Testamentary Capacity

(Being an address given by the Honourable Mr. Justice F. G. Myers of the Supreme Court of New South Wales to the Medico-Legal Society of New South Wales on 15th March, 1967.)

The subject upon which I have been asked to address is testamentary capacity, but a discussion of the law relating to it would scarcely be profitable for lawyers and would be of little use to an audience consisting largely of members of the medical profession. Instead of the subject given to me, I therefore propose to discuss medical evidence in relation to testamentary capacity, a subject of practical importance, which will, I hope, be of assistance to members of both the legal and medical professions who may be concerned with cases in which the capacity of a testator is in issue.

Before proceeding with the discussion, I must point out that I will not deal with cases in which the presence or absence of testamentary capacity is clear. I will direct myself only to contested cases in which there are grounds for dispute, where there is something to be said on both sides and medical evidence is adduced in support of, or in opposition to, the will propounded. My purpose will be to indicate how medical evidence can assist the court in arriving at a conclusion.

It is sufficient for a doctor who is called upon to consider the capacity of a man to make a will to keep in mind the following well known statement on the subject, which I abbreviate a little.

It is essential 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 influence him in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

The first condition is not likely to create any difficulty. It only involves knowledge of what a will is and that it operates on the testator's death to dispose of his property in accordance with its terms. It is the other elements of testamentary capacity that engage the attention of the courts and it is to them that I will direct myself.

To satisfy those conditions a testator must be able to remember, to reflect and to reason. He must be able to remember, so that he can call to mind the property at his disposal and those who may have claims upon him, to reflect so that he can consult with himself on the relative weight of their claims, and to reason so that he can judge, having regard to his assets, how far, if at all, he should give effect to them. It is to be observed that it is not necessary for the testator to do any of those things. All that is required is that he should be able to do them and, if he can, his will will be valid no matter how unreasonable or capricious it may be. Testamentary dispositions are always relevant to the question of testamentary capacity, but I have never known a case in which they have done more than create suspicion on the one hand, or serve to confirm capacity on the other.

Consider now the requirements that a testator must be able to understand the extent of his assets and to comprehend and appreciate the claims to which he should give effect. How can a doctor satisfy himself on those points ? The answer is that he cannot. To solve those problems—and keep in mind that I am dealing only with the doubtful cases—it is necessary to know what property the testator has and who may have claims upon him and, to discover the latter, it may be necessary to know the circumstances that may create a claim or may destroy a claim that would otherwise exist. Spouses and children always come into the category of persons to whom a testator may have a moral obligation, but in some circumstances other relatives may also come into it, or persons entirely unrelated, a woman with whom he has lived, an illegitimate child, or friends who have been loyal to him in adversity.

A doctor has no chance of finding out these facts. He cannot ask the testator, because his capacity to recall them is the question he is investigating, although, through some curious, mental lapse, it is not uncommon for doctors to do so. He can ask relatives, or friends, but they may not know the facts, or all the facts, or may not tell him the truth and a doctor has no way of knowing whether what he is told is either the truth or all the truth. Indeed, the task of finding out the circumstances may require painstaking and often lengthy enquiries, which a doctor could not possibly undertake, I have never known a case in which either a plaintiff or a defendant has given a complete or accurate account of the testator's assets, the persons who may have claims upon his bounty and the circumstances creating, destroying, or modifying claims.

Those matters are of considerable importance in the assessment of the capacity of a testator and have a significance that must not be confused with behaviour, or symptoms of mental disorder.

Take, for example, the case of an elderly man, living in a cottage which constitutes his only property and having no relatives except a daughter who has devoted her life to caring for her father. There is only one morally right answer to the question how that man should dispose of his estate and the mental effort required to consider and solve it is not very great.

On the other hand, consider a case which recently came before me. The testator was unmarried, but had several close relatives, brothers, sisters, nephews and nieces. His assets were valued at about $2,000,000, and a considerable part was represented by shares in groups of companies. In each group one company, which the testator controlled by virtue of a 51% shareholding, held all the shares in the others. His relatives were of varying degrees of affluence and business experience. The mental ability that sufficed for the testator in the first case may have been insufficient in the second. This case illustrates, too, how hopeless a search to ascertain the extent of a man's property and his possible beneficiaries may be.

Nor is that an end of the difficulties facing a doctor who proposes to give an opinion of a person's testamentary capacity.

The assessment of a man's mental powers in the marginal cases depends only partly upon the observations of the doctor himself. It is necessary to consider also his prior behaviour, often during several years, and for that know-

ledge the doctor is entirely dependent upon what he is told. Many people can speak of a person's past behaviour: relatives, friends, neighbours, business acquaintances, shopkeepers. The list is endless. The doctor can neither find them, nor assess the accuracy of what they tell him. Accounts will be coloured by prejudices, faulty recollection or observation, self-interest and opinions. This, one of the most important bases for assessing mental power, is the field where the greatest conflict is found. A feature of every probate suit is the conflict on this subject in the evidence offered on either side. I cannot recollect a case since I commenced practice at the Bar in which the evidence on one side has been wholly acceptable to the court, or in which relevant material has not been disclosed by the evidence of both parties.

