

The Role of the Medical Expert in the Retrospective Assessment of Testamentary Capacity

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Le rôle de l'expert médical dans l'évaluation rétrospective de la capacité de tester

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Abstract

Objectives: Physicians and other mental health experts are increasingly called on to assist the courts with the determination of testamentary capacity. We aim to improve the understanding of the retrospective assessment of testamentary capacity for medical experts in order to provide more useful reports for the court's determinations and to provide a methodology for the retrospective assessment of testamentary capacity.

Method: Medical experts with experience in the retrospective assessment of testamentary capacity collaborated with lawyers who practice estate litigation. The medical literature on the assessment of testamentary capacity was reviewed and integrated. The medical experts provided a clinical perspective, while the lawyers ensured that the case law and legal perspective were integrated into this review.

Results: The focus and limitations of the medical expert are outlined including the need to be objective, nonpartisan, and fair. For the benefit of the court, the medical expert should describe the nature and severity of relevant medical, psychiatric, and cognitive disorders, and how they may impact on the specific criteria for testamentary capacity as defined by the leading case of *Banks v Goodfellow*. Medical experts should opine only on the issue of vulnerability to influence and defer to the court to determine the facts of the case regarding any influence that may have been exerted.

Conclusions: Although the ultimate determination of testamentary capacity is a legal one, medical experts can help the court achieve the most informed legal decision by providing relevant information on clinical issues that may impact the criteria for testamentary capacity.

Abrégé

Objectifs : Les médecins et autres experts en santé mentale sont de plus en plus appelés à assister les tribunaux en ce qui concerne la détermination de la capacité de tester. Nous cherchons à mieux faire comprendre l'évaluation rétrospective de la capacité de tester pour les experts médicaux afin de fournir des rapports plus utiles aux décisions des tribunaux, et d'offrir une méthodologie de l'évaluation rétrospective de la capacité de tester.

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Méthode : Les experts médicaux qui ont l'expérience de l'évaluation rétrospective de la capacité de tester ont collaboré avec des avocats qui pratiquent le litige successoral. La littérature médicale qui porte sur l'évaluation de la capacité de tester a été révisée et intégrée. Les experts médicaux ont offert une perspective clinique tandis que les avocats ont fait en sorte que la jurisprudence et la perspective juridique soient intégrées dans cette revue.

Résultats : L'axe privilégié et les limitations de l'expert médical sont présentés, notamment le besoin d'être objectif, impartial et juste. Pour le bénéfice du tribunal, l'expert médical devrait décrire la nature et la gravité des troubles médicaux, psychiatriques et cognitifs concernés ainsi que l'incidence qu'ils peuvent avoir sur les critères spécifiques de la capacité de tester telle qu'elle est définie dans l'arrêt de principe *Banks c. Goodfellow*. Les experts médicaux ne devraient se prononcer que sur la question de la vulnérabilité à l'influence et se reporter à la cour pour déterminer les faits de l'affaire au regard de toute influence qui peut avoir été exercée.

Conclusions : Bien que la décision finale en matière de capacité de tester soit juridique, les experts médicaux peuvent aider les tribunaux à atteindre la décision juridique la mieux éclairée, en offrant de l'information utile sur les enjeux cliniques qui peuvent avoir une incidence sur les critères de la capacité de tester.

Keywords

retrospective assessment, testamentary capacity, estate litigation

Introduction

We are in the midst of a perfect medicolegal storm. An aging population with a high prevalence of cognitive and psychiatric disorders is about to make the greatest transfer of wealth in human history to a generation that is more complex in family structure and under greater economic stress than its parent generation.¹ At the same time, an increasing awareness that Will-making provides a conduit for the perpetration of elder abuse and undue influence² has led to increasing scrutiny of Wills. Thus, we can expect an increase in legal challenges to Wills on the basis of alleged lack of testamentary capacity and/or the effect of undue influence on potentially cognitively and emotionally vulnerable individuals.

Although the determination of testamentary capacity and undue influence is ultimately a legal decision, it invites medical and psychological input and collaboration. Specialists in psychiatry, neurology, neuropsychology, and geriatric medicine among others are in an excellent position to inform legal decisions by the court that involve mental and cognitive functions that subsume decision-making capacities.

