TAB 8

Part 3: Protecting Yourself While Serving Your Clients

Cognitive Neuroscience and the Solicitor's Approach to Mental Health

Arthur I. Fish
Borden Ladner Gervais LLP

8

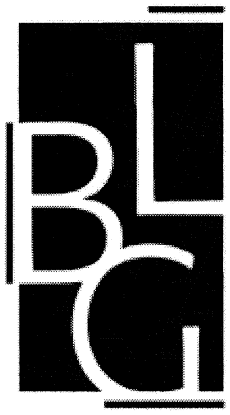
Special Lectures 2010

A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING LEGAL EDUCATION



BORDEN
LADNER
GERVAIS

Cognitive Neuroscience and the Solicitor's Approach to Mental Incapacity

by

Arthur Fish, B.A., LL.B., B.C.L. (Oxon.), S.J.D. (Toronto)
Director, Wealth Management Practice Group
Borden Ladner Gervais LLP (Toronto)

Law Society Special Lectures 2010

April 14 & 15, 2010

The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties.

John Stuart Mill, On Liberty

Might I respectfully suggest that had any of the parties really cared about [the allegedly incapable person's] well-being, they would have moved heaven and earth to have had this matter adjudicated yesterday. Instead, each, in his or her own way, has bickered and delayed, leading me to believe that [the allegedly incapable person's] best interests have been shoved to the back seat whilst other problems amongst these battling family members have been brought to the fore.

Brown J. in *Abrams* v. *Abrams,* 2010 ONSC 1254 (CanLI) at par. 34

Introduction

This paper, which argues that the law of mental capacity is incomplete if it does not properly incorporate medical knowledge and expertise, was inspired by the meetings of the Planning Committee for the Law Society Special Lectures 2010. Although, or perhaps <u>because</u>, physicians approach mental capacity much differently than lawyers do, it became clear that lawyers, especially solicitors, could more effectively serve clients by adopting some of the physicians' approaches. It also seemed likely that the law of mental capacity could be improved by taking into account some of the findings of the discipline called "cognitive" or "behavioral" neuroscience. As a practical matter, lawyers require the assistance of medical professionals in addressing difficult issues of mental capacity, and in improving our ability to deal with clients who may lack capacity. More importantly, law as a discipline is unable to define or describe "mental incapacity" in a practically useful way without drawing on brain science.

This paper is aimed primarily at lawyers who practice as planners or counselors ("Advisors"), not as courtroom advocates. There is considerable overlap between the issues that confront medical professionals and Advisors who address issues of mental incapacity. For this reason, Advisors probably have more to learn from medical professionals than do courtroom advocates. Furthermore, the relationship between Advisors and courtroom lawyers on mental capacity issues is similar to that of health care professionals and courtroom lawyers. The quality of the

work done in the Advisor's or the physician's office will often determine which cases give rise to legal disputes, and in whose favor those disputes are resolved. By taking judicious account of medical practice and brain science, Advisors can better equip themselves to spare at least some clients the kind of intra-family litigation that is becoming more common in Ontario's courts and that so aroused Justice Brown's ire in the *Abrams* case.

There is nothing new in lawyer\physician collaboration. Indeed, Ontario's *Substitute Decisions Act*[1] emerged from two policy documents[2] each of which considered the roles of law and medical science in formulating and administering the law of mental capacity. Both the Fram Report and the Weisstub Report considered whether mental capacity is a medical or a legal concept, and decided in favor of the latter position. In addition, Weisstub gave lengthy and detailed attention to the medical literature on capacity and capacity assessment, to the point of incorporating in his Report a lengthy, scholarly response to one of the medical experts who had been retained to assist the Enquiry. [3] Each document recognized the possibility that the law of mental capacity could become a vehicle for drawing vulnerable people into protracted and unnecessary litigation, and assumed that this outcome could be avoided by means of procedural rights (Fram Report) or by offering an intermediate form of substitute decision-making (the "Continuing Power of Attorney for Property" and the "Power of Attorney for Personal Care") that instantiated the principle of the "least restrictive alternative (Weisstub Report)."[4] The idea is that a person who is incapable of making decisions regarding his own property or personal care may still be capable of appointing a decision maker to do so on his own behalf.[5] *Abrams*, and a host of similar cases certainly suggest, if they do not decisively establish, that these expectations, and the model or paradigm of thought from which they emerged, were misplaced and must be corrected in the light of experience and new research.[6] Three points emerge with particular force in this connection, and will be considered in the second and third parts of this paper. First, mental capacity is not just a standard to protect individual liberty from unwarranted intervention: rather it is a condition or state in which some human beings unfortunately find themselves. An assessment does not make a person incapable but only confirms or refutes the existence of a particular state of being. More simply, incapacity is something real, and the point of procedural law is not only to protect people from unwarranted assessments but also to ensure that the true facts of a matter are ascertained as quickly and accurately as possible. Second, it is incorrect to equate the capacity to choose a decider (in contrast to the capacity to make decisions) with a

lower standard of capacity. If anything, the latter decision will often be vastly more taxing than the former. Finally, the provision of procedural rights alone is an inadequate safeguard of individual liberty and well-being: to reach those goals, it is necessary for Advisors to recognize how difficult it can be to "decide who will decide" and to offer helpful advice to their clients on how to make this difficult choice.

Structure

This paper is divided into three sections. Part I summarizes the approaches taken by the Fram and Weisstub Reports. This Part argues that although the Fram and Weisstub Reports have generally stood the tests of time and practice, some aspects of their approach should be corrected in light of accumulating practical experience and emerging brain science. Part II contrasts the main principles of mental capacity established by Weisstub, with some findings of cognitive neuroscience, and summarizes some findings of that science that, it is respectfully admitted, have immediate application to the practice of law. Part III offers some practical observations on how Advisors may assist their clients to make better decisions in connection with the appointment of attorneys for property and personal care.

I: Fram and Weisstub

These two documents were prepared as part of a single ongoing process of policy formulation that ultimately gave rise to a massive reform of Ontario's laws of consent, substitute consent and involuntary psychiatric hospitalization.[7] It is sometimes said that generals always fight the last war. Fram and Weisstub are similarly heavily colored by certain political struggles that preceded and accompanied them. Fram is heavily influenced by the battle to secure the rights of people with developmental disabilities to live independent lives in the community, and Weisstub by the ongoing struggles over the legitimacy of psychiatric hospitalization and involuntary treatment of psychiatric patients.

The Fram Report is comprised of three elements, each of which is summarized below.

