want, there is no need to explore the basis for them. In the unlikely event that the expert simply answers "yes", that will be sufficient if you do not

have to challenge it. If the court wants to hear more, the court will ask. If the expert embarks on a lengthy answer the lawyer should ask if the answer, in summary, is essentially "yes", if that is the answer the lawyer wants. Remember that the lawyer asks the questions in English (ordinary and natural meaning), the expert may be answering in jargon, and the judge must make a decision in English. Bear in mind the matters discussed in para 4.1 above, which stress the overriding importance of the ingredients of the statutory definitions as interpreted judicially.

6 *Representing the client: counsel's role*

The lawyer must not be distracted by the wider interests of justice which concern the judge to the extent that the client's interests are neglected. Of course the lawyer must bear in mind how the judge will come to a decision, but the point here is that the lawyer's own opinion of what is in the interests of justice should not be advanced at the expense of the client's rights.

Remember the client's rights: BORA, s 11 (the right to refuse to undergo medical treatment); s 17 (right to freedom of association); s 18 (right to freedom of movement); s 22 (right not to be arbitrarily detained). A disability hearing is, from the client's perspective, often about whether these rights survive official scrutiny of his or her mental state.

7 *Possible results of disability hearing*

These should be borne in mind at the preparation stage because there might be evidence which could assist the court in deciding between the alternatives. The possible results are:

(i) where disability is found: s 115 CJA

- immediate release (subs (2)(b))
- detention in hospital under compulsory treatment order (subs (2)(a))
- detention as special patient (subs (1)(a))
- no order if person is liable to immediate imprisonment (subs (2)(c))

(ii) where no disability is found:

- *Police v XYZ* [1994] DCR 401, inability to adequately instruct counsel arising from something less than mental disability will give rise to issues of fairness and the possibility of a stay of proceedings.
- defended hearing (trial) proceeds with possible defence of insanity; issue of disability may be raised again (s 109 CJA), including at sentencing—see Hall, *Sentencing in New Zealand*, p 268.