

TAB 7

**Part 3: Protecting Yourself While Serving Your
Clients**

**When Should the Lawyer Consult with the
Medical Practitioner and What Should They Ask?**

Dr. Richard Shulman
Medical Director, Seniors Mental Health Services
Trillium Health Centre, West Toronto and Mississauga
Assistant Professor
University of Toronto

Susan J. Woodley
Woodley Law

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



The Law Society of
Upper Canada

Barreau
du Haut-Canada

CONTINUING LEGAL EDUCATION

When Should the Lawyer Consult with the Medical Practitioner?

What Should the Lawyer Ask?

What Are the Reasonable Expectations?

Who Should Be Asked?

**Dr. Richard Shulman, MD CM, FRCPC.
Medical Director, Seniors Mental Health Services
Trillium Health Centre, West Toronto & Mississauga
Assistant Professor, University of Toronto**

**Susan J. Woodley, LL.B.,C.S.
Woodley Law**

Boyse v. Rossborough (1857)

6 H.L.C. 2 at 45, 10 E.R. 1192

"There is no difficulty in the case of a raving madman or of a driveling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine."

Objectives

1. The Red Flag Situations for Capacity:

Cognitive Impairment, Psychosis, Third Party Involvement, Questionable Influences and Suspicious Circumstances, Advanced Age, Illness, Questionable Capacity, Coercion/Undue Influence

2. What Should the Lawyer Ask?

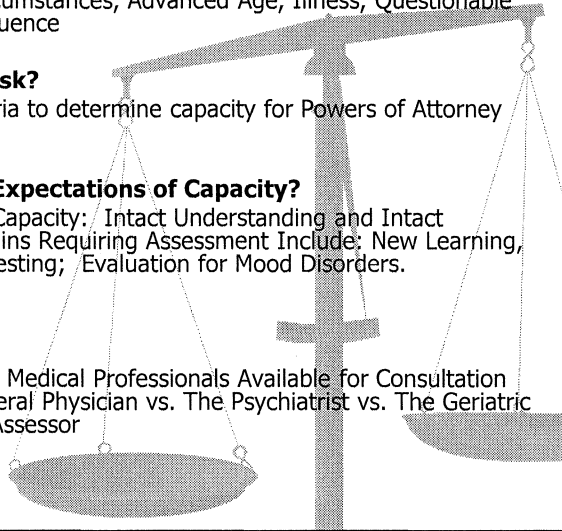
Does the client meet the criteria to determine capacity for Powers of Attorney and Testamentary Capacity?

3. What are the Reasonable Expectations of Capacity?

Mental Status Assessment of Capacity: Intact Understanding and Intact Appreciation. Cognitive Domains Requiring Assessment Include: New Learning, Executive Function; Reality Testing; Evaluation for Mood Disorders.

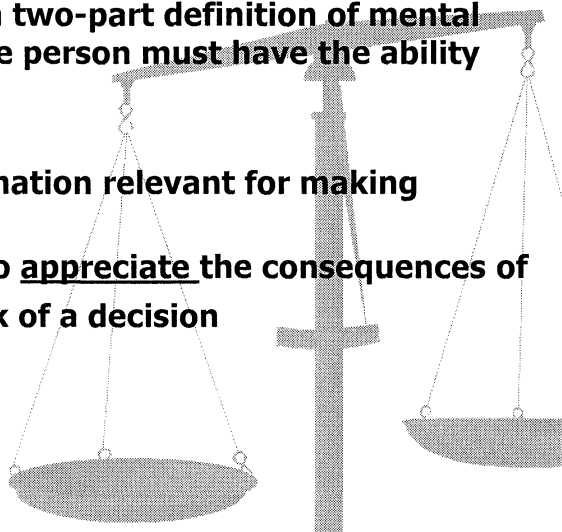
4. Who Should Be Asked?

A Quick Review of the Various Medical Professionals Available for Consultation and/or Assessment: The General Physician vs. The Psychiatrist vs. The Geriatric Psychiatrist vs. The Capacity Assessor



"UNDERSTAND" AND "APPRECIATE"

- The SDA sets out a two-part definition of mental capacity in that the person must have the ability to:
 - understand information relevant for making decisions
 - show the ability to appreciate the consequences of a decision or a lack of a decision



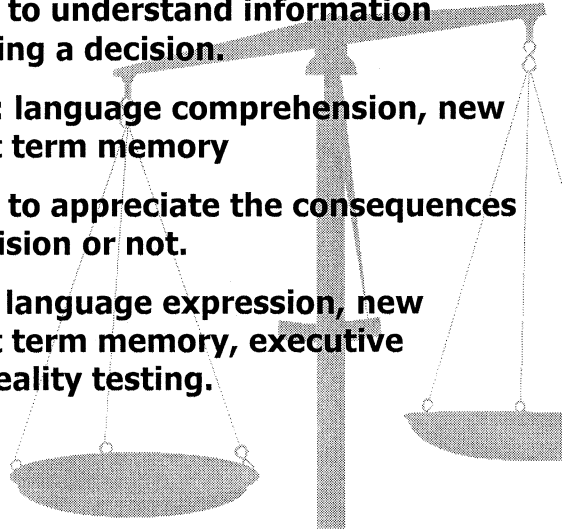
Capacity Requirements

- 1. The ability to understand information relevant to making a decision.**

Cognitive domains: language comprehension, new learning & short term memory

- 2. The ability to appreciate the consequences of making a decision or not.**

Cognitive domains: language expression, new learning & short term memory, executive functioning, & reality testing.