First is an analysis of the need for reformed substitute decision laws and a statement of the principles that ought to guide that reform. That analysis and those principles are both colored by

then recent initiatives to close the Provincial "Schools" for developmentally disabled persons in favor of independent life in the community. Fram is animated by a laudable desire to ensure that guardianship legislation could not be used to establish a regime of paternalistic control in the community. For this reason, it takes the position that guardianship (and by logical extension all forms of substitute decision-making underpinned by findings of incapacity) is at best a necessary evil. In addition, it holds that "mental capacity" is a purely legal concept with no counterpart in human function and should therefore be assessed primarily by non-medical practitioners.

Second, Fram makes an urgent plea for the investment of public funds to create what might be described as a form of "consensual" institutional guardianship of property for developmental delayed persons who lack mental capacity. This request is inconsistent with Fram's general opposition to bureaucratic intervention and "paternalism," although easy to sympathize with in historical context.

Third, Fram offers an annotated model statute that was ultimately substantially incorporated in the *Substitute Decisions Act*. It is a fair summary to say of this model that it presupposed the creation of institutional structures that would centralize and oversee the process of obtaining assessments of capacity and imposing guardians on incapable people. Some of Fram's institutional substructure was eliminated when the model was transformed into a Bill, and still more when the *Substitute Decisions Act* was substantially amended approximately one year after it became law. In the result, the only institutional actors left to oversee much of the resulting legislation are the Office of the Public Guardian and Trustee, the Consent and Capacity Board and the Superior Court of Justice, and the latter two institutions act only after findings of incapacity have been made.

The Weisstub Report is, on every relevant scholarly and intellectual criteria, a landmark achievement. It was rightly accepted as establishing the standard for defining and assessing mental capacity, and where one may now reasonably differ with some of its conclusions it is largely because of developments that neither nor his experts can be faulted for failing to fully anticipate. Furthermore, much of the analytical framework that Weisstub established stands the test of time, and can readily be modified to incorporate later developments.

There are two issues in respect of which Weisstub's approach ought now to be modified, each of which is summarized below.

First, Weisstub's subtle notion of mental capacity is at odds with the ordinary understanding of the concept, and this has caused great difficulty for the medical practitioners and lawyers who must assess capacity. Although he is very far from sharing the Fram Report's notion that mental capacity is simply a legal concept, in the final analysis, Weisstub adopts a more sophisticated version of Fram's view. "Capacity" is not a human attribute or collection of human attributes but a legal standard the primary function of which is to protect individual liberty from unwarranted intervention. For this reason, Weisstub endorses a conceptual framework that is primarily intended to ensure that capacity is not assessed by reviewing the quality of an individual's decisions, e.g. by asking whether the assessor agrees with the actual decision.[8]

In justice, it must be said that Weisstub qualifies this view in a number of crucial respects. He does not assert, as some have since, that capacity can be assessed without reference to the actual decisions that people make, e.g. that a person may be found capable without any demonstrated evidence of capacity.[9] Nor does he deny the connection between incapacity on the one side and brain injury, psychiatric illness or age on the other, or argue (as Fram does) that there is such a thing as non-paternalistic substitute decision-making. Weisstub acknowledges the reality of mental incapacity, but wants to be sure that he banishes the notion that odd, disagreeable or inappropriate views, decisions or conduct - or the presence of a particular illness or diagnosis - can ever again be taken as proof of incapacity. But in pursuing these entirely justifiable goals, he carries matters one fatally confusing step too far: capacity is a human function and incapacity is the absence of that function or functionality. It is not merely a legal standard for the justification of intervention in a private person's personal affairs but rather a test that is keyed to who that person is. More simply, an assessment of capacity is not simply a procedural step to justify intervention, but also a mode of pursuing the truth about a particular human being, and responding accordingly to his or her needs. Again, to be fair to Weisstub, it is necessary to state that had he available to him an approach to assessing capacity that did not simply assess the quality of decisions he might well have taken a different approach. But he did not, and there is an argument for doing so now.

This may seem like a merely technical dispute, but it lies at heart of a complex of issues that together have undermined the stability and practicality of the framework established by Weisstub and Fram. The main elements of that complex can be summarized as follows:

1. Downplaying (Weisstub) or ignoring (Fram) the human propensity for abuse of the vulnerable, and of legal and social systems established for the purpose of protecting the vulnerable.

2. A definition of mental capacity that on the one hand seems very straightforward, and on the other very disengaged from ordinary experience. Read literally, the "appreciate" and ""understand" test could be applied to render a well-trained dog legally capable of making decisions. Yet the specialized notion of "capacity" as something distinct from peoples' actual decisions seems to call for the application of a specialized expertise that is capable of penetrating to peoples' inner experience and abilities. The definition therefore leaves many thoughtful people wondering how, if at all, capacity can ever be assessed in any meaningful way.

3. The successful functioning of a system for mental capacity assessment and substitute decision-making depends on the creation of a related institutional structure or super-structure. This is clearest in Fram, which issues an impassioned plea for the creation of a non-paternalistic "advocacy" system to support developmentally handicapped people in the community, and proposes legislation that assumes the existence of an official advocacy agency. But it is also, albeit more subtly, a feature of Weisstub. First, Weisstub's reliance on "pre-assessment of capacity" as a prelude to capacity assessments assumes that the cohorts of caring professionals in medicine and law will take his point and incorporate such assessments into their practices. Yet precisely because the definition of "capacity" points towards a specialized expertise it is not at all clear how they are to do so without assessing actual conduct or decisions. In retrospect, Weisstub was probably asking more of most professionals than they were capable of giving, for nothing in their training had prepared either medical or legal professionals for the task assigned to them.

4. The Fram and Weisstub frameworks also gave no or insufficient attention to how the "new" law of mental capacity would interact with existing institutions, and this has occasioned much ongoing trouble. For example, Weisstub established a framework for professionalizing assessments of capacity, without considering that the effect of doing so was to fragment the world into "professional" assessors legally able to work within the statutory framework and other experts who would henceforth be excluded from performing functions under the statute but would continue to address extra-statutory issues like testamentary capacity or the capacity to make gifts.[10] Among other things, this division of labor heightened the expectation that a statutory assessment brought a special kind of expertise to bear in a new kind of legal procedure conducted by non-lawyers. Finally, and most fundamentally, neither Report considers how the new approach will affect the families and community based health practitioners, clinics and agencies – many of whom have little or no access to legal advice- who provide care to vulnerable people.

