

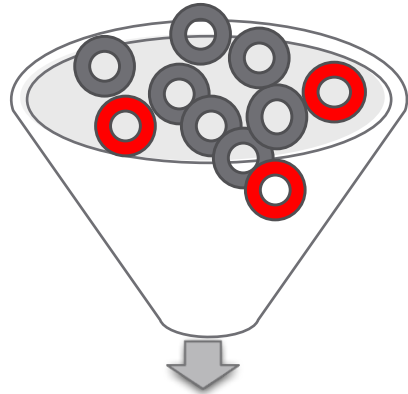
Dementia and the cognitive requirements of Banks v Goodfellow

A review of the literature



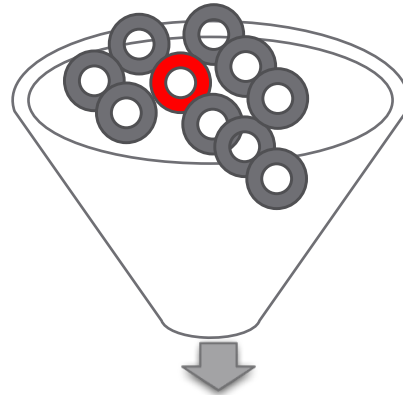
Dementia & Testamentary Capacity

Over 85 years



3/10

Over 65 years



1/10

- Dementia is caused by a progressive loss of brain cells over time.
- The onset and progression of symptoms is usually insidious.
- Symptoms are noticed on average 3 years prior to diagnosis.
- The pathological changes occurring within brain cells begin as early as 20 years prior to emergence of the first symptoms i.e. memory loss
- There are many different types of dementia. Alzheimer's is the most common type.
- Different brain networks are affected by different types of dementia and give rise to different patterns of cognitive impairment.



The Centrality of Cognition

‘Within and beyond the realm of dementia, the distribution of syndromes giving rise to questionable testamentary capacity reflect a preponderance of concerns about cognitive and in particular executive function more so than frank psychiatric disorder such as mood disorders or psychotic disorders’

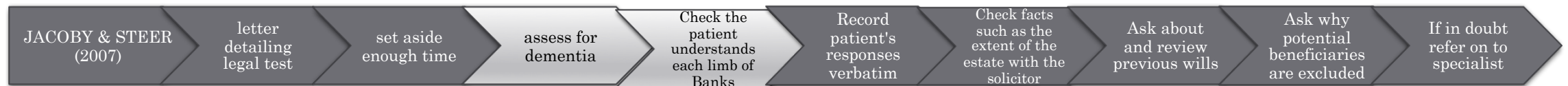
(Shulman et al., 2005).

‘The real question, is one of cognition and voluntariness’

(Merikangas et al., 2015).



Models for Assessing Testamentary Capacity



Testamentary Capacity and the MMSE

- Provides an indication of whether your client or patient's general level of cognitive functioning is appropriate for their age
- Provides an indication of the stage of dementia
- Lacks sensitivity to certain types of cognitive impairment and mild cognitive impairment
- Does not allow for the reliable determination of a testator's capabilities in different areas of their thinking
- Underestimates the cognitive abilities of client's or patient's with predominant language impairments
- Over-estimates the cognitive abilities of client's or patient's with executive impairments



Review of the Literature

Database search

- Amed, BIOSIS Citation Index, Embase, Journals@Ovid Psych Articles, APA, Psych Info, Pubmed, Web of Science
- 2005- 2016
- 'Testamentary Capacity' & 'Dementia'

Journal Search

- 2005 - 2016
- 'Testamentary Capacity'

Removal of Duplicates
N=27

- 16 duplicate articles removed

Content based exclusion
N=14

- 13 Articles removed

Authors database

- 3 journal articles added

Papers Reviewed
N = 17

- Content of 17 Papers reviewed for content addressing one or more aspect(s) of cognition in relation to testamentary capacity as per Banks



