

TAB 6

Part 3: Protecting Yourself While Serving Your Clients

Mini Med-School for Lawyers.... The 4 Ds: Depression, Delirium, Dementia and Drugs

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Special Lectures 2010 **A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client**



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A Mini Medical School Presentation.....

The 4 Ds: *Depression, Delirium, Dementia, and Drugs*

N Herrmann MD FRCPC



Learning Objectives

- What are red flag issues for lawyers?
- Review common medical conditions that affect capacity and vulnerability to undue influence
- What are the 4 Ds?

Helping you jump to conclusions....

- Age?
- Where are you seeing this person?
- What do you know about their medical problems (and/or their treatment)?
- Is there something about their cognitive abilities, thought process, emotions or behaviors that bother me?

Common Things are Common....

- WHO Global Burden of Disease Study (2020):
 1. CAD
 2. CVD
 3. Depression
 4. Cancer
 5. MVCs
 6. Alcohol abuse
 7. Arthritis
 8. Dementia
 9. COPD
 10. Self-inflicted injury

What symptoms might affect competence?

- Cognitive impairment
 - Memory
 - Aphasia (language)
 - Executive function
 - Insight
 - Judgment
 - Planning
- Depression
- Psychosis
 - Delusions
 - Hallucinations
 - Thought disorder

The 4 Ds

- Depression
- Delirium
- Dementia
- Drugs

What the RE Lawyers will tell you: *Location, Location, Location...*

- Office: Depression=Dementia>>Delirium
- Hospital: Delirium>Dementia>Depression
- LTC: Dementia>Depression>Delirium

...and Drugs are common everywhere..!

DSM IV

- Diagnostic and Statistical Manual, Fourth Edition, of the American Psychiatric Association (1994, 2000)
 - Official coding system of psychiatric disease in the US (Canada uses ICD 10)
 - Provides a criteria set for each disorder
 - Uses a multiaxial system
 - Due for revision (DSM V) in 2013

Major Depressive Disorder: DSM IV Criteria

- Five (or more) of the following:
 - depressed mood*
 - anhedonia*
 - appetite/weight changes
 - insomnia/hypersomnia
 - agitation/retardation
 - fatigue, energy loss
 - worthlessness or guilt
 - concentration, memory problems
 - suicidal ideation

Depression

- Epidemiology
 - ECA: .1-.5% males, 1.0-1.6% females
 - CSHA: 11.2%
- Significant depression in 30-50% of ambulatory care
- MDE in 25% of LTC residents

Why Might Depression Affect Competence?

- Negative views of self, world, future
- Psychosis
- Susceptibility to undue influence
- Impaired cognition
- Substance abuse
- Medication effects

Think Depression When...

- Previous history of depression, suicide attempts
- Alcohol abuse
- Recent psychosocial stressors (e.g. retirement, bereavement)
- Medical illness
 - Dementia, stroke, MI/CAD, cancer, Parkinson's Disease, MS

Delirium

An acute, transient, potentially reversible, fluctuating syndrome occurring in a setting of an acute medical/surgical condition

Delirium: Diagnostic Criteria

- Disturbance of consciousness (ie reduced clarity, awareness of environment) with reduced attention
- Cognitive change (eg memory, orientation, language) or development of perceptual disturbances (eg hallucinations)
- Develops over a short period of time and fluctuates over the day

Delirium: Epidemiology

- Community prevalence: 1-2%
- General hospital admissions: 14-24%
- Prevalence during acute hospital stays: 6-56%
- Postoperative delirium (elderly): 15-53%
- ICU (elderly): 70-87%

Risk Factors

- | | |
|---------------------------------|--------------------------|
| • Non-Modifiable: | • Modifiable: |
| – Age | – Medications |
| – Dementia/cognitive impairment | – Sensory impairment |
| – Males>females | – Metabolic derangements |
| – Multiple comorbidities | – Environment |
| | – Sleep deprivation |
| | – Pain |
| | – Immobilization |

How Might Delirium Affect Competence?

- Cognitive impairment
 - Disorientation
 - Memory
- Psychiatric symptoms
 - Psychosis (hallucinations, delusions)
 - Depression
 - Agitation/aggression

Beware of fluctuations.....!

Dementia: Diagnostic Criteria

- Development of multiple deficits:
 - memory impairment
 - one or more:
 - aphasia
 - apraxia
 - agnosia
 - disturbance of executive function
- Deficits impair social/occupational function

Canadian Study of Health and Aging

- Dementia prevalence:
 - 8% > 65 y.o.a.
 - 28.5% > 85 y.o.a.
 - 58% > 95 y.o.a.
- 64% Alzheimer's Disease,
19% Vascular Dementia

Causes of Dementia

- Alzheimer's Disease
- Vascular dementia
- Mixed dementia
- Dementia with Lewy Bodies
- Frontotemporal dementia
- And many more.....