The point regarding the new legal regime and the community returns us to Point 1 immediately above, namely, that neither Report seriously considers the human propensity for abusing the vulnerable. Indeed, this omission is directly related to defining capacity as a legal standard and not the absence of a human attribute or attributes that enable human beings to make decisions. Both Weisstub and Fram effectively assume that by setting a relatively low threshold for mental capacity (which translates into a high threshold for declaring an individual incapable) they would avoid making capacity an issue of widespread import and importance. This expectation has proved wrong. First, the *Substitute Decisions Act* was accompanied by the *Health Care Consent Act* which had the effect of making large numbers of professionals aware that capable people had the right to make their own decisions, without providing them with any expertise on what this meant in practice in domains beyond the hospital walls.[11] Second, as the population aged and rates of dementia increased, so too did the frequency and intensity of family quarrels over the capacity of peoples' elderly relatives. In this connection, two parallel threats emerged. The first is that the mere existence of a system for making and acting on declarations of incapacity made it more likely that problems that would have been dealt with under a different rubric would now be addressed as issues of incapacity. The second is that people who are either indifferent to the plight of vulnerable people, or who actively seek to exploit their vulnerabilities, were quick to

adopt "capacity" as the governing standard of legal and moral acceptability. Indeed, the emphasis on capacity assessment and the view of capacity as a legal test tacitly invited this outcome. On this legalistic view, a person is capable until declared incapable.[12] Hence, it is legally and morally proper to serve that person by advancing his or her express wishes until a declaration of capacity has been made. In short, the law of mental capacity had become centered on a legal fiction and practice soon followed.

Ideas matter, especially ideas that have been enshrined in official reports, statutes and institutions. The *Abrams* litigation indicates that Ontario's judiciary is aware of the need to avoid legalized injustice in guardianship cases. In this respect, and in keeping with the present discussion, one may draw particular attention to the litigation over the question of when and how many capacity assessments parties are entitled to request, and Brown J's stern denunciation of the parties for using a guardianship proceeding to address their own personal agendas.[13] With this background in view, we may now proceed to consider why it is reasonable to think that the law of mental capacity can be better adapted to practice by incorporating into it some of the insights of brain science, and further that this step can now be taken without compromising Weisstub's efforts to ensure that diagnosis, illness or the quality of a person's decisions could be taken as evidence of mental capacity.

II: Brain Science

It is best to let the scientists tell their own story, but it is essential to explain why lawyers need to read it. To that end, Appendix A offers an annotated list of suggested books, articles and web sites, and this part sets out with a modest goal. That is to explain why lawyers – and the law – should take account of this burgeoning scientific literature and invite them to do so. The reason is that brain science offers insight on how to assess mental capacity without openly or tacitly assessing the quality of a person's decisions.

Recall here that Weisstub acknowledged that it was, in practice, impossible to assess capacity without taking account of an individual's actual decision-making. This is what lawyers do when we assess a client's capacity e.g., to issue Will instructions. We can ask ourselves whether the person appeared to listen and respond to us, whether his or her responses were or were not

rational and related to the advice given and whether he or she consistently expresses the same wishes. Ultimately, the last two points tend to be given substantial weight, and reported cases on mental capacity –especially testamentary capacity – tend to review the history of the allegedly incapable person's relationship with the parties engaged in the litigation. The reason is that the best read that a lawyer (or a Judge) can get on mental capacity is to ask whether the available facts, taken as a whole, add up to a rationally coherent whole.

This is not to say that natural observation is less weighty than expert evidence of capacity. To the contrary, our capacity for observation is the only basis on which solicitors may claim special expertise in assessing capacity. The question is, however, whether we can improve on that capacity by drawing lessons from brain science. More precisely, are there lessons we can draw that will help us overcome the inherent limitations of the solicitor\client relationship, the most significant of which is that most of the time lawyers are not able to independently assess the veracity or completeness of the facts presented to them by their client (or others, for that matter.)[14] Cognitive neuroscience has a rich and instructive history of careful and systematic patient observation that offers a model for such observation by lawyers. [15] In Appendix A, under the heading Interviewing, the reader will find citations of some book chapters that incorporate particularly helpful case reports. If one disregards the occasional hyperbolic claim to have penetrated the secrets of human consciousness, and is skeptical of all claims to be able to deduce functional capacity (e.g. the ability to do things independently in the real world) from brain anatomy or function, the neuroscientific literature is a treasure trove of helpful insight for lawyers.

Neuroscientific observation differs from that of desk lawyers primarily in its focus not only on the content of thought and speech but also on the form – that is, a person's manner or style of speech, movement and communication. This seemingly obvious distinction (between form and content) takes us immediately to the deficiency in the law of mental capacity that neuroscience offers to fill. Neuroscientists have developed incredibly fine grained models for observation because they are able to infer the presence of a disturbance of perception, thought or judgment from the content of peoples' speech, their actions, and their patterns of speech, thought or movement. In this respect, neuroscience affirms that mental capacity, understood to mean the neuro-cognitive underpinnings of real world decision-making, is a short hand for the complex

and seamless intermixture of observation, recognition, recall, understanding, that normally functioning human beings bring to the process of making decisions. Mental capacity is something real. As well, neuroscience affirms that one can assess capacity without simply assessing the quality – e.g. the goodness or badness - of a person's decisions. Rather neurology lends insight into what it means to say that a particular expression of desire is, in fact, a decision (as opposed, for example, to an automatic or nonvolitional urge - as with obsessions.) At its best, neuroscience sheds light on how perception, emotion and reason come into play to create decisions that reflect the entire humanity of the person making them.

The foregoing paragraph makes a large claim that the curious reader may easily test by referring to the suggested texts, and ultimately to the rich array of books and articles that each cites. For the more limited purposes of this paper, namely, to demonstrate how useful these insights are in practice, immediately below the reader will find a summary list of some of the insights this author has drawn from a course of reading and discussion over the course of several years.

1. **Memory is a Complex Phenomenon:** Memory is a far more complex and multi-faceted phenomenon than most people appreciate, and disturbances of memory can, at times, severely and pervasively impair decision-making. Neuroscientists have devised a remarkably careful taxonomy of different forms and functions of memory, but two of the distinctions they draw are particularly useful in practice. First, a remarkable feature of human memory is not only the capacity for recall (which in some respects is a synonym for learning) but for relevant recall – that is, calling on conscious or unconscious memory that is immediately relevant to something happening now. For this reason, memory impairment may severely and pervasively the decision-making capacity even of people who can receive and understand information presented by an assistant: such a person is effectively dependent on his or her assistant to decide what counts as relevant. More simply, memory is related to attention. Second, there are disturbances of memory that allow people to remember particular information but not how or when the information was acquired. This is particularly significant when such a person is making a decision that requires an assessment of another's character – e.g. which of my children is best suited to act as my attorney for property. In such a case, there is a very significant difference between a person who rejects her son as an attorney because she independently

recalls numerous instances of his untrustworthiness and another who thinks her daughter to be untrustworthy but forgets that she thinks this because she has been repeatedly told so by her son.[16]

