ASSESSING A CLIENT'S MENTAL CAPACITY IS IN YOUR INTERESTS

By Darryl Browne

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Snapshot

- NSW Parliament has suggested that renewed attention be given to assessing mental capacity.
- It is important to understand the different 'tests' for mental capacity and to have sound procedures for making such an assessment.
- The Law Society has revised and republished its Practical Guide to Mental Capacity (see lawsociety.com.au).
- The assessment of mental capacity is time and task specific, and must be undertaken without preconceptions.
- If a medical opinion is sought to assist in the assessment of mental capacity, it will often be necessary to direct the doctor's attention to the relevant 'test'.

In late June this year, a Committee of the NSW Legislative Council produced a report into elder abuse in New South Wales (General Purpose Standing Committee No.2, NSW Parliament, Legislative Council, *Elder abuse in New South Wales,* Report 44 – June 2016). Among other things, the Committee considered that there is a need to improve solicitors' assessment of mental capacity in respect of substitute decision making, wills, property and other financial transactions. Studies referred to in the report suggest that cognitive impairment and other forms of disability are strongly associated with an increased vulnerability to abuse. This is particularly the case when it comes to the elderly. The Office of Legal Services Commissioner and Lawcover have also identified capacity as a growing area of complaint and claims against solicitors.

It is in both practitioners' interests and clients' interests that we are familiar with the legal principles involved in the assessment of mental capacity and vigilant in the application of those principles, especially with elderly clients. After all, the existence of mental capacity is essential to all legal transactions, from wills and contracts to litigation.

Three types of capacity

Capacity has three aspects: legal, physical and mental. The difference between the various types is best illustrated in the context of making a will. In that context, *legal* capacity means being 18 years or older (although the court may allow a will for a person of a younger age and an exception applies if the minor is about to marry, is married or has been married). A minimum age is often a requirement for legal capacity but other impediments to legal capacity include bankruptcy and conviction of a serious criminal offence.

Physical capacity requires the testator to sign the will (in the presence of two competent and preferably independent witnesses) although, again, there is an exception whereby someone else may sign the will for the testator, provided it is in the presence of and at the direction of the testator. The third type of capacity is *mental* capacity (sometimes called sanity), or in the context of a will, testamentary capacity.

'Tests' for mental capacity

In *Read v Carmody* (unreported, Meagher, Powell and Stein JJA, 23 July 1998, 4), the NSW Court of Appeal provided the following restatement of the principles in *Banks v Goodfellow* (1870) LR 5 QB 549 as to the requirements for mental capacity to make a will:

'"[T]estamentary capacity" encompasses the following concepts [that the testator]:

1. ... is aware, and appreciates the significance, of the act in the law which he - or she - is about to embark upon;
2. ... is aware, at least in general terms, of the nature, and extent, and value, of the estate over which he – or she – has a disposing power;
3. ... is aware of those ... [who] may reasonably be thought to have a claim upon his – or her – testamentary bounty, and the basis for, and nature of, the claims of such persons;
4. ... has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons'.

In legal transactions other than a will, the mental capacity required by the law is relative to the legal transaction which is being investigated. In general terms, it is the capacity to understand the nature of that transaction when it is explained. Ordinarily the nature of the transaction means its broad operation (*Gibbons v Wright* [1954] HCA 17; at [7]–[8]).

Usefulness of medical reports

It can be seen that these mental capacity 'tests' are legal tests, not medical tests. This does not mean that a medical opinion is not useful in assessing a person's mental capacity to undertake a legal transaction; it often will be, especially if obtained from a longstanding treating doctor. It does mean though that the medical capacity tests which are routinely performed by medical practitioners, such as orientation to time and place, or the Mini-Mental test, are not particularly helpful in assessing mental capacity in the legal context. The medical practitioner will often need to be directed to the relevant legal 'test'. After all, a person may not know the Prime Minister or be unable to draw a clock face but understand the broad operation of a power of attorney when it is explained.

Accordingly, it is highly recommended that the doctor's attention be directed to those legal 'tests' explained by the

High Court and the Court of Appeal (above). Doctors, of course, should not explain the legal transaction to their patient /your client, rather they should comment on the client's ability to have the requisite understanding after explanation. The solicitor must provide the explanation of the transaction. (As to the requirements for an adequate explanation, assistance can be found in the remarks of Street J in *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSWR 30 and Kirby P in *Stivactas v Michaletos (No 2)* (1993) NSW ConvR 55-683.)

