

Medicolegal issues concerning testamentary capacity

Introduction

Hong Kong has seen a recent increase in legal challenges concerning the capacity to execute legal documents. Consequently, clinicians will be called upon to assess capacity more frequently. This article aims to give a clear explanation of capacity and provide guidelines in this area of medical practice.

Legal principles

In the legal context, capacity refers to a person's ability to do something, including making a decision, which may have legal consequences for that person, or for other people.¹ Capacity is assessed in relation to the particular decision or activity rather than a general assessment of the individual's condition. In other words, it is function- or task-specific rather than status-specific, as stated in one of the case authorities: "... that is to say the requirement to consider the question of capacity in relation to the particular transaction (its nature and complexity) in respect of which the decisions as to capacity fall to be made".²

When making a Will, the capacity involved is commonly known as testamentary capacity. A Will is a document in which the maker (testator or testatrix) appoints an executor to deal with his or her affairs when the person dies and describes how the person's estate is to be distributed after death. When a solicitor is drawing up a Will, the golden rule is that he should request medical assessment on the testamentary capacity for certain individuals, including those who are elderly, infirm and those who show signs of mental illness or cognitive deficits.³ When a doctor witnesses and certifies a Will, it is assumed that the doctor is not just a factual witness, but has made an assessment of the person and reached the conclusion that he or she has the requisite capacity to make a Will. It is therefore incumbent upon the doctor that he should conduct a proper assessment and fully document his observations.

Unfortunately, some doctors, both junior and senior, may not be aware of the potential gravity of the consequences and tend to certify testamentary capacity without reference to proper standards. If a solicitor asks a doctor to perform an assessment, he probably has concerns that the testamentary capacity of the individual may later be challenged. For example, the testator has a history of stroke. Some testators may have an extended family (with

both legitimate and illegitimate children unbeknown to each other) or complicated family relationships. The Will itself may be idiosyncratic. Hence, caution is called for in this area of practice. It would be prudent to assume that the certification may well be contested.

Tam Mei Kam v HSBC International Trustee Limited and others

This recent court case⁴ is instructive. The attending doctor was asked to witness the execution of a Will of a famous artiste. The doctor had treated her with radiotherapy and chemotherapy to manage cervical cancer (with liver metastases) for 5 months. He certified that she had the requisite capacity and the Will was duly executed in his presence and that of a solicitor and a trustee representative. Nevertheless, a formal assessment of the patient's testamentary capacity was not conducted, though he had impressive recollection of the observations he made at the time. On the following day, the patient was noted to be drowsy and had interrupted speech. Her serum ammonia level was elevated. Hepatic encephalopathy (HE) at the precoma stage was diagnosed and successfully treated, but she succumbed to other complications of cancer after 3 weeks.

A year later, her mother filed a writ challenging the Will, and testamentary capacity was one of the major issues contested. The Plaintiff's expert opined that it was doubtful whether the patient had the requisite testamentary capacity to execute the Will on several grounds (*vide infra*). The attending doctor was able to give detailed evidence of the medical and mental condition of the patient at around the time of execution of her Will, based on his personal medical knowledge of her treatment and his examination of the patient during her hospital admission.

Having heard the attending doctor's and other individuals' factual testimonies, experts' opinions and counsels' submissions, the judge found that the patient/testatrix had the requisite testamentary capacity. Several learning points can be drawn from this case.

Firstly, proper medical assessment is of paramount importance when ascertaining testamentary capacity. This consists of a thorough evaluation of the mental status and any physical disease which may affect brain function, together with

application of the parameters in *Banks v Goodfellow*.⁵ These parameters stipulate that the testator: (i) understands the nature of the act and its effects (ie he is giving instructions for the disposal of his property after his death); (ii) recollects the extent of the property of which he is disposing with understanding and reason; (iii) is able to comprehend and appreciate the claims to which he ought to give effect; and (iv) is not affected by any disorder or disease of the mind which would influence his decisions. If the decisions in the Will seem idiosyncratic (eg spouse excluded as beneficiary), the testator's reasons for them should be explored and recorded in the notes or the report. Such documentation is of assistance to the Courts since it is ultimately a legal question as to whether or not an individual has testamentary capacity.

In *Tam*, a formal assessment was not performed although the doctor's detailed account of the testatrix's mental status greatly assisted the Court in its deliberations. It would have been better, however, if a formal assessment had been performed and duly documented.

Secondly, detailed documentation of the assessment findings is of equal importance. A legal challenge to a Will is often mounted a number of years after the Will is signed, by which time memory of the events has probably faded. If case notes are not made or are inadequate, the doctor may face the unenviable task of attempting to reconstruct a case history from memory. Furthermore, statements and opinions based on good contemporaneous records are much more convincing.

Thirdly, as demonstrated in this case, the Court attaches great importance to the certifying/attending doctor's observation and judgement of capacity because he was at the scene. Retrospective opinion given by experts may not carry as much weight.