Like all other legal decisions involving experts, the court will weigh the credibility and relevance of expert testimony. Therefore, it behooves medical experts to have an understanding of what the legal process needs, including their role and limitations.

This article sets out an approach to the role of the medical expert from a combined legal and medical perspective in the unique circumstance of a Will challenge where the medical expert's mandate is to provide a retrospective assessment of testamentary capacity. While undue influence is often alleged in conjunction with claims of lack of capacity, this article will focus on the assessment of testamentary capacity.

Increasingly, requests for contemporaneous testamentary capacity assessment are made out of an abundance of caution or in anticipation of a future challenge. Nonetheless, many Wills still continue to be made in the absence of such

assessments, and accordingly, we can expect postmortem challenges to occur with greater frequency. The retrospective assessment by a medical expert of the mental and cognitive status of a Will-maker (the testator/testatrix) who they have not examined may invite initial skepticism. This is only compounded when medical experts do not understand their role and limitations in the legal process.

Role of the Lawyer

When asked to give a medical opinion pertaining to testamentary capacity, the physician is being called to give opinion evidence as an expert witness. This type of evidence must meet certain legal criteria in order to be admissible (in the Canadian context, see *White Burgess Langille Inman v Abbott and Haliburton Co.*³)

It is the role of the lawyer to ensure a medical expert is properly instructed relative to the opinion being requested. At the outset of the retainer, counsel will typically provide a letter of instruction setting out the scope of the opinion requested. In Ontario, expert witnesses must provide a written report, signed by the expert, containing an acknowledgment of expert's duty signed by the expert.

The mandatory language of the acknowledgment of expert's duty provides, among other things, that it is the expert's duty:

- a. to provide opinion evidence that is fair, objective, and nonpartisan;
- b. to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
- c. to provide such additional assistance as the court may reasonably require to determine a matter in issue.

The expert's duty "prevails over any obligation which [the expert] may owe to any party by whom or on whose

behalf [he or she is] engaged” (Ontario *Rules of Civil Procedure*, Form 53; Islam and Series).

The initial letter of instruction from counsel should provide the medical expert with guidance on the structure of the report. The letter of instruction should also set out the legal test applicable in the jurisdiction for capacity, making reference to the relevant case law or statutory provisions. A well-constructed expert report will also typically include the expert’s comments on any competing reports filed, and requests for this should be outlined in the letter of instruction.

It is also the lawyer’s role to ensure the medical expert is provided with the documents necessary to prepare the report. Typically, lawyers will provide the following documents:

1. All affidavits filed in the proceedings.
2. Transcripts of any relevant cross-examinations on affidavits or examinations of witnesses out of court.
3. Legal professionals’ notes (e.g., the notes of the drafting solicitor—see below).
4. All medical records prior to and following the target date, including primary and specialist care, long-term care and hospital records.

Banks v Goodfellow and Other Case Law

In Canada and most other English-speaking jurisdictions, the leading case on testamentary capacity remains *Banks v Goodfellow* (1870),⁴ a decision from the English High Court in 1870. The following paragraph is extracted from the original 1870 decision and has formed the basis for the widely accepted test for testamentary capacity:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Shulman et al. have proposed an update to the traditional *Banks v Goodfellow* test.⁵

The testator must be:

1. capable of understanding the act of making a will and its effects,
2. capable of understanding the nature and extent of their property relevant to the disposition,
3. capable of evaluating the claims of those who might be expected to benefit from his estate and able to demonstrate an appreciation of the nature of any significant conflict and or complexity in the context of the testator’s life situation,

4. capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure from previously expressed wills or wishes, and
5. free of a mental disorder including delusions, which influences the distribution of the estate.

In the United States, the test for mental capacity of a testator is similar to that in *Banks v Goodfellow* and presents similar challenges. The “Cunningham test,” named for the decision in *Cunningham v Stender*⁶ requires that (1) the testator understood the nature of his or her act, (2) the testator knew the extent of his or her property, (3) the testator understood the proposed testamentary disposition, (4) the testator knew the natural objects of his or her bounty, and (5) the will represented the testator’s wishes.