Procedure for assessing mental capacity

Wherever a client's mental capacity is in doubt, it is recommended that:

- instructions be taken from the client, and not the client's (supposed) 'delegate' (see *Legal Profession Conduct Commissioner v Brook* [2015] SASCFC 128);
- the client be interviewed alone (or, at worst, with a support person who has no interest in the legal transaction);
- the client's understanding be tested by asking open-ended questions;
- the assessment be approached from the mindset that a client's mental capacity is presumed, irrespective of his or her age, appearance, disability or behaviour;
- the focus be upon the client's *ability* to understand the relevant issues that need to be assessed, not whether any reasons for a decision or any other manifestation of the client's consideration of the issues appear to be objectively rational, sensible, well-considered, logical or the like; and
- sufficient time and an appropriate place be arranged to enable an assessment of the client's understanding (see *Dickman v Holley; in the estate of Simpson* [2013] NSWSC 18 (as to to inadequate time) and *Matouk v Matouk (No 2)* [2015] NSWSC 748 (as to inappropriate venue).

From a risk-management perspective, it is suggested that the practitioner:take detailed notes of both questions asked and answers given; obtain a medical opinion if time, circumstance and the client's instructions allow; and retain the file notes and medical opinion indefinitely.

Contemporaneous and transaction specific capacity assessments

Task or transaction specific assessment

The conscientious exclusion of preconceived ideas extends to any previous assessment of mental capacity. There are two reasons for this.

Firstly, mental capacity 'must be assessed relative to the nature, terms, purpose and context of the particular transaction' (*Scott v Scott* [2012] NSWSC 1541, at [199]). For example:

- a person who has been found incapable of managing their financial affairs may still be capable of making a will or making an enduring power of attorney (*Perpetual Trustee Company Ltd v Fairlie-Cunninghame* (1993) 32 NSWLR 377; *P v NSW Trustee and Guardian* [2015] NSWSC 579, at [347]);
- the same mental capacity may not be necessary to revoke a will as it is to make one (*d'Apice v Gutkovich - Estate of Abraham* (No. 2) [2010] NSWSC 1333, at [96]) and a lesser mental capacity may be needed for a codicil than a will (*Hay v Simpson* (1890) 11 LR (NSW) Eq 109);
- a person may not have mental capacity to make a contract but have mental capacity to make a will (*Banks v Goodfellow* (1870) LR 5 QB 549);
- a litigant may not have mental capacity to act in person but have mental capacity to instruct a solicitor (*Coffey v Coffey (No. 2)* [2015] NSWSC 338, at [16]); and
- similar, if not greater, capacity is needed to make a power of attorney compared to that required for a will (*Szozda v Szozda* [2010] NSWSC 804).

Contemporaneous assessment

The assessment must also be contemporaneous to the particular transaction for which mental capacity is being assessed; a finding of mental capacity or incapacity at one point of time doesn't preclude a different and opposite finding at another point of time.

A recent example of the task and time specific nature of an assessment of mental capacity is *Estate Cockell; Cole v Paisley* [2016] NSWSC 349. At the time Mr Cockell executed his last two wills he suffered the delusional belief that he had a special relationship with the Kingdom of Belgium. The Court concluded that from time to time Mr Cockell plainly lacked capacity to make a will. At the time of his last will, a protected estate management order was in place because he was incapable of managing his affairs. Nevertheless, the Court concluded that at the time he made the will, he still had the ability to weigh claims on his testamentary bounty and the Court granted probate.

In *Van der Meulen v Van der Meulen* [2014] QSC 33 the Court found that a person who had suffered brain damage 23 years earlier but had lived in the community in the meantime, had bought and sold real estate in the interim, and purported to make two wills in that time, lacked testamentary capacity. In *Briton v Kipritidis* [2015] NSWSC 1499, a paranoid schizophrenic was found to have testamentary capacity. These decisions confirm that the assessment of mental capacity is both time and task sensitive.

Where there's a doubt

Given there is a presumption of mental capacity, the onus of establishing mental *incapacity* lies on the party who seeks to rebut the presumption. The position is different with a will however, where there is no presumption of testamentary capacity. The onus of establishing testamentary capacity always falls on the person propounding the will (*Tobin v Ezekiel* [2012] NSWCA 285, at [44]–[45]).

In this context, it must be born in mind that a 'determination that a person lacked (or has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter' (*Easter v Griffith* (1995) 217 ALR 284, 290) and suggests that a conclusion about lack of mental capacity should *not* be 'produced by inexact proofs, indefinite testimony, or indirect inferences' (*Briginshaw v Briginshaw* [1938] HCA 34 and *Evidence Act*, s 140(2)).

Once upon a time, a solicitor would be advised to prepare a will for a client when, after due enquiries, the solicitor had doubts, but no conviction, about the client's testamentary capacity (*Ryan v Public Trustee* [2000] 1 NZLR 700, 718; *Public Trustee v Till* [2001] 2 NZLR 508, at [19]). The rationale for proceeding was that otherwise the client would be deprived of the opportunity of making a will. A current alternate approach is to advise the client to seek a court order for a statutory will where testamentary capacity is in doubt (*Re Levy Estate – Application of Samuels* [2010] NSWSC 1014). **LSJ**