The assessment of testamentary capacity

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ABSTRACT

In the older generations, cognitive impairment and wealth are both increasing. Doctors routinely assess decisional capacity in health matters yet are less adept in the assessment of other domains. Recent New Zealand Court decisions will likely result in increased requests by lawyers for contemporaneous medical assessments of the capacity to make a will. The clinical assessment is underpinned by the legal test for testamentary capacity. A psychogeriatrican and a barrister explain the principles and the clinical application. Careful assessments could protect the older adult and minimise the risk of a contested will after death.

Freedom of choice is a fundamental human right. When it comes to welfare, property or legal matters, decisions can have far-reaching implications. An important principle in decisional capacity is that it is task-specific and cannot be generalised. A person may have the capacity to make a decision about health issues yet have a compromised ability to manage financial affairs.

The ageing population presents with a complexity of health and living needs. People are living longer with chronic medical conditions and there is an increased prevalence of cognitive impairment. Baby boomers are the wealthiest cohort to date and there will be an inevitable shift of this wealth to the next generation. There have been higher divorce rates, new partners and blended families. Defacto and same-sex relationships are now recognised by law and the statute dealing with the division of relationship property is under review by the Law Commission. Cultural factors and global mobility add to the complexity. All these factors are contributing to a trend for wills to be revised.

In this context, knowledge of the clinical assessment in conjunction with the legal test for testamentary capacity is important for the protection of the older will-maker. An improvement in practice could lessen the risk that wills be contested after death.

Capacity to decide

Doctors assess capacity to consent (or to decline) treatment on a regular basis. The seminal paper of Appelbaum and Grisso established the legal standards for competence in the clinical area.[1]

It involves the ability to:

(a) understand relevant information;

(b) appreciate the current situation and its consequences;

(c) rationally manipulate information; and

(d) communicate a decision.

These principles form the backbone for the assessment of any significant decision in health and in legal settings. In short, a patient must know the context in which a decision is to be made, the choices that are available, and understand the consequences of the specific choices.[2]

Criteria for testamentary capacity

The landmark judgment for assessing testamentary capacity is the 1870 case of *Banks v Goodfellow*.[3] In this case the Court held that testamentary capacity requires that a person must:

(a) Understand the nature of a will and its effects.

(b) Have a knowledge of the nature and extent of their estate.

(c) Have a knowledge of the people who

may have a reasonable claim to their estate.

(d) Be free from any delusions or disorder of the mind that would *"poison his affections, pervert his sense of right or prevent the exercise of his natural faculties"*.

The presence of delusions does not, of itself, automatically invalidate a will. In *Banks v Goodfellow*, the will-maker was diagnosed as having a psychotic disorder, yet the Court upheld the will with a finding that the persecutory delusions did not influence how he wanted to dispose of his property.

The older will-maker is more likely to have cognitive impairment, perhaps subtle, or otherwise diagnosed as a dementia. Although there should be no assumptions made about capacity just from a diagnosis, the Courts are increasingly aware of the importance of memory in decision-making. The ability to hold and to 'use and weigh' information in working memory, and to access autobiographical memory regarding relationships and beneficiaries, is critical to will-making.[4]

Relatively intact memory on its own does not provide all the mentation necessary to enable effective decision-making. Executive functions of the frontal lobes involve working memory as well as reasoning, planning, impulse control and judgment. Impairment in these higher-level cognitive processes may render a person unable to comprehend, appraise and then appreciate consequences in decision-making. Preserved cognitive function cannot be presumed and deficits can sometimes be subtle. An assessment that a person is 'cognitively intact' only has true validity if it is based on evidence of standardised cognitive assessment incorporating a battery of frontal lobe tests.

The many advances in medical science since 1870 have led to a recognition in England that the test in *Banks v Goodfellow* is a little out of date. In *Key v Key*, Justice Briggs said that the *Banks v Goodfellow* test was too confining in the light of "*the greater understanding of the mind now available from modern psychiatric medicine*".[5] The *Banks v Goodfellow* test has also recently been qualified in 2018 by the New Zealand Court of Appeal. In *Loosley v Powell,* it was said that the test is not to be used as a *"formula"* but more as "*guiding propositions"*.[6] An understanding of the legal parameters informs the clinical assessment of the capacity to make a will.