2. **Veridical versus Goal-based Decision-making:** Some neuroscientists draw a very helpful distinction, that is immediately relevant to legal practice, between veridical and goal-based decision-making. Veridical decisions are ones that may easily be assessed as either correct or incorrect, e.g. is this cheque made out for the correct amount? Goal-based decisions, in contrast, require people to form and implement their own goals and cannot easily, if ever, be assessed as correct or incorrect, e.g. which of your children would make the best attorney for property. (This is not a veridical question because one person may prefer an attorney who is consultative and diplomatic, while another person prefers an attorney who is decisive and independent.) Recall here that some people cannot remember how they know certain things. If such a person is primarily called on to make veridical decisions in respect of property management (e.g. remembering what bills he has to pay, and then paying them on time) he may be capable if he is able to rely on external memory aids. But if the same person has to make a decision that requires him to identify and assess his relevant experience and formulate his own goals based on that experience (e.g. should I divide my estate equally between my two children), he is likely incapable.[17]

3. **Memory of the Future:** Neuroscientists have developed a seemingly paradoxical concept called "memory of the future" which is, in a way, the cognitive counterpart of the statutory "ability to appreciate the consequences of making or not making a decision." "Memory of the future" means the capacity to rely on stored information and experience to assess - and make decisions regarding – current situations. It turns on the ability to recognize relevant patterns of experience and deploy them to permit rapid, and sometimes unconscious, analysis of situations. It is at the root of the phenomenon we describe as "judgment" or "wisdom," and is one of the grounds for asserting that equivalent levels and types of disability do not always result in similar levels of disability in dissimilar people. For example, a person who has long familiarity with powers of attorney may possess the capacity to make a power of attorney even though a stroke has

disrupted his capacity to learn, while another person who suffered a similar stroke is unable to make such a power of attorney. Conversely, disruptions of memory and attention are likely to disrupt "memory of the future" and effectively deprive people of the ability to understand information that is not merely relevant but essential to the decision-making process. One might say that some people quite literally cannot decide what they want because they cannot know why they want anything.[18]

4. **Decision-making turns on Reason and Emotion:** Lawyers are rationalists. We proceed through rigorous analysis and the application of lucid conceptual schema to the circumstances of ordinary reality. We are prone to explain things, and impatient with circumstances that defy explanation or resolution. One way to think of emotional valuations is a kind of short-hand assessment of reality based on learned reaction. In some respects, Judges have been prepared to acknowledge this truth, but in general, one may suspect that they are ill equipped by disposition to do so – and neither practicing lawyers nor the experts on whom they rely have been fully effective in overcoming this tendency. Recent data suggests both that rates of dementia in the aging population will be higher than anticipated, and that impairments of judgment related to the desire for pleasure are both more common than supposed – and more likely to appear before the more common, and more evident, symptoms of dementia (like word finding difficulty and forgetfulness.) For these reasons, it is imperative that solicitors pay more attention to recent changes in the habitual character and demeanor of their clients than they have traditionally done, especially in connection with late life decision-making about Wills and powers of attorney.[19]

5. **Neuroplasticity:** From the 1960's forward, the so-called "medical model," which supports non-consensual therapeutic intervention, has been contrasted with the more libertarian, rights oriented "lawyers model." Contemporary neuroscience in many ways renders this dispute sterile, because it offers such powerful support for the central premise of the law of mental capacity, namely, that the onus should always be on the person who asserts that another lacks mental capacity to demonstrate the truth of that assertion.

There are at least six ways in which neuroscience actually supports a generally non-interventionist orientation towards issues of mental capacity.

(a) It encourages a general awareness of how much human behavior depends on brain function, and of how broad the spectrum of normalcy is.

(b) It encourages a salutary awareness of the enormous complexity of brain function and its relation to actual behavior, and so simultaneously encourages therapeutic ambition and hopefulness at the high level, and therapeutic modesty in assisting particular individuals.

(c) By demonstrating how plastic and changeable to brain is, and how deeply grooved particular skills may become with practice, neuroscience offers strong support to Weisstub's caution about accepting a diagnosis, or even evidence of a particular kind of brain dysfunction, as evidence of mental incapacity.

(d) The brain is a "use it or lose it" instrument. This observation puts a new spin on the dangers of the "labeling" effects of diagnosis. There truly is a risk that labeling a person as incapable will restrict that person's opportunities to acquire the missing capacity through practice, thus producing incapacity (if the diagnosis was incorrect) or maintaining it (if the diagnosis was correct.)

(e) There appears to be more hope for recovery from brain injury than was previously thought to be the case, especially in connection with closed head injury and stroke. Doidge's the "Brain that Changes Itself" offers moving testimony to two of the great figures in the development of neuro-rehabilitation (Paul Bach-y-Rita and Merzenich) and this writer's own experience in acting for people with grievous closed head injuries suggests that there is reason to be cautious before writing people off as irremediably incapable.[20]

(f) Finally, a raft of writers have produced a powerful testimony to the power of human creativity and independence to co-exist (and at time draw strength from) disability. The literature is replete with instances of profound creative insight and ability that co-exist with genuine and profound disability.

In sum, the emerging field of cognitive neuroscience offers an opportunity for co-operation between medical professionals and lawyers and between neuroscience and law. Probably the greatest gift proffered by this science is evidence that there is such a thing as mental capacity; that mental capacity is related to, but not fully determined, by brain function; and, that it can and should be recognized and assessed without any reference to the assessor's agreement with or disapproval of the decisions made by an allegedly incapable person.

III: Implications for Practice

The final section of this paper offers some thoughts on the practical implications of some of the insights outlined in the previous part of this paper.

Overreliance on procedure: Both Weisstub and Fram placed great reliance on procedural rights as a primary mode of protecting individual liberty . The *Abrams* decision in particular demonstrates how procedure may become a weapon for the deprivation of liberty, a conclusion that was expressed by a leading counsel in guardianship applications in a newspaper story that reported on the *Abrams* litigation. In that connection, Jan Goddard observed that too often the instigation of guardianship litigation leaves allegedly incapable people in a state of prolonged limbo.[21] It is respectfully submitted that this outcome follows, in part, from regarding assessments of capacity as, in essence, a procedural requirement for state-sanctioned intervention in a private individual's personal affairs. This view is only partially true, and a more accurate description is that assessments of incapacity are a mode of recognizing or confirming an underlying truth, namely, that a person has lost the mental capacity to make some or all of his or her own decisions. The assessment has no intrinsic worth but, like all expert opinion, must itself be assessed in light of the expert's thoroughness and integrity, and the evidence as a whole. In light of this fundamental truth, lawyers should equally recognize that it is impermissible to assert that a particular person is capable only because no assessor has ever said that he or she is incapable. Such a statement is about as meaningful as saying that a person did not die of cancer because she refused to allow a doctor to confirm that it was cancer that was killing her. This is not to say that lawyers should disregard the procedural rights built into the law of mental

capacity, but only recognize their intrinsic limitations, and seek to supplement procedure with a thoughtful focus on pursuing truth.