Causes of Failure to Have Capacity

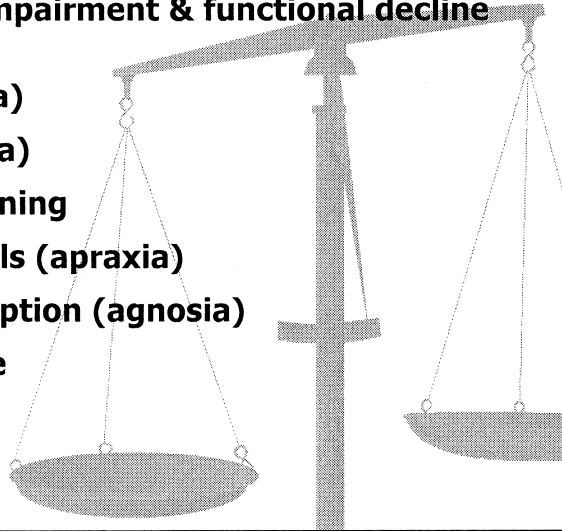
- dementia**
- delirium**
- depression**
- alcoholism/substance abuse**



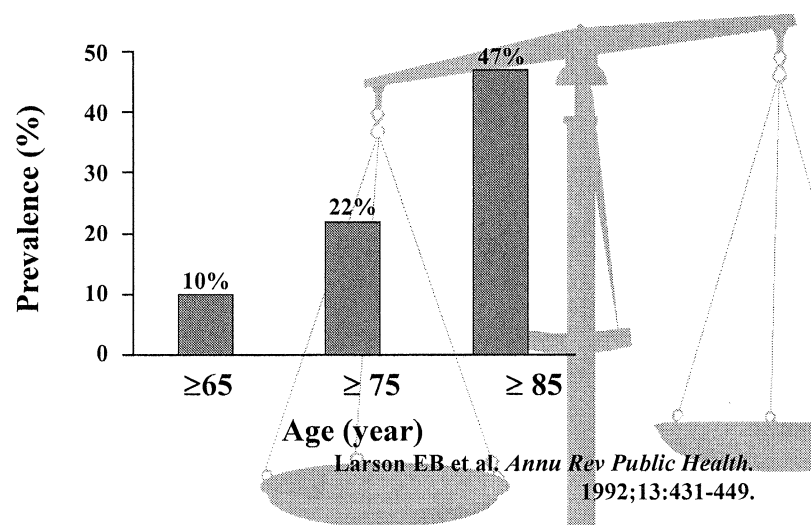
Dementia

chronic cognitive impairment & functional decline

- memory (amnesia)
- language (aphasia)
- executive functioning
- visual-spatial skills (apraxia)
- sensory misperception (agnosia)
- behaviour change

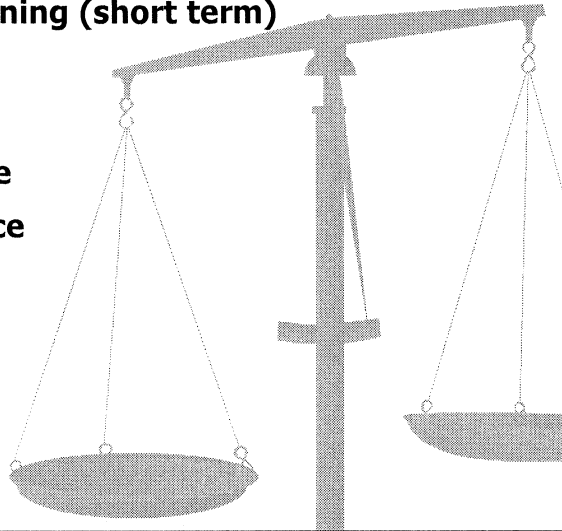


Dementia: Prevalence



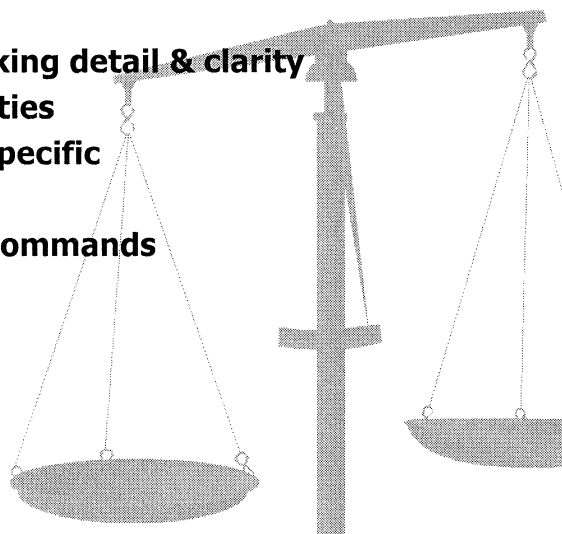
Amnesia

- Impaired new learning (short term)
- Impaired recall
- Repetitious
- Disoriented to date
- Disoriented to place