Solicitors’ Files and Instructions

In a Will challenge, the solicitor’s file will be produced. It is reasonable to expect the contents to provide some support for capacity and the solicitor’s evidence on examination more so. The trier of fact can place considerable reliance on this evidence in reaching a decision (see *Palahnuck v. Palahnuck Estate*⁷). It is critical for the expert to address it in the report prepared. For instance, as regards particular dispositions or changes in them, was the testator asked to provide reasons and are these logical and proportionate? Were they probed?

Medical experts who are asked to provide an opinion based on only one side of the story (e.g., based only on one party’s affidavit) must be prepared for their opinions to be vigorously challenged. It is best that all affidavits be reviewed, including those provided to the other party’s expert and upon which the other party’s expert based their opinion.

The letter of instruction must delineate the opinion being sought. It is often helpful for the lawyer to work with potential experts to find the right “match” of expert to case, so that, for example, a case resting on the existence of delusions might be better suited to a psychiatrist.

In Ontario, there has been substantial discussion about the role of the lawyer in providing such direction, instructions, and guidance, once the initial draft report is prepared. This discussion stemmed from a concern about counsel interference with the independence and integrity of the expert witness. The Court of Appeal has clarified that it is proper for lawyers to meet with expert witnesses to review draft reports.⁸ The decision in *Moore* recognizes that doctors properly require guidance from instructing counsel on how to structure their reports so that they will be useful to the Court. Lawyers must ensure they provide this guidance in a manner consistent with the case law and their professional obligations.

Validity of the Retrospective Opinion

While the art and science of retrospective opinion is well-recognized in medicine, the courts have not always recognized its validity, and such, this is one area where “the law lags behind medicine.”⁹ Some judges have downplayed the role of retrospective expert witnesses who have never seen the testator, preferring evidence of those who knew the deceased or who saw the deceased prior to death.¹⁰⁻¹² However, the reality is that often little or no contemporaneous evidence from health practitioners who have put their mind to the matter of testamentary capacity at the relevant time, or who had the requisite expertise to offer opinion about testamentary capacity, is available.

Retrospective capacity assessments have been admitted into evidence by Canadian Courts. In a 2019 decision of the *Ontario* Superior Court of Justice, ruling on a *voir dire*, the Court applied the admissibility criteria to a retrospective capacity assessment and admitted the evidence.¹³ In that case, the Court rejected the notion that a retrospective capacity assessment relies on a novel science.¹⁴

In medical science, the psychological autopsy, a concept similar to retrospective expert opinion, has been recognized since 1958.¹⁵ The psychological autopsy is a method of deriving diagnoses based on medical records of the deceased combined with family interviews, much like the affidavits relied on in giving retrospective expert opinions. Moreover, medical assessments are often done in the absence of the patient. This was noted in a case in the Australian Federal Courts involving the “assessment” of a patient inaccessible for face-to-face examination.¹⁶

A Physician’s Guide to the Retrospective Assessment of Testamentary Capacity

One can conceptualize a retrospective capacity assessment as the equivalent of providing a consultation. This involves consideration of the reason for referral, history of present illness, personal and relationship history, past medical and psychiatric history, medications, and review of the mental status examination, if available, which includes psychiatric symptoms and cognitive assessment. This is followed by a review of laboratory exams including blood work and neuroimaging, where available. The assessor then determines a primary medical diagnosis and finally provides an opinion on how the condition and the symptoms (both psychiatric and cognitive) may have impacted on the testamentary capacity of the testator.

The assessor is not responsible for determining who is “correct” with respect to the disputed facts but must acknowledge the evidence of all the parties and be able to utilize whatever history they provide that speaks to the capacity of the testator. Not only will the legal documents provide information regarding the history and mental status of the testator at the relevant times of drafting and execution of the will, but they will also provide information regarding

the nature of assets comprising the estate and the degree of conflict and complexity of the relationships of the beneficiaries. These are all factors that impact on the level of capacity required to execute a will (see below). One must be clear as to which facts one is relying on (by referring to the documents or affidavits) in giving a medical opinion.