Patient Listening: Patient listening is the most important skill that a lawyer can bring to serving clients who may be incapable of making decisions. Furthermore, insisting that medical experts possess and deploy this skill in their work is probably among the most important services that a lawyer can render to a client. Capacity and incapacity are deeply interwoven with experience, beliefs and mental functioning. The right to be heard is therefore essential to protecting individuals from unwarranted findings of incapacity, and that right should be respected from the moment a client enters a lawyers' office. Moreover, lawyers must recognize and act on the distinction between veridical and goal-based decision-making. When the latter is in issue, it is particularly important to ensure that the client has been invited to speak his or her own mind for otherwise the lawyer will have no meaningful way to determine what his or her client really wants – and at best, a deficient basis for demonstrating, if called upon to do so, that the client possessed mental capacity. It is likely the case that the skill lawyers most need to learn from medical professionals is the art of the free-ranging, non-directional clinical interview, and one can make a sound case for incorporating training in basic interview techniques in the standard law school curriculum.

Deciding Who Will Decide: The *Substitute Decisions Act* explicitly recognizes that a person who is mentally incapable of making decisions regarding his property may be capable of appointing an attorney for property, and that a person who is incapable of making decisions regarding her personal care may be capable of making a power of attorney for personal care. These provisions rest on ordinary common sense. There are many occasions in life when we must rely on others to exercise their judgment in our behalf on matters outside our personal expertise. But it must be noted that our ability to do so often, if not always, turns on the limits of expertise. That is, my stock broker may fully understand the implications of an increase in the Bank of Canada's overnight borrowing rate, while I know nothing about it. But I am still able to oversee my stock broker because I am aware of the role that finances play in my life (e.g. whether I am a profit-focused investor with a high risk tolerance who is prepared to "play" the effects of a likely increase in the overnight rate, or a security-oriented saver with a low risk

tolerance whose primary goal is to ensure that I have the income required to spend on the things that most matter to me.) Indeed, there is a cogent argument that the test for capacity to make a power of attorney for property incorporates the element of oversight indirectly by requiring a capable person to understand the attorney's duty to account and the grantor's right to revoke the power. But there is a subtler and more fundamental element of capacity that is presumed by the statutory test, and that necessarily enters into the process of assessing capacity, namely, the capacity to understand information about the appointment of a particular attorney and the likely consequences of appointing one attorney instead of another. Put this way, the test for capacity recalls the distinction, discussed above, between veridical and goal-oriented decision-making. The appointment of an attorney is an instance of goal-oriented decision-making that requires the grantor to assess the attributes of those whom he might appoint, how each is likely to behave, and which appointment is therefore most consistent with the grantor's own goals. In this last respect, the decision also recalls the neurologist's notion of knowledge of the future, and the role of emotion in decision-making. The forced choice among quarreling children or other relatives is a particularly difficult decision to make, and impossible for a person who lacks a solid grasp on his own history (including the sources of the knowledge on which he or she acts.) For these reasons, it is important for solicitors to recognize that especially in cases where a person's finances are relatively straightforward or call for the exercise of well-learned and practiced skills; where a person's children or near relatives are at odds with one another; and, where a person's judgment is compromised by memory loss, brain injury, illness or aging, the appointment of an attorney for property or personal care may actually be a more intellectually demanding task than is the management of property.

Finally, as lawyers recognize the full complexity of mental capacity, and the intricate connections between personal experience and brain function, they should correspondingly expand the range and depth of their own mandate. The appointment of an attorney is a technical matter, but also a question of what difference the appointment will make in the circumstances of a client's own life. To answer this question, the client must engage in a kind of high-speed summation of his or her life experience with the person nominated as an attorney, and while lawyers cannot require people to make this assessment a thoughtful one, we can certainly encourage and assist people in this direction.

Appendix B to this paper, entitled "Risk Factors for Attorneys" is a document that is intended to demonstrate how people can be assisted in making thoughtful decisions. This document is a work in progress, and is intended to show how lawyers, if we analyze our practical experience as carefully as neuroscientists do theirs, can greatly enhance our ability to serve our client more effectively than we now do.

C:\DOCUME~1\afish\LOCALS~1\Temp\MetaSave\TOR01-4328583-v1-AIF_-_Conference_-_April_14_&_15__2010_-_LSUC_Special_Lectures_2010_-_Arthur_Fish_s_Paper__Cognitive_Neuroscience_and_the_Solicitor_s_Approach_to_Mental_Incapaci.DOC

---

[1] *Substitute Decisions Act*, 1992, S.O. 1992, C-30, as amended (hereinafter, the "*SDA*").
[2] Ontario, Final Report of the Advisory Committee on Substitute Decision Making for Mentally Incapable Persons, 1987 (hereinafter, the "Fram Report") and Ontario, Enquiry on Mental Competency, Final Report, 1990 (hereinafter, the "Weisstub Report". For further elaboration of this approach to mental capacity, see also Deciding for Others and When the Mind Fails.
[3] See Fram Report at 92-99, 106 and 139-40 and Weisstub Report at 163–231.
[4] See Fram Report at 60-61 and 74 and Weisstub Report at 45, 47, 68, 80, 112, 268 and especially 232-272.
[5] *SDA*, s.8 and s.47, and compare Fram Report at 192 and Weisstub Report at 112-113 and especially at 268-269.

[6] *Banton* v. *Banton*, 1998 CanLII 14926 (ON S.C.); *Feng* v. *Sung Estate*, 2003 CanLII 2420 (ON S.C.); *Chu* v. *Chang*, 2009 CanLII 64816 (ON S.C.)

[7] Need reference to *Consent and Capacity Statute Law Amendment Act*.
[8] Weisstub Report at 31-33.

[9] Compare, for example, the Weisstub Report at 249 and the use made of the referenced material by Major J. in *Starson* v. *Swayze*, [2003] 1 S.C.R. 722 at par. 80.

[10] In fact, the statute presumes the availability of this kind of expertise.
[11] *Health Care Consent Act*, 1996, S.O. 1996, C-2, Sch.A
[12] A view supported by the reverse onus following a declaration.

[13] *Abrams* v. *Abrams*, 2010 ONSC 1254 (CanLII) at par. 35

Proceedings under the *SDA* are not designed to enable disputing family members to litigate their mutual hostility in a public court. Guardianship litigation has only one focus – the assessment of the capacity and best interests of the person whose condition is in issue. This court, as the master of its own process and as the body responsible for protecting the interests of the vulnerable identified by the Legislature in the *SDA*, should not and will not tolerate family factions trying to twist *SDA* proceedings into arenas in which they can throw darts at each other and squabble over irrelevant side issues.