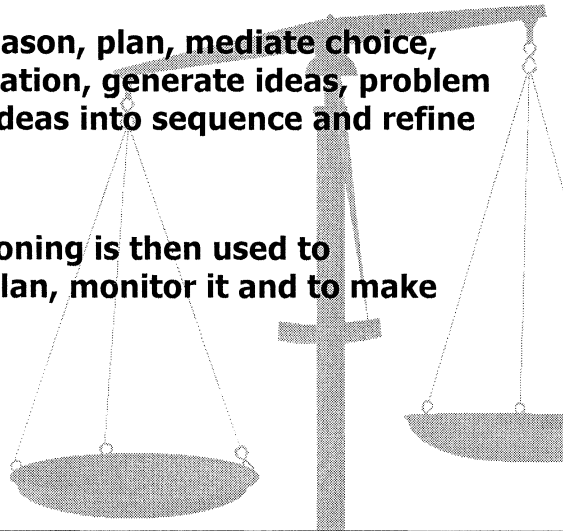
Aphasia

- Expressive
Speech is vague, lacking detail & clarity
Word finding difficulties
Naming loss is less specific
- Comprehension
Difficulty following commands



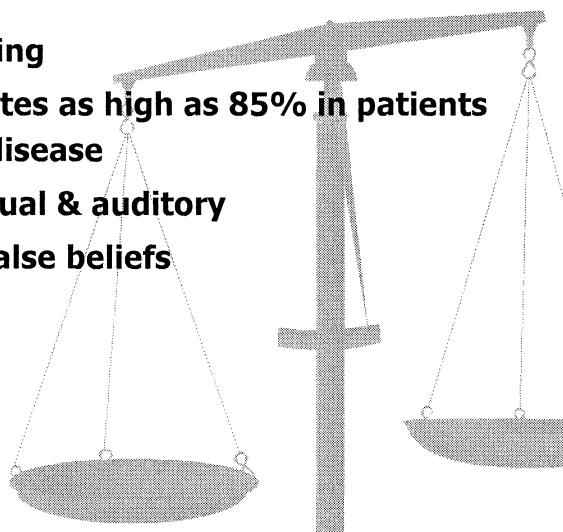
Executive Functioning

- The ability to: reason, plan, mediate choice, integrate information, generate ideas, problem solve, program ideas into sequence and refine future actions.
- Executive functioning is then used to implement the plan, monitor it and to make adjustments.



Psychotic Symptoms in Dementia

- loss of reality testing
- prevalence estimates as high as 85% in patients with Alzheimer's disease
- hallucinations: visual & auditory
- delusions: fixed, false beliefs



Delusions in Alzheimer's Disease

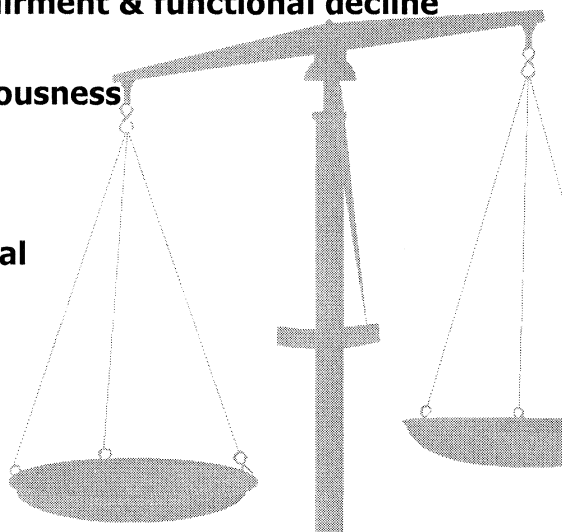
- marital infidelity
- patients, staff are trying to hurt me
- staff, family members are impersonators
- people stealing things
- my house is not my home
- strangers living in my home
- people on TV are real



Delirium

acute cognitive impairment & functional decline

- clouding of consciousness
- in-attentiveness
- hallucinations
- sleep-wake reversal



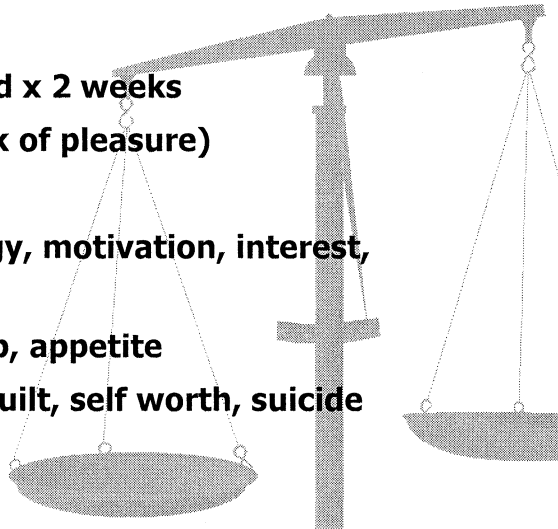
Depression: Criteria

A):