How Might Dementia Affect Competence?

- Cognitive impairment
 - Memory
 - Orientation
 - Language
 - Insight, judgment
- Psychiatric symptoms
 - Depression, apathy
 - Psychosis (delusions, hallucinations, misidentifications)
- Susceptibility to undue influence (secondary to need for support with activities of daily living)

Drugs

- The elderly take a lot of medications
 - 11% of the population, taking 25-30% of the prescription drugs, 40% OTC drugs
 - 5-7 prescription drugs/person
 - 2-5 OTC drugs/person
- Most drugs can get into the brain
- Any drug that can get into the brain can cause potential problems:
 - Dementia/cognitive impairment
 - Depression
 - Delirium
 - Psychosis

When to really worry....

- Psychotropics
 - Antidepressants
 - Antipsychotics
 - Anxiolytics/sedative hypnotics
 - Narcotic analgesics
 - Anti-epileptics
 - Anti-Parkinson's
 - Steroids
- Alcohol and
drugs of abuse!

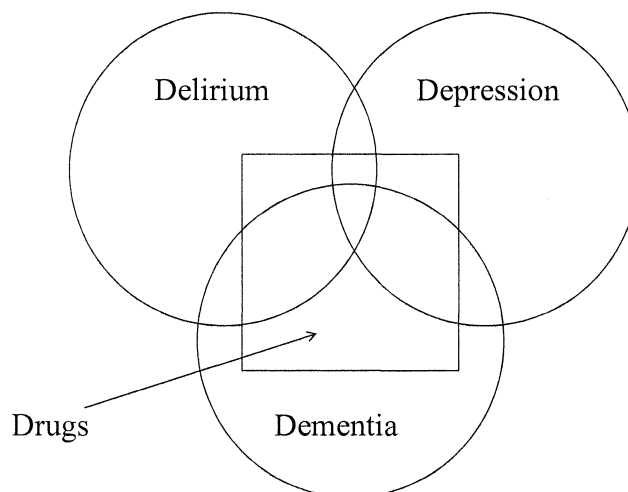
But, even over-the-counter
drugs (OTC) and Natural
Health Products (NHP) can
cause significant
neuropsychiatric symptoms!

Do you recognize any of these OTC drugs?

- diphenhydramine:
 - Nytol
 - Sleep-Eze
 - Unisom
 - Sominex
 - Benadryl
 - and many others....
- dimenhydrinate:
 - Gravol
 - Dramamine
- chlorpheniramine:
 - Chlor-Tripolon

They can all cause delirium and cognitive impairment in the elderly!

Overlapping Ds



Parkinson's DDDDisease

- A movement disorder characterized by tremor (shaking), rigidity (stiffness), bradykinesia (slowed movement)
- Associated features that could effect competence:
 - Depression
 - Dementia/Delirium/cognitive impairment
 - Drugs:
 - Psy chosis (hallucinations, delusions)

Summary

- Before you start: think about your client's age, where you are seeing them, what you know about their medical history
- When you begin: look, listen and observe their affect, thought process, and behaviour
- As you proceed: consider whether there is any evidence of the 4 Ds
- When you've completed your assessment of competence: try to sleep well at night!

TAB 6a

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6a

The Lawyer's Dilemma

Mary Lou Dingle, Q.C.
Lazier Hickey Lawyers LLP

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The Lawyer's Dilemma

Mary Lou Dingle, Q.C.

Lazier Hickey Lawyers LLP

Most people who are seeking legal services are clearly capable. A few are clearly incapable, like the lady who didn't know if her long term spouse was dead or alive, or the man who didn't know his own name. Where lawyers require professional assistance is in assessing people whose capacity is unclear, and spotting the possibility that a person who appears competent is not.

Many factors affect the ability of lawyers to assess competency. Most lawyers have no medical training, although over time they absorb a plethora of practical knowledge. For instance, good social skills often camouflage mental deficits, some spouses minimize or even conceal a partner's incapacity, and a person who is confused in the office today may be lucid at home tomorrow. Those who are institutionalized seldom know the date, the "non-financial" spouse will lack specific financial knowledge, and the less complicated the concept, the more easily it is understood. Since most clients are clearly capable, most lawyers have limited experience in recognizing subtle signs of incapacity.

Of course, Will and Power of Attorney clients continue to expect to pay a modest fee, a problem lawyers created for themselves years ago by treating Wills as loss leaders. As a result, lawyers may limit the time spent with a client which may lessen the value of the lawyer's assessment of the client's ability.

The vast majority of elderly clients are delivered to an appointment by folk who are vitally interested in the outcome of the meeting! Judges may interpret this as a sign of undue influence. While this may reflect a controlling chauffeur, it often reflects a parsimonious client! What it does mean to the lawyer is that the possibility of undue influence must be investigated!