[14] The obvious exception is the lawyer dealing with a long time client.
[15] Much of legal fiction plays on the gap between forensic truth and the full truth, see e.g. the trial scene in Dostoevsky's, The Brothers Karamazov. See also Oliver Sacks's forward A.R. Luria, The Man With A Shattered World, Harvard University Press, 1987 and Oliver Sacks, The Man Who Mistook his Wife for a Hat, Touchstone

Press, 1998 at p. 173 and forward and E. Goldberg, The New Executive Brain, Oxford University Press (2009) "The Fallen Horseman: A Case Study at p. 189.

[16] E.R. Kandel, In Search of Memory, Norton (2006) esp. part IV at pp. 279 -307; Turving and Craik eds., The Oxford handbook of Memory, Oxford University Press, (2000) esp. chapter 2; Tulving, "Concepts of Memory," chapters 11, 12 and 13 under the heading "Reflections in Memory", chapters 20-23 under the heading "Memory in Use" and chapters. 25-28 under the heading "Memory in Decline" especially chapter 26, Mayes, "Memory in the Aging Brain" and chapter 27, "Selective Memory Disorders."

[17] E. Goldberg, op. cit. at 98 – 114.

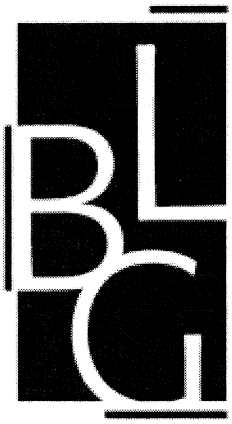
[18] J. Ratey, A Users Guide to the Brain, Vintage Books, 2002 at 188-201 and Goldberg, op. cit. at 193.

[19] J. Lehrer, How We Decide, Houghton Miflin (2009) at pp. 28-56; R. Montague, Why Choose This Book, Dutton (2006) at 162-197 and

[20] N. Doidge, The Brain that Changes Itself, Viking (2007)

[21] K. Makin, Globe and Mail, March 30, 2010 at "Judge Blasts Sibling" "While Ontario's *Substitute Decisions Act* is considered one of the most progressive in the country, Ms. Goddard said that cases are not being processed speedily and effectively.

'I don't think that anyone foresaw that the court proceedings the act planned for would become a forum for high-conflict families to engage in disputes," Ms. Goddard said. "It really was unanticipated, and there are lots of shortcomings in the law. The court process moves fairly slowly and is relatively expensive. It isn't a very good fit for the needs of the person who is central to the dispute.'



BORDEN
LADNER
GERVAIS

Appendix "A"

Neuroscience for Lawyers: An Annotated Reading List

by

Arthur Fish, B.A., LL.B., B.C.L. (Oxon.), S.J.D. (Toronto)
Director, Wealth Management Practice Group
Borden Ladner Gervais LLP (Toronto)

The purpose of this reading list is to encourage lawyers to sample the neuroscience literature. In my own reading over several years, I have found that there are numerous entrance points into this literature. This reading list is neither definitive nor complete. It is however broad enough to relate to a wide variety of interests and to indicate the numerous points of contact between law and neuroscience. I have also tried to identify works, especially under the heading "Ethics and Neuroethics," that frame some of the controversies surrounding the assessment of mental capacity in the more fundamental moral and philosophical debates from which they emerge.

If any reader knows of books, articles or websites on neuroscience that may interest lawyers, I will be grateful if they forward their suggestions by email to afish@blgcanada.com . Please include publication data and a brief statement of why you think the suggested work will interest others. I will update the list as I receive suggestions, and all contributors will be duly acknowledged. As the list is revised, I will make it available through social media and websites.

INTRODUCTORY WORKS

The following books offer general introductions to the field of neuroscience and how the brain controls or shapes human functioning:

S. Allen "Brains on Purpose" at http://westallen.typepad.com/brains_on_purpose/ and "idealawg" at http://westallen.typepad.com/idealawg/2009/11/new-blog-on-the-neuroscience-of.html

Allen is a lawyer and mediator, and her blogs explore the application of neuroscience to conflict resolution, legal training and practice. "Brains on Purpose" focuses narrowly on neuroscience and conflict resolution while idealawg addresses a wide variety of law related topics. Each blog is interesting in itself, and links to related sites.

G. Campbell, Brain Science Podcast at http://docartemis.com/brainsciencepodcast/

This remarkable site is operated by an emergency room physician with a passion for brain science. Dr. Campbell has conducted detailed interviews with an amazing collection of brain scientists, and accompanies each interview with a guide to the scientist's own works and a reading list of related items.

Rita Carter, The Human Brain Book, DK Publishing: New York (2009)

Almost all books on neuroscience contain descriptions of neuro-anatomy and neurophysiology. These topics are as essential as they are difficult for the lay person to grasp. This beautifully illustrated book is therefore an essential reference tool. Aside from serving as an atlas of the brain, it contains a wealth of well indexed and illustrated information on particular topics, e.g. development and aging at p.208.

Cole, Levitin, Luria, The Autobiography of Alexander Luria, Erlbaum Associates: New Jersey (2006)

Luria is a pioneer of modern neuropsychology. Oliver Sacks honors him as the inspiration for his own literary and scientific approaches, as does Elkhonon Goldberg. An introduction to Luria's life and intellectual concerns also serves as an introduction to the purpose of neuropsychology and a wonderful frame to many of the ongoing debates about capacity assessment. This is an extraordinarily interesting book about an extraordinarily courageous and resourceful man. "In a totalitarian Communist regime that valued the individual not at all, Luria worked with his neurologically impaired patients by discussing their injuries with them and taking their comments seriously." D. Orwin at p.3. The final chapter of the Autobiography, "Romantic Science" (at pp. 174 – 188) illuminates the tension between mathematical and observational psychology. This discussion puts the debate over the role of medical or scientific expertise in capacity assessment into a fresh and illuminating perspective. For further insight into Luria, see Elkhonon Goldberg "The New Executive Brain" at pp. 9 -19 and Donna Orwin, "Consequences of Consciousness" (Stanford University Press: California (2007), the introduction to which begins with a brief but telling discussion of Sacks and Luria. Orwin's book is a work of literary criticism devoted to "subjectivity and its validation in mid-nineteenth-century Russian psychological realism." As a whole, Orwin's book suggests that the capacity for careful observation of others is a function of self-knowledge, and that this capacity forms the basis for meaningful psychological inquiry in ways that psychologists and other experts are not themselves always willing to acknowledge.