- **depressed mood x 2 weeks**
- **Anhedonia (lack of pleasure)**

B)

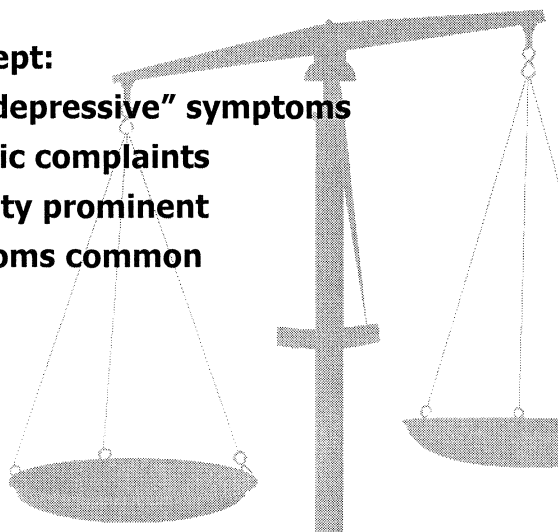
- **impaired: energy, motivation, interest, concentration**
- **change in: sleep, appetite**
- **symptoms of: guilt, self worth, suicide**



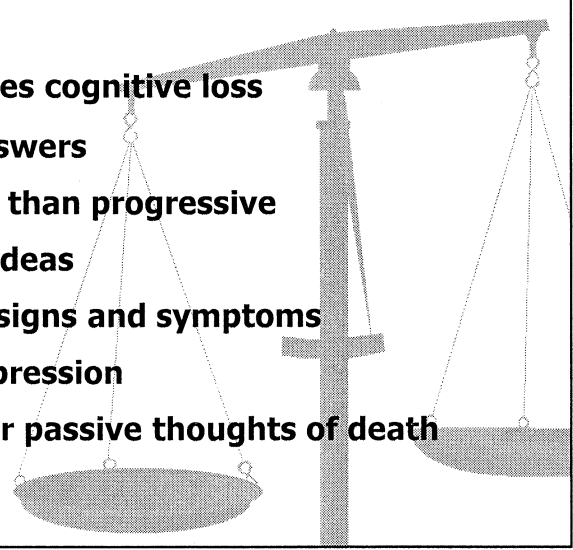
Symptoms : Elderly Depression

Same as adults except:

- **fewer mood or "depressive" symptoms**
- **numerous somatic complaints**
- **agitation / Anxiety prominent**
- **psychotic symptoms common**

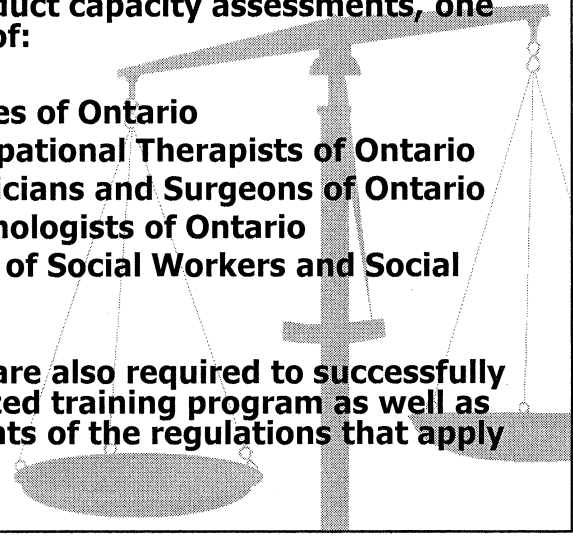


Depression in the Elderly Presenting as Dementia

- **patient exaggerates cognitive loss**
 - **"I don't know" answers**
 - **rapid onset rather than progressive**
 - **self-depreciating ideas**
 - **neuro-vegetative signs and symptoms**
 - **past history of depression**
 - **suicidal ideation or passive thoughts of death**
- 

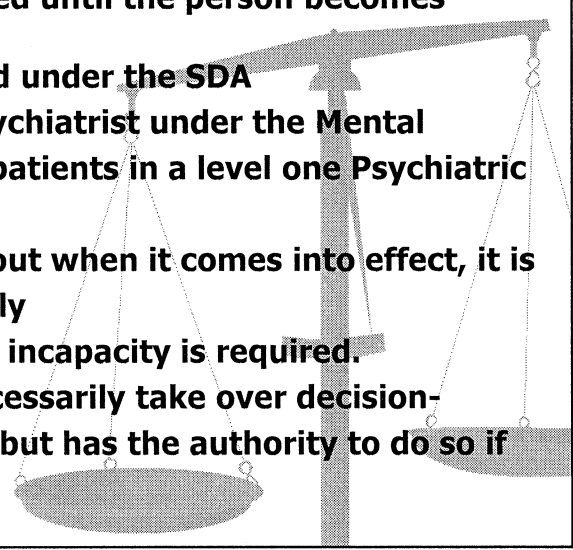
Capacity Assessors

To be qualified to conduct capacity assessments, one must be a member of:

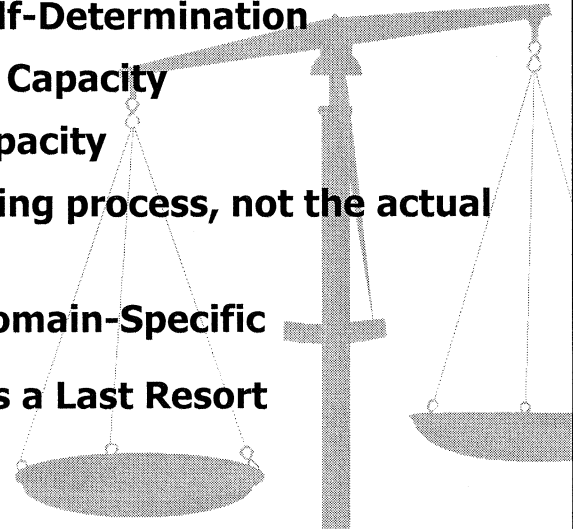
- **The College of Nurses of Ontario**
 - **The College of Occupational Therapists of Ontario**
 - **The College of Physicians and Surgeons of Ontario**
 - **The College of Psychologists of Ontario**
 - **The Ontario College of Social Workers and Social Service Workers**
-
- **Capacity assessors are also required to successfully complete a specialized training program as well as fulfilling requirements of the regulations that apply to them.**
- 

Postponed vs. Immediate POA Effectiveness

If the POA can't be used until the person becomes incapable:

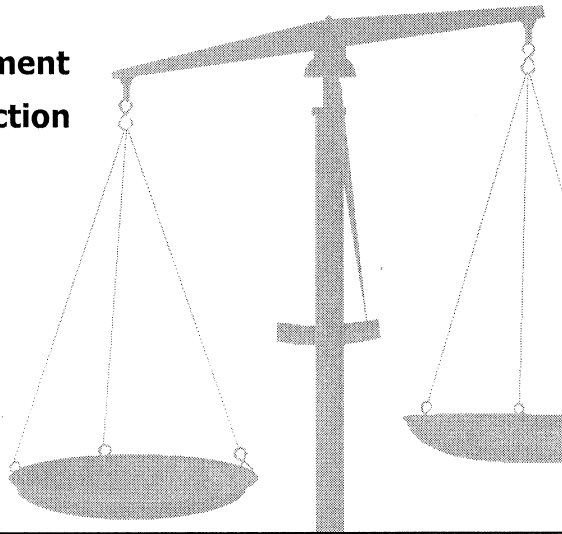
- **assessment required under the SDA**
 - **assessment by a Psychiatrist under the Mental Health Act only for patients in a level one Psychiatric facility.**
 - **if a POA is silent about when it comes into effect, it is effective immediately**
 - **no determination of incapacity is required.**
 - **the POA will not necessarily take over decision-making right away, but has the authority to do so if necessary**
- 

KEY Concepts of SDA

- **The Right to Self-Determination**
 - **Presumption of Capacity**
 - **"Decisional" Capacity**
the decision-making process, not the actual decision
 - **Incapacity is Domain-Specific**
 - **Guardianship as a Last Resort**
- 

Summary: Red Flags for Capacity

- **Memory loss**
- **Language impairment**
- **Executive dysfunction**
- **Psychosis**
- **Mood disorder**



**WHEN SHOULD THE LAWYER CONSULT WITH THE
MEDICAL PRACTITIONER?**

WHAT SHOULD THE LAWYER ASK?

WHAT ARE THE REASONABLE EXPECTATIONS?

WHO SHOULD BE ASKED?

Dr. Richard Shulman, MD CM, FRCPC.

Medical Director, Seniors Mental Health Services
Trillium Health Centre, West Toronto and Mississauga
Assistant Professor
University of Toronto

Susan J. Woodley, LL.B., C.S.

Woodley Law
Estates, Trusts & Guardianship Law
55 Temperance Street
Bowmanville, Ontario
L1C 3A7

1. WHEN SHOULD THE LAWYER CONSULT WITH THE MEDICAL PRACTITIONER?

Red Flag Situations for Capacity: Cognitive Impairment, Psychosis, Coercion/Undue Influence

- Revocations Of POA/Will
- Initiation Of Request For POA/Will By Family Member or 3rd Party
- Insistence that Family Member/3rd Party Attend Meeting
- Exclusions Of Family Members From POA/Wills
- Major Amendment to POA/Will at Advanced Age
- Difficulty Detailing Family Members and/or Assets
- Strife in Family
- Caretaker/Adult Child Residing with Client/Present at Meeting/Major Beneficiary
- New “Best Friend”/Companion Major Beneficiary
- Sweetheart Scams
- Anytime Lawyer Suspects POA/Will is susceptible to Challenge on grounds of Undue Influence/Lack of Capacity

2. WHAT SHOULD THE LAWYER ASK?

There is no set test to determine capacity which can be applied in all situations. Unfortunately, for medical professionals and lawyers, this means that the ability to assess and/or determine capacity will vary both on a situational basis and a case to case basis. To complicate matters further, there are different tests for capacity which tests sometimes include variable factors such as health, age, and relationships.