Personal and Relationship History

An account of the testator’s life, including specifically the history of relationships with past and present beneficiaries, is an essential part of any expert report. This is where the lay affidavits are of most use, and it is important for the expert to look at changes in relationships, particularly with regard to conflict coincidental with the onset of dementia.¹⁷ “Newfound friends” who become beneficiaries are also important to note.⁹ Such changes may be mirrored by a change in will-making pattern that may be indicative of impairment of testamentary capacity.⁵

Past Medical and Psychiatric History

A review of past medical and psychiatric history begins with examining the records of the primary care physician who may have had the longest and most intense medical relationship with the testator and likely has documentation of hospitalizations, specialist consultations, and investigations. Most importantly, the primary care physician will have had an opportunity to provide a longitudinal assessment over time, thereby able to document changes to behavior, cognition, and function.

Past psychiatric history should be reviewed to determine possible psychiatric diagnoses—and symptoms such as delusions or depression—that might have influenced the disposition in the Will in question. The past medical history may include conditions that have an impact on cognition and behavior, particularly behavioral and psychological symptoms of dementia, which might manifest as paranoid ideation or suspiciousness toward a potential beneficiary.

If the execution of the Will occurred while the patient was in hospital or in close temporal proximity to a hospitalization, careful attention must be paid to the possibility of delirium¹⁸ which can cause cognitive impairment and delusions, particularly so for the dying testator who may be vulnerable to a range of physical and psychological comorbidities.¹⁹

Medications

All medical notes must be scrutinized for medication lists. It is not uncommon to find the testator was on one or more psychotropic medications such as antidepressants, anxiolytics, or antipsychotics that provide clues to previous psychiatric illness, even when none is listed in the available histories. Similarly, the use of cognitive enhancing medications like cholinesterase inhibitors or memantine suggests that a physician diagnosed dementia.

The combination of drugs and their potential interactions and impact should be addressed. Finally, determining whether there was a history of alcohol abuse and/or use of other illicit drugs is important, though the particular significance of this information can be challenging. Use of opioids or benzodiazepines may be relevant at the end of life.¹⁹

Investigations

Laboratory examinations and neuroimaging are only useful in so far as they help support or refute diagnoses at the time the will is drafted or executed. For example, neuroimaging that demonstrates significant cortical atrophy or even specific hippocampal atrophy is unhelpful, unless the testator has a history of cognitive impairment or dementia, in which case these findings support those diagnoses.

Interpretation of Common Cognitive Screening Tests

Standardized cognitive screening instruments have become an essential component of the assessment of mental and cognitive function in older adults. In assessing mental capacities, lawyers and medical experts will encounter the results of various cognitive screening tests and need to have a reasonable understanding of how to interpret the test results and place them in context in the determination of legal capacity.

The results of cognitive screening tests are not diagnostic. One can have a diagnosis of mild cognitive impairment, dementia, or Alzheimer disease and still be capable. Conversely, one can have a normal cognitive screening result and lack capacity. Diagnosis is dependent not just on a cognitive screening test but on a comprehensive clinical assessment including history and investigations. Similarly, capacity is always decision-specific.

Capacity is not dependent on diagnosis or on the mental state of the individual but rather on the specific components of cognition and mental status necessary to undertake a particular task or make a particular decision at a particular time.

Capacity is also situation-specific and is influenced by the level of conflict and complexity in the environment of an individual.²⁰ From a clinical perspective, in such an environment, the threshold for capacity increases as an individual attempts to understand relevant facts and appreciate competing claims and the consequences of specific actions.

A poor cognitive screening result is a “signal” and not a conclusive finding. An important caveat is that all standardized cognitive screening tests are influenced by age, education, culture, and language as well as sensory impairment. Nonetheless, a particular value of a standardized cognitive screening instrument is that it can provide a quantitative measure of the longitudinal clinical course of an individual’s cognitive status. Serial testing over time can establish whether an individual’s cognitive functioning is taking a deteriorating course consistent with a dementia and corroborate other clinical information. Cognitive screening tests can also give an idea of severity of disorder.