Norman Doidge, The Brain that Changes Itself, Viking Penguin: USA (2007)

Doidge is a Toronto-based brain researcher and psychiatrist. This extraordinarily well written and pleasurable book deals with "neuroplasticity" or the brain's capacity to re-organize itself (for better and worse) in response to ongoing experience. This book offers the best description of brain physiology and neurochemistry that I have read. Neuroplasticity is immediately and heavily relevant to the law of mental capacity because

it illuminates the "use it or lose it" character of the human brain and the promise of new brain rehabilitation technologies. This book is in the literary-scientific tradition established by Luria, and is also a model for scientifically informed reasoning on philosophical problems (see especially the two appendices.)

Elkhonon Goldberg, The New Executive Brain: Frontal Lobes in a Complex World, Oxford University Press: New York (2009)

If the reader must pick one book only from this list, this should be it (if two, this one and Doidge's, "The Brain that Changes Itself".) Goldberg's immensely readable book includes a personal autobiography that details his escape from the Soviet Union, his relationship with his mentor, Alexander Luria and detailed and fascinating explorations of how the frontal lobes of the brain make us human. This book has great immediate relevance to the topic of capacity assessment because it addresses the crucial roles of adaptation to novelty, judgment and goal formation in decision making. It also offers an extremely useful introduction to the value of computational neurology. Along the way, Goldberg details his own theories on the purpose of the bi-cameral human brain, on neuro-anatomy and brain organization and on the value of brain training. Readers may supplement the book by consulting his personal website at elkhonongoldberg.com and the website for sharpbrains.com which offers a wealth of links to sites dealing with brain training.

V.S. Ramachandran and S. Blakeslee, Phantoms in the Brian, HarperCollins: New York (1998)

Ramachandran is a puckish and irrepressible man, who set out to write a popular science book based on his work with his own patients. He is also an extremely ingenious thinker, with a remarkable ability to formulate unexpected insights into human functioning from his careful observation of his own patients. Chapter 4 "The Zombie in the Brain" at pp. 63 – 84 in which he draws conclusions about the nature of the "self" from a blind patient who had retained the capacity for sight (anyone who wishes to resolve this seeming paradox must read the chapter) is a wonderful example of this side of Ramachandran.

John Ratey, A User's Guide to the Brain, Random House: New York (2001)

Ratey is a Harvard-based psychiatrist and a prolific author of popular and scientific works on psychiatry, brain function and related topics. This book describes the human brain in terms of perception, attention, consciousness and what Ratey calls the "Four Theaters" – movement, memory, emotion and language. This book is well written and particularly helpful because the theoretical descriptions are closely tied to actual human behaviour, are illustrated with numerous clinical examples, and illuminated by Ratey's humanistic approach. His chapter on emotion is directly relevant to mental capacity assessment. Ratey ultimately uses the emerging brain science as the foundation for a new psychiatry, and his work in this area has profound implications for the presentation of expert evidence in the courts. Insofar as it attempts to offer a new kind of psychiatry, Ratey's book can usefully be read together with V.S. Ramachandran's, "A Brief Tour of Human Consciousness", Pi Press: New York (2004) which emerged from his 2003 BBC Reith Lectures. Ramachandran's book is less comprehensive but more daring than Ratey's, as is apparent from the title of his final chapter "Neuroscience – the New Philosophy." In this connection, Ramachandran's book is an excellent complement to Gazzinga's book on neuroethics (see below.)

INTERVIEWING - THE ART OF OBSERVATION

Oliver Sacks, The Man who Mistook his Wife for a Hat, Simon & Schuster: New York (1985)

Sacks is himself a model for the thoughtful observation of human beings, and demonstrates that this is a deeply human activity over which no professional group can claim a monopoly. He combines dispassionate neurological analysis and diagnosis with vivid, deeply moving evocations of the inner lives of his subjects, all of whom are afflicted by neurological disorders. The first chapter "The Man who Mistook his Wife for a Hat" illustrates how profound neurological disability can co-exist with an appearance of staid normalcy. His brief introduction to part four of the book (at pp. 173 - 77), "The World of the Simple" (in which he acknowledges his debt to Luria) is a clear

and profound statement of Sacks's own working methods. This brief statement illustrates the moral and ethical importance of focusing on individual cases, as lawyers and writers do, and in this way bolsters the case for thinking that the assessment of mental capacity should not be allowed to turn solely on "expert" assessment.

A.R. Luria, The Man With a Shattered World, trans. L. Solotaroff, Harvard University Press: Cambridge (1987)

This work should also be considered under the headings memory and ethics, for it illustrates how the devastating effects of profound memory loss may be conjoined with, and to some degree offset by, neuro-rehabilitation and the profound human longing for psychic wholeness.

EMOTION AND DECISION-MAKING

Although discussions of this topic appear pervasively in the neuroscience and neuro-economic literature, three books, read together, introduce the theoretical role of emotions in decision-making; illustrate the practical implications of this interconnection in real world activity; and, explore the philosophical and ethical implications of the connection between emotion and reason. Damasio's and Goulston's books are aimed directly at a popular audience. Brann's book is an academic tour de force that traces the history of thought about emotions from the ancients through to contemporary philosophy and psychology. The book combines detailed interpretations of particular writers with Brann's own comprehensive reflections.

For theory: **A. Damasio, Descartes Error, Penguin: New York (1994)**

In practice: **M. Goulston, Just Listen, Amacom: New York (2010)**

Implications: **E. Brann, Feeling our Feelings, Paul Dry: Philadelphia (2008)**.

MEMORY

Eric Kandel, In Search of Memory, Norton & Company: New York (2006)

This is the autobiography of Eric Kandel who won the 2000 Nobel Prize in physiology or medicine for his work on the mechanisms of memory storage in the brain. Doidge's "The Brain that Changes" Itself begins with an explanation of how Kandel's findings opened the door to the discovery of neuroplasticity. Kandel's book is part personal autobiography, part scientific autobiography and part reflective essay on the implications of his research into memory and brain function. Kandel's personal story begins with Kristallnacht in 1938 and continues through his emigration to the United States and development as a brain scientist. He artfully interweaves his personal memories with his explication of the mechanisms of memory so that the reader will gain a fuller understanding of memory's role in learning, reasoning and shaping our individual characters and brains. Kandel also offers a provocative discussion of how the new brain science fits with the practice of psychoanalysis, a topic that appears repeatedly in the books cited on this list. Readers who wish to pursue this topic might consult the website of the International Neuropsychoanalysis Centre at http://www.neuro-psa.org.uk/npsa/ or http://www.mindhacks.com/blog/2007/05/neuropsychoanalysis.html which links to a wide-ranging interview with Dr. Mark Solms.