Capacity is complex and involves an intermingling of both legal tests and medical assessments. Further, the legal test to determine capacity varies depending on the action to be undertaken by the person whose capacity is in question such as: to make a will; to marry; to obtain a driver's license; to make a small gift; to make a large gift, to make an inter vivos gifts or a testamentary gift, or to make a will.

i. Criteria to Determine Capacity under the Substitutes Decisions Act, 1992, for Property and Personal Care Management

The *Substitutes Decisions Act, 1992, S.O. 1992, (SDA)* establishes the basic criteria for determination of capacity as follows:

a. Capacity to Manage Property and to Give/Revoke a Continuing Power of Attorney for Property: Sections 6 and 8 of the SDA

6. *Incapacity to manage property – 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.*

8. (1) *Capacity to give continuing power of attorney – A person is capable of giving a continuing 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.*

(2) *Capacity to revoke – A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.*

b. Capacity to Manage Personal Affairs and/or to Give/Revoke a Personal Care POA and/or to Give Instructions for Care: Sections 45 and 47 of the SDA

45. *Incapacity for personal care – 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 reasonable foreseeable consequences of a decision or lack of decision.*

47.(1) *Capacity to give power of attorney for personal care – A person is capable of giving a power of attorney for personal care 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.

(2) Validity – 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.

(3) Capacity to revoke – A person is capable of revoking a power of attorney for personal care if he or she is capable of giving one.

(4) Capacity to give instructions – Instructions contained in a power of attorney for personal care with respect to a decision the attorney is authorized to make are valid if, at the time the power of attorney was executed, the grantor had the capacity to make the decision.

The determination of capacity is a question of mixed law and fact based on evidence as applied to the statutory tests for capacity.¹

The ability to understand the information that is relevant to making a decision under the SDA requires the “cognitive ability to process, retain and understand the information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene, or safety and is able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”² However, no specific rules can be applied as quite understandably, each case must be dealt with on its specific facts.³

¹ Starson v Swayze 2003 CarswellOnt 2079 (SCC)

² Ibid, at footnote 47, par 78

³ Godelie v. Ontario (Public Trustee) (1990), 39 E.T.R. 40 (Ont. Dist. Ct.); Moncur v. O’Neil (Nov. 28, 1995), Doc. 166/95; Knox v. Burton (2005), 14 E.T.R. (3d) 27

ii. Criteria to Determine Capacity for Making Gifts: Testamentary Capacity and Capacity to Provide Inter Vivos Gifts

(a) Testamentary Capacity

Testamentary capacity is the legal status of being capable to execute a will. Although the term testamentary capacity is legal in nature the determination of capacity requires a cooperative approach between the legal and medical professionals.

In Ontario, to be a valid will the document must be testamentary in nature and must reflect the free expression of a testator as to the intended disposition of his property which such testator such of sound and disposing mind. The document must also comply with the particular execution requirements of Ontario which are established by legislation⁴.

A person must be capable of understanding the essential elements of making a will: property, objects, persons who would normally benefit as the natural objects of the testators intentions, and revocation of prior testamentary dispositions.

A person does not necessarily need to be fair, considerate or kind, and may act capriciously provided that such instructions are given freely from a sound mine, memory and understanding.

The most commonly cited case which establishes the criteria for testamentary capacity is *Banks v. Goodfellow*⁵ which is long recognized as the leading authority⁶ which provides the following criteria for examination of a will:

⁴ Succession Law Reform Act, R.S.O. 1990, c. S. 26

⁵ (1870), L.R. 5 Q.B. See also, *Banton v. Banton* (1998) 164 D.L.R. (4th) 176 (Ont. Ct. Gen. Div.) supp. Reasons 164 D.L.R. (4th) at p. 244 (Ont. Ct. Gen. Div.); *Boume Estate v. Boume*, (2000) 32 E.T.R. (2d) 164 (Ont. S.C.J.) *Hall v. Bennett Estate*, (2003), 50 E.T.R. (2d) 72 (Ont. C.A.) revg 40 E.T.R. (2d) 65 (Ont. S.C.J.)

⁶ *Sivewright v. Sivewright*, [1920] S.C. (H.L.) 63 per Lord Atkinson

"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 has been sound, would not have been made.

Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But, what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the property making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is the result; ought we, in such case, to deny the testator the capacity to dispose of his property by will?"⁷

The onus of proof is on those propounding the will to prove, on the balance of probabilities, due execution, the presence of testamentary capacity and that the testator had knowledge of and approved of the contents of the will. If an allegation of undue influence is alleged, that allegation is on the challenger to prove on the balance of probabilities that undue influence was exerted.