The medical assessment

The general practitioner is usually the doctor who is consulted and is in the unique position of having known a patient over a long period of time. It is crucial that the assessment is specific to the task. General statements about capacity are to be avoided. A letter of instruction from the solicitor should be obtained to provide (a) the legal test for assessing testamentary capacity and (b) background details of the person's estate and circumstances. In a revision of a will, the previous wills and proposed changes should be referred to. If a will is being made in conjunction with other legal transactions, the doctor needs to have full details so as to be able to perform task-specific assessments of capacity of the will-maker.

The interview conditions should be made optimal for the person and the assessment performed at the person's best time of day. The person should be interviewed on their own, (unless an interpreter is required), to ensure that anyone who may benefit from the will or may influence the outcome of the interview, is not present. Following an explanation of the reasons for the assessment and obtaining consent to proceed, take a brief history. Check that there is no significant mood disorder or psychotic features which may impact on decision-making. If there is a possibility of cognitive impairment, perform a standardised cognitive assessment, including the sub-tests of frontal-executive function such as verbal fluency, abstract thinking, the trail-making test or the drawing of a clock face. The Montreal Cognitive Assessment or the Addenbrooke's Cognitive Examination III are the preferred screening instruments.

A diagnosis of a dementia does not preclude the existence of testamentary capacity even though dementia is a disorder of the mind. In the Court of Appeal case of *Woodward v Smith* it was stated; "*memory may have become in some degree enfeebled; and yet there may be enough left clearly to understand and make a sound assessment of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament."*[7]

These days, many Estates are complicated with the existence of trusts and companies. The fact that a will-maker cannot recall the precise details of all of the assets does not necessarily mean that the person lacks capacity. The person should nevertheless have a broad and general understanding of his/her estate. Sometimes the process of enquiry can help the person recall and retain the information for long enough to firm up a rational decision about the proposed distribution.

However, testamentary capacity is not only task-specific but situation-specific. The more complicated the situation, the higher the threshold for the clinical determination of capacity. If there is a proposed revision of a will that significantly deviates from previously expressed wishes, a higher level of understanding is required. There needs to be the evidence that the person understood that the new will revoked the previous will, can recognise the differences between the old will and the new will and be able to explain the rationale for the changes. A comprehensive appreciation of the estate is often necessary in these circumstances.[8]

The person needs to know the claims of those who might expect to benefit from the will. The concept of natural beneficiaries includes the surviving spouse or partner and children of the will-maker. There needs to be an appreciation of the risks of claims that might be made under the legislation of the Property (Relationships) Act 1976, the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949. The lawyer should have explained these risks to the person, and a medical assessment provides a further opportunity to review the person's understanding of these risks.

In a situation where a proposed will makes a significant revision from a previous will, or an uneven distribution among beneficiaries of a similar ranking, or where children are to be excluded from provision, this need to be carefully explored and documented, preferably with a verbatim written record. In a complicated family with a complex past, the person's working memory needs to hold and consider facts and events so as to be able to make a sound judgment consistent with prior values and goals in the broadest sense. A careful exploration of the rationale behind the distribution of the estate is important. This probing is to evaluate the decision-making ability of the patient, not to necessarily form an opinion on the decision itself. The person may have retained language skills with the ability to cover up deficits or to confabulate, yet have impaired conceptual thinking and an inability to appreciate the details and the consequences. A person who is mentally compromised may make different choices when asked the same question on different occasions. In the medical assessment, if the will-maker knows that he/she wants to leave his/her assets in a specific proportion for reasons that are clear, rational and consistent, then he/she might be considered capable.[4]

The assessment is carefully documented and the opinion to the lawyer should record the relevant findings on mental state and cognitive function. It should be stated whether the patient met the four components of the legal test to make a will and may include detail such as the patient's rationale as to why potential beneficiaries are included or excluded.