Lawyers are also at risk in situations where there isn't enough time to obtain a professional assessment. Pity the scribe who attends a would-be Will client on her death bed. On the one hand, those who will benefit from the status quo will sue the lawyer if a Will is signed. On the other hand, those who will benefit from a change in the status quo will sue the lawyer if a Will is not signed. Lawyers need guidelines to follow for determining competency when there is not enough time to obtain the opinion of a professional.

What a person must know to sign a Will or Power of Attorney is described in statute and case law.

Sections 8 (1) and 47 (1) of the *Substitute Decisions Act, 1992*, S.O. 1992, c.30, recite what a person must know to either give or revoke Powers of Attorney for Property and Personal Care while Sections 6 and 45 set out when a person is incapable of managing property and incapable of personal care. Sections 9 (1) and 47 (2) state that a person may be capable of giving a Power of Attorney for Property or Personal Care even if he or she is incapable of managing property or incapable of personal care.

The case law enumerates what a person must know to make a Will.¹ Although a person may be incapable of managing property, he or she may still be capable of making a Will.²

What lawyers need are simple pointers to help them determine capacity - something like the 5 signs of stroke: sudden headache, weakness, and trouble speaking, seeing, or walking! Is a similar list of signs indicating incapacity a possibility, or is this as far fetched as a simple Will?

What lawyers also require is help to establish when a client should be professionally assessed.

Finally, lawyers need to learn how to instruct their medical colleagues when asking for a competency assessment. A draft letter requesting an assessment follows. The question remains - how can doctors and lawyers assist one another to work together in a way that is efficient, effective, and mutually satisfying for them and their patients/clients?

¹ *Hall v. Bennett Estate* (2003), 171 O.A.C. 182, rev'g (2001) 40 E.T.R. (2d) (S.C.J.).

² *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291.

Dear Dr. _____:

Re: New Will and Powers of Attorney for Mary Martin

Last week, I met with Mary Martin who told me that she had recently been diagnosed with early Alzheimer's Disease by Dr. _____. Mary instructed me to prepare a new Will and new Powers of Attorney for her for both property and personal care. The new papers will be substantially different from her existing Will and Powers of Attorney. Mary's longtime lawyer and friend has just retired, and this is the first time I have acted for her.

To ensure the validity of the documents, I suggested that she meet with you so that you could assess her to confirm that you are satisfied that she is capable of signing the new Will and new Powers of Attorney. To assist you, and with Mary's instructions, I enclose the following:

1. A list of Mary's assets which I prepared from the information she gave me when we met, and copies of some of Mary's financial documentation.
2. A copy of her existing Will and Powers of Attorney.
3. A copy of my notes of her instructions for her new Will and new Powers of Attorney.

4. Contact information for Mary, her doctors, and immediate family members.

For your convenience, I am also enclosing a 3 page handout entitled, "Capacity Requirements" which outlines what people must know to sign Wills and Powers of Attorney from the legal perspective.

I look forward to hearing from you.

Capacity Requirements

Current case law recites that a person is capable of making a Will if he or she:

- a. Understands the nature and the effect of a Will.
- b. Recollects the nature and extent of his or her property.
- c. Understands the extent of what he or she is giving under the Will.
- d. Remembers the people he or she might be expected to benefit under his or her Will.
- e. Where applicable, understands the nature of claims that may be made by people he or she is excluding from his or her Will.

Current case law also notes that a person may still be capable of making a Will even if he or she is incapable of managing property.

Section 8 (1) of the *Substitute Decisions Act, 1992*, S.O. 1992, c.30 recites that a person is capable of giving or revoking a property power of attorney if he or she:

- a. Knows what kind of property he or she has and its approximate value;
- b. Is aware of obligations owed to his or her dependants;
- c. Knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a Will, subject to the conditions and restrictions set out in the power of attorney;

- d. Knows that the attorney must account for his or her dealings with the person's property;
- e. Knows that he or she may, if capable, revoke the continuing power of attorney;
- f. Appreciates that unless the attorney manages the property prudently its value may decline, and;
- g. Appreciates the possibility that the attorney could misuse the authority given to him or her.

Section 47 (1) of the *Substitute Decisions Act* recites that a person is capable of giving or revoking a personal care power of attorney if the person:

- a. Has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare, and
- b. Appreciates that the person may need to have the proposed attorney make decisions for the person.

Section 6 of the *Substitute Decisions Act* recites that a person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Section 45 of the *Substitute Decisions Act* recites that a person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Section 9 (1) of the *Substitute Decisions Act* recites that a continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property.

Section 47 (2) of the *Substitute Decisions Act* recites that a power of attorney for personal care is valid if, at the time it was executed, the grantor was capable of giving it even if the grantor is incapable of personal care.