⁷ Per Cockburn C.J., *supra*, at 565

(b) Testamentary Capacity and Undue Influence

Complications to the process of establishing capacity are added when outside individuals become intertwined in the process. Allegations of undue influence may raise issues about the validity of a gift or a will. Although undue influence is strictly a legal concept – the onus of proof is on those claiming undue influence – the presence of undue influence affects the threshold for capacity. In other words, a person with moderate cognitive impairment may still be considered to have capacity. However, if there is a suggestion of undue influence, the legal threshold becomes higher and calls for more careful probing of rationale at the time of the gifting or the execution of the will.⁸

Undue influence has been defined as:⁹

- (a) influence that overbears the will of the person influenced, so that in truth, what he does is not his own act;
- (b) the exertion of pressure so as to overbear the volition and the wishes of a testator;
- (c) use by one person of power possessed by him/her over another in order to induce the other to do something; and
- (e) the ability to dominate one's will over the grantor/donor/testator and to exercise such dominance.

⁸ Shulman, Kenneth, M.D., F.R.C.P.C. "Assessment of Testamentary Capacity and Vulnerability to Undue Influence", *Am J Psychiatry* 164:5, May 2007

⁹ Longmuir v. Holland (2000) 35 E.T.R. (2d) 29; Keljanovic Estate v. Sanseverino (2000) 34 E.T.R. (2d) 32 (C.A.); Berdette v. Berdette (1991) 41 E.T.R. 126; Brandon v. Brandon, 2007, O.J. No. 2986, S.C.J. ; Craig v. Lamoureux 3 W.W.R. 1101 [1920] A.C. Hall v. Hall (1868) L.R. 1 P & D; Dmyterko v. Kulilovsky (1992) 46 E.T.R.; Leger v. Poirier [1944] S.C.R. 152.

The previous notion of undue influence was focused on coercion. This concept seems to have been softened to include intentional interference by continuous influence designed to overcome the will of the testator/grantor of a gift. This concept has been referred to as “subversion of a will”.¹⁰ Subversion allows for a continuum of influence depending on the extent of cognitive impairment. The relationship between cognitive capacity and influence provides that the lower the capacity or cognitive status the less influence would be required to determine that the individual was incapable or unduly influenced. The converse may also be true.

A presumption of undue influence may arise out of a relationship between two persons where one has acquired influence over another.¹¹ The history of the parties’ relationship is vital to an examination of capacity where undue influence is, or could be present.

(c) Testamentary Capacity and Suspicious Circumstances

Usually, proof of testamentary capacity includes proof that the testator has knowledge of and approved of the contents of the will. However, where suspicious circumstances are raised by the evidence the court places a higher onus on the person propounding the will to persuade the court that the testator had knowledge of and approved of the contents of the will. Where there are suspicious circumstances the presumption of capacity is somewhat displaced and becomes a flexible standard of proof in that the more suspicious the circumstances the more weighty the evidence must be of those propounding the will to allay the suspicions of the court.¹²

¹⁰ Ibid, at page 3-2

¹¹ Royal Bank of Scotland P/C v. Etridge (No. 2) [2002] 2 AC 773; Pesticcio v. Huet [2004] W,T,C,R, 699; Hart v. O’Connor [1985] A.C. 1000

¹² Schnurr, Estate Litigation, Carswell, Chapter 2, Challenging the Validity of Wills.

The Supreme Court of Canada has set out the grounds on which suspicious circumstances may be found as follows:

- (a) circumstances surrounding the preparation of the Will – especially where the person who is to benefit prepared or assisted in the preparation of the Will;
- (b) circumstances tending to call into question the capacity of the testator;
- (c) circumstances where the will in question constituted a significant change from the former will; and
- (d) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.¹³

(d) Inter Vivos Gifts

The standard for capacity to make an inter vivos gift has not been settled in jurisprudence. Generally speaking however, the court has acknowledged that the capacity necessary to make an inter vivos gift is lower than the standard for testamentary capacity. There is some acceptance of the theory that the degree of understanding required to effect a valid inter vivos gift is relative to the substance of the transaction. So, a gift of a teacup would involve a lesser degree of understanding than that of a house which effectively results in a gifting of the estate.¹⁴

The burden of proving capacity at the time of the gift rests with the person alleging incapacity. This is a rebuttable presumption which once spent, shifts the burden to those supporting the gift.

¹³ Vout v. Hay [1995] 2 S.C.R. at page 226

¹⁴ Re Beaney (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.)

For a complete and excellent review of the case law and theory applied to inter vivos gifts please see the article written by Eric Hoffstein, Fraser Milner Casgrain, LLP, 11th Annual Estates and Trusts Summit, Tab 5, titled “The Vulnerability of Pre-Death Gifts”.-

3. WHAT ARE THE REASONABLE EXPECTATIONS OF CAPACITY?

Mental Status Assessment of Capacity

i. Intact Understanding

Does the person have the ability to understand the required information relevant to making a decision?

Cognitive domains requiring assessment: language comprehension, new learning & short term memory.

ii. Intact Appreciation:

Does the person have the ability to appreciate the consequences of making a decision or not (weighing pros & cons)?