1).....understand the nature of the act and its effect

- Receptive and expressive dysphasia and semantic memory loss in the late stages of dementia can affect testator's ability to understand even relatively simple concepts and choices and in this manner, language impairment may undermine capacity to meet the first limb of Banks (Shulman et al., 2005)
- There is a need to differentiate between the effects of impaired comprehension vs communication, as these functions are not affected in a uniform manner by dementia and much can be done to facilitate capacity where deficits relate to communication (Shulman et al.,2009)
- The 'lucid interval' in dementia - fluctuating levels of attention and arousal on a background of persisting and progressing higher level cognitive impairments



2)...understand the extent of the property of which he is disposing

- Short and long-term memory impairments can adversely impact upon a testator's ability to understand and retain the facts upon which a decision about estate distribution is based.
- Recent memory or the ability to learn and retain new information (i.e. information learned in the recent past) allows a client to develop and retain an accurate and up to date understanding of the extent, value and composition of his estate.
- This is particularly important where the composition or value of one's estate has changed and/or will likely continue to change subsequent to the onset of dementia. From this time onwards, a testator with dementia will likely find it increasingly difficult to acquire and retain any altered detail of their estate and incorporate the new estate detail into their decision making process.
- Where limitations in a testator's recent memory exist, 'it may be possible to help the testator to remember the extent of their estate and to retain the relevant facts for long enough to allow them to demonstrate a rationale or reasoning base for their distribution decision' (Shulman et al., 2007).
- An understanding of the extent of one's estate in turn forms the basis from which rational decisions about estate distribution can occur (Shulman et al., 2009).



3).....comprehend and appreciate the claims to which he ought to give effect

- Arguably the most commonly disputed element of banks (Liptzin et al., 2010) ‘ As is typical in such cases, the testator had an idea of the nature of a will and an understanding of the general extent of her estate, although it was unclear whether she could appreciate and discriminate between the claims of her potential beneficiaries.
- Knowledge of former wills dependent on integrity of long term and recent memory and together with the executive functions of complex decision making and reasoning (Peisah et al., 2014; Shulman et al., 2005; Shulman et al., 2007) are needed for a testator to provide a rationale for will changes or formulations and to demonstrate comprehension and appreciation of the claims of beneficiaries.
- Impairments in the cognitive areas of recent memory and executive function are associated with loss of insight (its difficult to know you are forgetful when you forget you have forgotten), perception, judgement and impulse control all of which have the potential to cloud a testator’s appreciation of his/her wider circumstances and the impact of the distribution of his/her estate (Shulman et al., 2007).
- Deficits in encoding and executive fxn affect an individuals ability to understand the relevant facts of a situation, the choices that are available to them and the consequences of such choices (Shulman et al., 2005).
- Executive dysfunction in mild-moderate AD has been shown to correlate with impairment in ability to provide rational reasons for choices and to identify the consequences of a particular choice (Shulman et al., 2005).
- Potential contributions of working memory, divided attention, future thinking and social cognition to a testator’s capacity to comprehend and appreciate the claims of his beneficiaries are yet to be explored.



4)....no disorder of the mind shall poison his affections,pervert his sense of right,or prevent the exercise of his natural faculties

- *It is not uncommon for the testator's appraisal of family members to be tainted by dementia (Liptzin et al., 2010)*
- *The 'potential for personality changes towards apathy and passivity to render a testator vulnerable to undue influence (Peisah et al.,2009).*



Conclusions

- Surprisingly limited discussion of which aspects of cognitive function in dementia are important in the determination of testamentary capacity
- Consensus and discussion limited to the impact of memory and executive dysfunction on the third limb of Banks
- Executive fxn – reasoning, complex decision making, judgment, impulse control, insight
- Memory – recent, long-term & semantic
- Even less discussion of the *mechanisms* by which cognitive impairment in dementia adversely impact the four limbs of Banks or of how important areas of cognitive function should be evaluated
- Other cognitive skills of potential importance to testamentary capacity – working memory, divided attention, future thinking and social cognition (recognition of emotion in others and theory of mind).