None of the standardized screening tests “prove” or “disprove” testamentary capacity, regardless of the score. Moreover, the most common cited limitation of the Mini-Mental State Examination (MMSE)²¹ is its failure to address important frontal/executive functions, which means that someone can score “normally” on the MMSE and still have significant cognitive impairment if their dementia has a frontal pattern. Other commonly used screening tests include the clock-drawing test,²² Mini-Cog,²³ The Montreal Cognitive Assessment,²⁴ the Frontal Assessment Battery,²⁵ and the Addenbrooke’s cognitive examination–revised.²⁶ Scores on these tests are often misinterpreted and misused in arguments about testamentary capacity. Diagnosis and the assessment of capacity are complex determinations and do not lend themselves to simple testing.

The Interpretation of Lay Evidence, Videos, and Preservation of Social Graces

It is not uncommon in dementia to see a preservation of social graces. Indeed, it is easy to miss significant cognitive impairment if formal probing of cognition or rationale for an estate distribution is not conducted. Often, lay witnesses attest to the lucidity of an individual who is actually suffering from dementia but who has preserved social graces and can engage in superficial social conversation without being probed. Physicians, even those who have known the testator for many years, are also prone to miss significant cognitive impairment or even frank dementia²⁷ if based on conversation only and not specific testing.

This phenomenon is sometimes reflected in attempts by potential beneficiaries to record interviews with testators in order to demonstrate their testamentary capacity. Our experience with videos is mixed but very often the video demonstrates the exact opposite of what is intended. The value and validity of the video or audio recording is entirely dependent on the skill of the interviewer. Self-serving videos that ask leading closed questions requiring only “yes or no” answers are unhelpful. Similarly, the fact that a lawyer has read the entire Will to the testator who has nodded in agreement with each paragraph is not necessarily probative of capacity.

Red Flags

The growing importance of dementia (major neurocognitive disorder) in relation to mental capacity is self-evident. However, despite advances in awareness, such diagnoses are often missed even by health care professionals.²⁸ We highlight “red flags” that increase the likelihood that a client may be suffering from dementia, and thus, the concern that a client may not have the capacity to execute a Will.

1. The overall prevalence of dementia in a population aged 65 and over is about 8%, while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence becomes significant

from a demographic perspective. However, this means that great age alone becomes a red flag.

2. A testator who is living in long-term care has a high likelihood of dementia, yet the rate of detection in this setting is around 50% worldwide.²⁸
3. A dramatic change from a prior pattern of behavior, attitude, and thinking—especially when associated with suspiciousness toward a family member. Paranoid delusions, especially those of stealing, are common in the early stages of dementia. Notably, one can suffer from a delusion, but if it does not influence the disposition, an individual may still be considered capable.^{29,30}
4. Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behavior, then one should be concerned about a developing dementia.
5. A deathbed Will where there is a strong likelihood that the testator may be delirious. Similar concerns apply when a Will has been executed while the testator is in an intensive care unit or palliative care unit prior to death.
6. Complexity or conflict in the milieu of a vulnerable individual may compromise their ability to appreciate competing claims.²⁰
7. Known cognitive or mental disorder that creates a vulnerability to undue influence.

Conclusion

In forming an opinion on testamentary capacity for the court's consideration, the expert provides a "clinical opinion" on the balance of probabilities. This will be only one of several inputs for the court's determination including other expert opinion(s) and the evidence of other witnesses in the context of precedent case law. Alternatively, no opinion on the ultimate question is expressed, but the expert clarifies the nature and severity of any mental or cognitive disorders and how they might impact on specific criteria for testamentary capacity. While contemporaneous assessment will remain the gold standard as a means of exploring and probing the specific criteria for testamentary capacity as in *Banks v Goodfellow*, there is still a role for retrospective capacity assessments by qualified medical experts. Medical experts should familiarize themselves with the specific needs of the law in contentious cases and learn the role they can play as well as their limitations in helping the courts come to the most informed legal opinions.

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