E. Tulving and F. Craik eds. The Oxford Handbook of Memory, Oxford University Press, New York (2000)

This compendium of articles is extremely useful in itself and as an extremely valuable reference tool. Tulving and Craik reside in Toronto and are associated with the Rotman Research Institute of the Baycrest Centre for Geriatric Care. The book may usefully be supplemented by consulting their individual pages on the Institute's website at www.rotman-baycrest.on.ca.

F. Yates, The Art of Memory, University of Chicago Press, 1974.

We live in a time and culture that whirs along at a demonic pace, and in which we are accustomed to rely on artificial supplements or replacements for our own memories. This book returns us to times and cultures where a learned person had to have a good memory, and allows us to understand how explosive the topic of memory was in early modern times. In a curious way, this book which, among other things, describes ancient systems for memorization, is a wonderful historical counterpart to the burgeoning literature on "brain training" e.g. see for example Sharpbrains.com.

ETHICS AND NEUROETHICS

Michael S. Gazzinga, The Ethical Brain, HarperCollins: New York (2006)

This is an extraordinarily ambitious book by an eminent neuroscientist who turns his mind to ethical problems. Gazzinga distinguishes neuroethics from bioethics. He defines neuroethics "as the examination of how we want to deal with the social issues of disease, normality, mortality, lifestyle and the philosophy of living *informed by our understanding of underlying brain mechanisms*. It is not a discipline that seeks resources for medical cure, but one that places personal responsibility in the broadest social and biological context" (emphasis in original.) Gazzinga believes that "there could be a universal set of biological responses to moral dilemmas, a sort of ethics built into our brains." This book should be read as a contrast to the Kass book cited immediately below. Gazzinga was recruited by Kass to serve on the President's Council on Bioethics under Kass' chairmanship. This book emerged directly from that experience, and directly challenges Kass' approach to bioethics.

Leon Kass, Life, Liberty and the Defense of Dignity, Encounter Books: California at pp. 1 -76

Kass is a deservedly well-known and controversial figure in contemporary bioethics. Although these two chapters do not directly address neuro-science, they offer a well

written, useful and thought-provoking introduction to some of the fundamental controversies that animate the field and do apply directly to neuroscience. Among other things, Kass' strictures against allowing bioethics to become an expert dominated field are directly applicable to the ongoing controversy over who should be entitled to assess peoples' mental capacity to make decisions.

DECISION-MAKING AND NEURO-ECONOMICS

Neuro-economics is an emerging inter-disciplinary field that seeks to bring together insights drawn from economics, neurology and anthropology. The influence of economic thought is felt in many of the books on this list, and the field directly addresses and is directly relevant to assessing the human capacity for decision-making. Economists sometimes describe this field "behavioural ecology." The general goal of the field is to develop theoretical models that unify and explain the growing body of psychological experimental data on decision-making. For thorough academic treatises on this emerging field see Paul Glimcher, "Decisions, Uncertainty and the Brain", MIT Press: Massachusetts (2004) or Peter Politser, Neuro-economics, Oxford University Press: New York (2008). At p. xvi Glimcher offers a brief bibliography of works that offer a basic grounding in modern economics and behavioural ecology. He also offers (especially in chapters 5, 9 and 10) useful summaries of the relevant findings of neuroscience. Politser's chapters are heavily laden with mathematically-driven analyses, although he invests great effort in assisting the reader to follow the twists and turns of his argument and does his best to lighten his prose. He does a better job than Glimcher of illustrating the behavioural implications of neuro-economic theories.

For a book that covers the same turf as Glimcher and Politser but in a more readily accessible mode see:

Read Montague, Why Choose This Book: How we Make Decisions, Penguin, New York (2006)

It is extremely helpful to use pp.272-294 of Goldberg's, "The New Executive Brain" as an introduction to the possibilities of computational neurobiology and so to Montague's clear, brilliant and fascinating book. This book can also be read as a counterpoint to the "Romantic Science" described above under the heading "Observation". Although Montague has a gift for the illuminating example, at core he is a reductivist who seeks to deduce a model of decision from the likely history of the brain's evolution over time. In this respect, he may actually make Gazzinga's point about the value of scientifically informed moral reasoning more effectively than Gazzinga does. Montague's chapter on "The Feelings we Really Treasure" at 161 – 197 will resonate with any lawyer who has worked with elderly clients and their quarrelling children, and also illustrates the connection between goal-based decision-making and emotion, and the crucial roles of regret and trust in decision-making.

Jonah Lehrer, How We Decide, Harcourt: New York (2009) covers the same field as Montague but in an extremely readable journalistic mode. The book is however ultimately less useful and satisfying than is Montague's admittedly less well written book. It is however helpful to read the two books together, starting with Montague's for his more thorough description of the scientific issues is well complemented by Lehrer's gift for telling narrative. Lehrer also operates an extremely interesting and useful Blog "The Frontal Cortex" at http://scienceblogs.com/cortex. This blog is a useful starting point for the interested reader who wishes to search neuroscience sites and blogs.

C:\DOCUME~1\Ktyrrell\LOCALS~1\Temp\MetaSave\TOR01-4333619-v1-AIF_-_Conference_-_April_14_&_15__2010_-_LSUC_Special_Lectures_2010_-_Neuroscience_for_Lawyers_(Appendix_A_to_original_paper___Cognitive_Neuroscience_and_the_Sol.DOC

Lawyers · Patent and Trade-mark Agents

BORDEN
LADNER
GERVAIS

Appendix "B"
"Risk Factors for Attorneys"

by

Arthur Fish, B.A., LL.B., B.C.L. (Oxon.), S.J.D. (Toronto)

Director, Wealth Management Practice Group

Borden Ladner Gervais LLP (Toronto)

Risk Factors for Attorney Failure

- Unwillingness to cooperate with health care providers→meetings cancelled
- Distrust\paranoia with respect to professionals
- Pattern of selfishness or dishonesty
- Mismanagement of his\her own property

Risk Factors for Attorney Failure

- Attorney's relationship with Grantor's close family and friends→especially if family/friends are dependents or Will beneficiaries)
  - Close relationships enhance loyalty: distance\fractious invites trouble
- Attorney's personality: argumentative, uncooperative, threatening, belligerent

Risk Factors for Attorney Failure

- Does the Attorney know the Grantor's approach to life\family\business?
  - may enhance legitimacy and quality of Attorney's decisions
- Conflict of interest
  - Grantor much wealthier that Attorney?
  - Financial (Attorney is a dependent or beneficiary)
  - Personal (e.g. spoiled child\child v. step-father)

Risk Factors for Attorney Failure

- Threats to sound financial management
  - Lack of financial acumen
  - Egotism (won't seek assistance)
  - Self-interest (opportunity to outwit sibling competitors)
  - Prior history of intra-familial litigation
  - Martyrdom\guilt
- "Split" high-tension families