Cognitive domains requiring assessment: language expression, new learning & short term memory, executive functioning, & reality testing.

a. Memory loss

- Impaired new learning (short term)
- Impaired recall
- Near misses
- Excuses

- Confabulation
- Repetitious
- Disoriented to date
- Disoriented to place

b. Language impairment (aphasia)

Expressive:

- Speech is vague, lacking detail & clarity
- Reliance on another for explanation
- Word finding difficulties

Comprehension

- Difficulty following commands

iii. Executive Dysfunction

- The ability to: reason, plan, mediate choice, integrate information, generate ideas, problem solve, program ideas into sequence and refine future actions.
- Executive functioning is then used to implement the plan, monitor it and to make adjustments.

iv. Psychosis (Prevalence as high as 73% in patients with Alzheimer's disease)

- Loss of reality testing
- Hallucinations: visual & auditory
- Delusions: fixed, false beliefs

- Marital infidelity
- Family members are impersonators
- People stealing things
- My house is not my home
- Strangers living in my home
- People on TV are real

v. Mood Disorders

Depression:

- Depressed mood x 2 weeks
- Anhedonia
- Impaired: energy, motivation, interest, concentration
- Change in: sleep, appetite
- Symptoms of: guilt, self worth, suicide
- Delusions: destitution, deserving of punishment

Mania:

- Psychotic grandiosity
- Impaired judgment
- Elation, euphoria
- Pressured thought and speech

4. Who Should Be Asked?

(a) Assessments under the SDA

There is a designated class of individuals who are entitled to complete assessments of capacity under the SDA. These individuals are called assessors.

The SDA defines assessors at section 1(1) as a member of a class of persons who are designated by the regulations as being qualified to do assessments of capacity.

The Regulations governing assessors are found at Ont. Reg. 460/05 and provide that a person is qualified to do assessments of capacity if he or she:

- (a) is a health care professional (physicians, psychologists, social workers, occupational therapists and nurses);
- (b) has completed a qualifying course;
- (c) complies with continuing education;
- (d) completes a minimum number of assessments per year (5 during the 2 yr. period following qualification date and thereafter during each 2 yr. period);
- (e) and is covered by insurance.

There are no other persons entitled to perform certain types of capacity assessments under the SDA in Ontario.

Capacity assessors have particular assessment guidelines that they must follow and are defined in the regulations at s. 3(1) of the SDA. The guidelines stress that the assessor will be assessing the person's capacity to make a decision. The critical question is whether the person can understand information that is relevant to making a decision and appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

It is crucial that capacity assessors provide rights advice to persons being assessed prior to the assessment. This advice includes an explanation of the

assessment, the effect of a finding of capacity or incapacity and the right to refuse assessment. The rights advice is mandatory in all cases except where a Court orders an assessment under section 79 of the SDA.

A capacity assessment can be challenged where the rights advice is not provided or documented as being provided in the report. The report to be provided by a capacity assessor is specifically mandated by legislation and is comprised of forms found in the regulations.

(b) Assessing the Assessors – Assessments under the SDA

The case of *Re Koch*¹⁵ is an interesting examination of the importance and dangers of capacity assessments. In this case, Linda Koch suffered from Multiple Sclerosis for 15 years and was quite physically debilitated by the disease. She and her husband separated and in the course of the separation in the midst of property and support issues, her husband requested an evaluator determine her capacity to make a decision about her placement (HCCA) and as assessor determine her ability to manage property under the SDA.

Justice Quinn rejected the evidence of the evaluator, the capacity assessor and overturned a confirmation of their findings by the Consent and Capacity Board. Justice Quinn strongly advised of the need by assessors to verify the information they gather before drawing conclusions that should be able to withstand objective scrutiny. He equated the implications of the HCCA and the SDA with a criminal trial only without the necessary procedural protections.

Justice Quinn stated: “The mechanisms of the SDA and the HCCA are, as I stated at the outset, formidable. They can result in loss of liberty, including the loss of one’s freedom to live where and how one chooses.”¹⁶

¹⁵ [1997] O.J. No. 1487 (Ont. Ct. Gen. Div.)

¹⁶ *Ibid*, at par. 89

Quite interestingly, Justice Quinn found that Ms. Koch has the right to have her lawyer present during the interview and that the interview should not have proceeded in the absence of a clear and unequivocal waiver of that right. Justice Quinn emphasized that the capacity assessor must give rights advice as required by the SDA (s. 78(2)) and in a court application where such advice is not necessary, applicants for court appointed guardianship must include a signed statement indicating that the person who is alleged to be incapable has been informed of the nature of the application and the right to oppose it and describe the manner in which this was completed.

(c) Assessments for Determination of the Validity of Inter Vivos Gifts and Testamentary Dispositions

There are no required “assessors” for the determination of capacity relating to inter vivos gifts and/or testamentary dispositions. However, the choice of the professional, and the identity of that professional can be crucial to any hearing.

Generally speaking the various medical professionals available for consultation and/or assessment are as follows: the general physician vs. the psychiatrist vs. the geriatric psychiatrist vs. the capacity assessor.