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An Appraisal of Competency

Henry Davidson*

COMPETENCE IS THE ABILITY to handle business affairs with ordinary prudence. It is a legal not a medical formula, and in a sense, it must be defined negatively. Every one is assumed to be competent. If you think some one is incompetent, you must prove it. He does not have to prove that he is competent. Therefore, the formula is a criterion of incompetency not competency.

To declare a person incompetent, these findings must co-exist:

1. He has a mental disorder.
2. This causes bad judgment.
3. Because of the bad judgment, the patient either:
 - (a) Squanders his money or
 - (b) Is easily victimized by designing persons or
 - (c) Hoards his assets to the point of depriving himself or his family of necessities.

(1) He must have a mental disorder. If the man's poor judgment is due to ignorance, inexperience or lack of sophistication, this is not "incompetency." In the absence of a psychosis, alcoholism is *not* considered a mental disease for this purpose. If a man squanders his money on liquor while his family are evicted for nonpayment of rent, this is, to be sure, poor judgment: but it is *not* enough to warrant the label of incompetency.

Mental deficiency in this context may be considered a mental disease. Psychoneurosis is rarely a proper justification for the "incompetency" label, even though it may result in very bad judgment. However, hysterical or epileptic clouded states or amnesic episodes may justify a finding of incompetency if the episodes are frequent or prolonged.

(2) Impairment of judgment must be demonstrated. Hallucinations, paranoid delusions, depression, elation, and the like are not sufficient. The psychiatrist may insist that a man can not have a delusion without some impairment of judgment; that a man who is elated will show impaired judgment too. But those

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are psychiatric concepts, and incompetency is a legal term. The impaired judgment must be specifically demonstrated.

(3) Resulting from this bad judgment there must be either (a) the fact of squandering money, (b) evidence that he was easy prey to some designing individual, or (c) unreasonable hoarding of funds. The examiner tries to elicit (from reports, statements of relatives, history or records) one or more instances of actual squandering or gullibility. If the subject has had no opportunity to squander money, but the examiner is sure that he is incompetent, he will so state. For example, suppose a patient has been in a hospital for years. As he has had no opportunity to squander money, there can be no absolute evidence that he would squander it. Suppose that he is so deteriorated that it is evident that money means nothing to him and that if he were handed a check, he would not know what to do with it. In that case, the doctor indicates why he thinks the patient would squander, ignore or unreasonably hoard his funds, and labels him "incompetent."

If a mental patient receives a benefit check (e.g. health insurance) and he refuses to endorse it or deposit it, this is "squandering" because it is like throwing away cash.

All doubt are construed in favor of competency. In a borderline case, the subject is declared competent. Thus given control of his estate, he may squander it. At this point, the family may re-open the matter—and with the positive evidence of squandering he may then be found incompetent. This looks like locking the barn door after the horse is gone—but it is a necessary practice if the subject is to enjoy the benefit of the doubt. Any other course, indeed, might lead to a tyranny of experts.

The whole concept is highly pragmatic. For instance, to a psychiatrist a delusion that you have a dollar in your empty pocket is no less "crazy" than a delusion that you have a million dollars there. But from the business man's view-point, the latter is a much "crazier" idea than the former. So, with competency. A patient might be competent to spend \$15.00 a month but not competent to handle the \$20,000 he might get from selling his house. To the doctor this distinction seems absurd—competent to do one thing but not another—it is like "partial psychosis" or "partial pregnancy." But to the lawyer it makes good sense. After all, it does take more and better judgment to handle \$15,000 than to handle \$15. At today's prices you really can't squander \$15 a month. It is not worth while going through incompetency

proceedings when the estate is small or when the money to be controlled is not much more than would be given as an "allowance" anyway. Never think of competency in the abstract. It is always a *practical* question of whether this client is able at this time to handle this particular amount of money. A veteran might be incompetent by reason of a non-service connected mental disorder, and be drawing \$18 a month for some other condition. Then the question would be: is he capable of handling \$18 a month? And it may well be that he could manage that small amount when he would be incompetent if he were drawing much more.

Attorneys sometimes hesitate to give doctors the figures of an estate or settlement. For example, the lawyer calls the physician and says: "We are settling some litigation. Is the patient competent to sign a release?" The doctor might ask: "How much are you settling for?" The lawyer, perhaps, thinks that this is none of the physician's business. But it is. The client might, conceivably, be competent to handle \$100 acquired in a nuisance settlement while he could be incompetent to manage a settlement of \$50,000.

Testamentary capacity is *not* a measure of competency, since there is no adversary interest. Hence he needs less competency to make a will than to make a contract to buy or sell a house. This is because he needs more wit about him in an adversary relationship where interests conflict, than in the situation where he is making a will.

A 7 year old child would be incompetent to handle funds in any significant amount. But it does not follow that an adult with a mental age of 7 is automatically incompetent. The adult has had more experience with life and, indeed, in spite of a low mental age he may be rather shrewd. So with a mentally defective adult, his competency is judged individually in terms of the three basic criteria regardless of his mental age. Is he, by reason of mental deficiency, likely to hoard assets to the detriment of himself or family? Or to squander such assets recklessly? Or to be readily gulled by a designing person?