The legal framework

The starting point in this decisional task is the presumption of testamentary capacity. This can be rebutted by evidence that raises doubt. In complex families or situations, it is increasingly common for the will-maker to request an independent medical assessment as "insurance" in the advent of litigation after death. The question to answer for any person seeking an opinion is: can this particular person, with their particular mental abilities, in this particular situation, make this particular will, at this particular time?

In the case of *Loosley v Powell* the will-maker was terminally unwell. Deathbed wills are potentially problematic given the significant physical and psychological morbidity with expected death.[9] The Court of Appeal emphasised the importance of checking whether the will-maker comprehends the nature and effect of his or her actions. The will-maker had been unable to give a satisfactory explanation of the different provision that she had made in her final will and this was a material factor in the Court concluding that the will-maker lacked testamentary capacity. In the medical

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assessment, the greater the complexity in the person's situation, a higher level of cognitive capability and emotional stability may be necessary.

The concept of lucid intervals or fluctuating capacity is another area that is fraught with difficulties. It has been referred to in the law for over a hundred years and there are various descriptions of it; "*Intervals occurring in the mental life of an insane person during which he is completely restored to the use of his reason, or so far restored that he has sufficient intelligence, judgment, and will to enter into contractual relations, or perform other legal acts, without disqualification by reason of his disease*".[10] A fluctuation in alertness and cognitive function is seen in many medical conditions and most commonly where there is a diagnosis of delirium. Cognitive fluctuations can occur in dementia, in particular dementia with Lewy bodies. These fluctuations are usually short in duration, primarily in attention, and do not occur to a significant degree in episodic memory and higher-level executive brain functions. Such short-term and limited changes in mental state are unlikely to allow a will-maker to appreciate all of the factors that are needed to execute a valid will. [11]

There are multiple factors that may lead to a variation in mental state and physical stamina which may impact on testamentary capacity. A non-exhaustive list includes pain, physical illness, medication, fatigue, stress and environmental changes. The critical issue for a Court to decide is whether the alteration in the mental state translates to a change in the more complex function of capacity to make a will.

A doctor performing an assessment of testamentary capacity needs to be aware of factors relating to undue influence. If a will is made as a result of undue influence, it will be invalid. In *Green v Green*, it was defined as "*pressure of whatever character [that] overbears the will of the testator*". It is a complex topic with a historical threshold of coercion, however a forceful person, not meaning to overbear a person's decision-making, may nevertheless do so and their persuasive effect can amount to undue influence. Usually there will not be direct evidence that the will-maker was pressured into signing the will and circumstantial evidence is sufficient yet "*the Court must be satisfied both that the power was exercised and that the will would not have resulted but for that exercise*".[12]

In the New Zealand jurisdiction, a clinician's role is generally to assess whether a person was vulnerable to undue influence. An older will-maker may be susceptible to influence due to the medical conditions of mental disorder, cognitive impairment or physical co-morbidities creating dependency. Social circumstances such as isolation, changed family dynamics or conflict may be fertile ground for coercion. The psychological situation, the process of the procurement and undue benefit in a will are further risk factors.[13] In most cases there are several of these 'red flags' present and, more often than not, the family or carers are the perpetrators. Lawyers have an important role in the detection and protection of older vulnerable will-makers in this often subtle form of elder abuse.

In the case of *Sandman v McKay*, 2019, the Supreme Court held by a majority that where a lawyer receives instructions to prepare a will in circumstances where testamentary capacity is in doubt, the lawyer should carefully document the advice given and steps taken, and, suggest to the client that a medical capacity assessment be obtained.[14]

Given the social and economic landscape, recent Court decisions and the duties lawyers owe to their clients, it is likely that there will be increasing requests for contemporaneous medical assessments of the capacity to make a will. In general practice or other continuing care settings, an understanding of the person, their family and the social context is a distinct advantage. Having the knowledge of the legal tests and then gaining experience in the assessment of testamentary capacity will serve many older patients well. If this is not practical and if the situation seems more complex and potentially contentious, or if there is concern that the person is vulnerable and at risk of influence, then the patient and the solicitor should be guided to seek the opinion of a specialist in this field.

Competing interests:
Nil.

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