Fourthly, the Court takes account of all the relevant facts of the case before it reaches the verdict, including the credibility of other witnesses and the nature of the legal documents. In *Tam*, the judge described the doctor and two individuals present during execution of the Will as honest, credible, and reliable witnesses. Obtaining instructions for the drafting of the Will began about a month earlier. Where a Will has been prepared in accordance with prior instructions given by the patient/testator at a time when he clearly had testamentary capacity, a perfect understanding of all the terms of the Will may not be necessary at the time of execution.⁶

Lastly, in dealing with the opinions of the expert who mounted the challenge, the doctor should apply sound medical knowledge and common sense. In *Tam*, the grounds for the challenge and the respective rebuttals were:

(1) *There were likely to be biochemical features of*

liver failure (with a raised serum ammonia level) and hence HE at the time of execution of the Will.

It is well established that the presence of impaired higher mental function (rather than biochemical abnormalities) is a prerequisite for the diagnosis of HE. In other words, a patient may have liver dysfunction that may not be severe enough to cause HE. Moreover, it is common knowledge that there is no clear correlation between the serum ammonia level and HE. Patients with liver disease may develop HE while their ammonia levels are normal. Conversely, patients with a high ammonia level may not have HE. There is no objective serum ammonia threshold beyond which HE manifests. Presented with these facts at trial, the judge had no difficulty deciding that at the time of execution of the Will, the deceased did not suffer from any form of HE or impaired capacity.

This case serves to remind the certifying doctor to be alive to the possibility of metabolic disturbance, which, if severe, may affect the mind and testamentary capacity, especially in patients with advanced cancer or severe systemic illnesses.

(2) *Aggravation by diazepam of the alleged 'depressed consciousness'.*

This may be the case if large doses were given. It is probable that the testatrix in *Tam* had developed tolerance to the drug.

The use of psychotropic drugs and narcotics is often cited in challenges to testamentary capacity. If a testator has been prescribed such drugs, it is important to determine the medical condition(s) for which they were prescribed, as well as possible interaction with other drugs prescribed concomitantly.

(3) *The legal language of the Will and trust deeds was difficult to understand.*

Whether a patient/testator has the necessary capacity also depends on the complexity of the Will. In *Tam*, despite the legal language used in those documents, the theme remained the same as the instructions that the testatrix began to give a month prior to execution.

Who can assess capacity?

There is a common misconception that only psychiatrists or neurologists are qualified to assess capacity. While these specialists are often involved in assessing capacity because of their expertise in disorders of higher mental function, the Courts do not make a distinction concerning the specialty practised by the doctor, and he/she need not be on

the list of Approved Doctors for the purposes of Section 2 (2) of the Mental Health Ordinance, Cap. 136. In fact, all doctors registered in Hong Kong are permitted to assess capacity, provided they have the requisite skills and experience.

Systematic assessment of testamentary capacity

The skills and experience needed to assess capacity can be acquired through practice with reference to standard guidelines.^{7,8} To reduce the risk of challenge, the following steps are suggested.

- (1) Doctors should avoid assessing capacity in relation to execution of Wills under which they are beneficiaries because there is a potential conflict of interest.
- (2) Doctors should obtain from the instructing solicitors relevant information including family and social background of the testator, contents of the Will, details of the estate and whether any potential heir is being excluded.
- (3) Doctors should obtain the medical history from the testator, his family and medical reports and records. In particular, the presence or absence of neurological disorders (eg strokes, cognitive decline), psychiatric illnesses or symptoms, and systemic diseases that may have secondary effects on the brain, should be noted. There should also be a complete list of medications (with dosages) consumed by the testator, especially any psychotropic drugs.
- (4) Before examining the testator, the purpose of the exercise should be explained to him/her and consent obtained.
- (5) The extent of the examination will be guided by the medical history, but a comprehensive examination of higher mental functions is mandatory. The Mini-Mental State Examination is a good screening tool for orientation, registration, attention and calculation, recall, and language, and alerts the doctor to the presence of significant cognitive decline. Tests for executive function, current knowledge and

abstract thinking should also be administered. Features of dysphasia, delusions, hallucinations and mood disorders should be actively looked for or excluded.

- (6) The testator's understanding and knowledge of the Will should then be assessed according to *Banks v Goodfellow*.⁵ It is preferable to let the testator use his own words. Leading questions should be avoided.
- (7) If in doubt or in difficult cases, referral for a second opinion is advisable.
- (8) With the available facts, the assessor should be in a position to determine whether or not the testator has the requisite capacity and certify accordingly. Since capacity is task-specific, a testator with mild dementia or other medical/mental conditions may still have the capacity to execute a Will provided he passes the above assessment.
- (9) The relevant information obtained in Steps 2 and 3, as well as the examination findings (Steps 5 and 6), should be documented contemporaneously. In some cases, it may be necessary, for record purposes, to write a detailed medical report based on the findings.

Conclusion

It cannot be stressed enough that the duty of certifying testamentary capacity must be discharged properly and with great care, since failure to do so may generate legal challenges that the doctor could do without.

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