The examiner must know whether the subject will concern himself about the needs of his *dependents*. If the poor judgment is due to mental disease, and if the squandering takes the form of depriving his dependents of their necessities then he may be found incompetent, even if he takes good care of his own needs.

The doctor should be furnished with information from employers, social workers, civil authorities, relatives, and so on.

There is no necessary relationship between competency and need for hospitalization. However, it is unlikely that a patient who for years has been in an institution could be considered competent. It might be necessary to hospitalize a patient for an *acute* condition (depression, assaultiveness and the like) without this being any reflection on his ability to "do business." But if, after the acute stage has passed, it is necessary to keep him in a mental hospital, it is reasonable to infer that this is needed precisely because he can *not* take care of himself on the outside. This, however, is a rebuttable presumption.

The poor judgment must be due to a *disorder of thinking* to justify a finding of incompetency. If a man squanders his money on drinking or on gambling, this, by itself, is not incompetency. The theory is that the alcoholic or gambler has a defect in character rather than a defect in thinking. Psychiatrists complain that this is hair-splitting, but the lawyer sees it as a good and practical distinction. If a man cashes his pay check in a saloon every week and spends the money on liquor so that his wife and children starve, the legal solution is to have a court order him to turn over his check to his wife. If he doesn't do it, he is sent to jail for contempt of court, thus solving the problem. However, if he had a psychosis associated with alcoholism, he could be declared incompetent and a guardian named.

The degree of competency varies with the size of the estate and with the wish of the patient. For instance, if an old woman with an only son wants her son given power-of-attorney, she does not need much competency to do this. The decision is simple and sensible. But if she wants to sell her house to the first bidder she would need a far greater level of competency than she needs to ask her son to be her manager. It cannot be categorically said that a patient cannot sign a paper naming an attorney for herself when she could not sign away her home.

What medical diagnoses might justify an inquiry into competency? Certainly the question is fairly raised when a patient has mental deficiency or a psychosis. Epilepsy, by itself, does not affect competency. However, some epileptics get prolonged post-convulsive confusional states, and might be incompetent in such periods. And in one form of epilepsy (called psychomotor) the patient might get trances or "fugue states" in which he could do things that he might never remember doing later on. When the

competency of an epileptic is an issue, this possibility should be investigated and the doctor asked to indicate the subtype of epilepsy. An electro-encephalogram is helpful in such cases.

Psychoneurotics are usually competent. Even in severe obsessional or compulsive states, there is no impairment of competency in the legal sense. The one exception is the "dissociative reaction," a type of psychoneurosis characterized by such major personality disorganization as a dream-state, a prolonged amnesia or a double personality. If a dissociative reaction can be shown, competency during the period of dissociation may be questioned.

Head injury does not normally impair competency, unless (as occasionally happens) it produces a prolonged amnesic period. If a patient has a period of several days of confusion and memory impairment, any release or other document he signs in that period would probably be voidable. Whether the patient actually was in a post-traumatic dream state or post-traumatic amnesic episode would have to be determined medically in each case. In rare instances, head injury leads to mental deterioration which, of course, does impair competency.

A person who has had a stroke may be aphasic. This often happens when a right-handed person has a right-sided paralysis (or a left-handed person has a left-sided paralysis) following a stroke. Aphasia is a disorder of communication. While an aphasiac is not psychotic, defective, or amnesic, he cannot communicate properly and he may have to be declared incompetent for that reason. Also, if his dominant hand is paralyzed, he cannot sign checks, so arrangement has to be made for an attorney or guardian to make necessary payments, though in this case the "incompetence" should be clearly spelled out as physical rather than mental.

A patient toxic from high fever or dehydration may be incompetent. If it is necessary to have a document signed by such a patient, the medical attendant should indicate in his own or in the hospital's records, that at the time, the patient was competent. The same tests apply: feverish or not, does he know what he is doing? Is he especially gullible at this moment? Is his judgment about the handling of the estate grossly impaired? Similar criteria apply to appraising the competence of a person who was in a state of great exhaustion when he signed the document.

The doctor—and the lawyer—must not replace the client's personal standards with their own. You may feel that it is foolish to spend a year's salary on an automobile whereas, perhaps, you

believe that money used for whiskey is money well spent. The man who wants the automobile may see that car as a symbol of glamour, success or power and think that it is cheap at one year's salary. You may feel that there is nothing that the vintners buy that is half as precious as the stuff they sell; and that liquor is a bargain at any price. These personal criteria must not overshadow your judgment. One remembers the sailor who spent all his money on 12 hours of shore leave. Asked to explain his splurge, he said ruefully: "I spent some money on liquor; and some on women; but the rest, I admit, I spent foolishly."

Before we call a man incompetent, we want to be sure (1) that he has a diagnosable disorder of thinking; (2) that this has impaired judgment; and (3) that this impaired judgment has led to squandering, hoarding or undue gullibility. With this firmly set up, the finding of incompetency can be supported. This is better than doing it by hunch or intuition.