The result is that a doctor, proposing to give an opinion on testamentary capacity, has to determine whether a testator is able to understand the extent of the property he has to dispose of, without knowing what the property is. He has to decide whether the testator is able to comprehend and appreciate the claims to which he ought to give effect, without knowing who may have claims, or upon what grounds their claims may be put. He has to form an opinion based on the testator's past behaviour, although he cannot ascertain with certainty what his past behaviour has been. Worse still, what information he gets may be untrue and he has no means of knowing whether it is. In those circumstances and in the doubtful cases I am concerned with, it is quite impossible to form a worthwhile opinion whether a testator has the necessary capacity to make a will.

Many of my audience will disagree, but there can be no doubt of it. In a case of disputed capacity the facts, which will also be in dispute, cannot be known until the evidence and addresses of counsel are complete and it is only when the facts are known that anyone, doctor or lawyer, can decide whether testamentary capacity existed. A doctor's opinion must be based on facts, and he simply cannot express a valid opinion until he knows what the facts are.

There is still another reason why a doctor cannot express an opinion of a person's testamentary capacity, namely, that such an opinion involves a question of law. It is the question that the court has to decide, not the doctor.

There are definitions that direct a doctor along the right lines and there are discussions and expositions that are helpful, but the law relating to testamentary capacity cannot be ascertained from any text book. It is judge-made law, found in a large number of decisions of the courts in England and Australia, mainly during the last hundred years. To some extent it has changed with advancing knowledge, and to understand it the judgments must be read and considered, sometimes reconciled and sometimes rejected. It is the province of the trained and experienced lawyer. A doctor can no more speak with authority on it than a lawyer can speak with authority on medical subjects.

I am fully aware that many psychiatrists are firmly convinced that they are qualified to determine the question of testamentary capacity, but that is simply not the case. They may be experts in mental disorders and processes, but they have no training in the assessment or analysis of evidence, do not know the law, and cannot have the advantage of evidence given on oath, and of cross-examination and argument by counsel. Nor can they compel others to disclose information, a circumstance that necessarily leaves them in ignorance of a substantial amount of relevant information, oral and documentary.

A court, on the other hand, has none of those handicaps and its lack of medical knowledge is supplied by medical evidence. The true function of a doctor in a testamentary case is to give that evidence.

What I have said is not intended as a criticism of doctors, but frequently psychiatrists believe they can perform the function of the court. Those who do so are quite mistaken, they cannot distinguish between evidence that is admissible and evidence that is not and they do not appreciate the manner in which a court must discharge its functions.

In trying a probate suit one's first task is to sort out the facts. That is not merely finding the extent of the testator's property and the persons who have claims upon him and what accounts of his behaviour are to be accepted. One must delve into the life of the testator, his education, the way he lived, his relations with his family and others. One must try to understand his character and relate his conduct to his past, to his environment and to his daily occupations. In that light, behaviour may assume a different significance to its face value. What appears coarse or dirty may be normal against the testator's background. What appears injustice to a child may be treatment dictated by necessity or reason and what appears to be irrational may not be so at all. A trial involves a consideration of all the admissible evidence produced by both sides and is a process of acceptance, rejection, analysis, reconciliation and appreciation. No doctor ever has the opportunity to perform it.

In that process one depends to a considerable extent upon medical evidence for the relation of acts and utterances to other circumstances. A simple illustration, but one sometimes involving a considerable amount of medical evidence and often disagreement, is the consequences of a physical condition, such as a head injury. On such a ground one may be able to eliminate otherwise relevant behaviour, or one may find no physical cause for it, or the relationship may be doubtful.

Ultimately one reaches a stage where there is some acceptable evidence of loss or impairment of mental faculties. What constitutes evidence of that will be largely a subject for medical testimony. The next problem will be the extent to which that loss or impairment affected the ability of the testator to exercise the powers of recollection and judgment. It is in these fields that medical evidence comes into its own. It is no matter that a doctor has formed an opinion on information given to him which may not be entirely acceptable. Unless what he has been told is so false that the basis of his diagnosis is destroyed, his medical opinion is necessarily of considerable value.

I recall the evidence of a psychiatrist which was a perfect illustration of the manner in which medical evidence can best be given. He had never seen the testator, but was told that he believed that the police would shoot him, if they knew he had made a will, and was also given an account of irrational and abnormal behaviour. The testator had expressed his obviously delusional belief to his solicitor and eight months later to his doctor and it was clearly proved. Reasoning from it, the doctor showed how such a delusion could impair judgment and affect the ability to consider properly the claims of possible beneficiaries, and accounted for the fact that the delusion was not manifested to other people. It was a simple, clear and entirely con-

vincing exposition and lost nothing if the information relating to other behaviour should be rejected.

A doctor's opinion of a man's mental capacity is based on facts leading him to conclude that he suffers from a particular mental disability. If the facts are found not to exist, that is necessarily the end of the matter, but if sufficient remain, the diagnosis will remain valid and what a court wants then is an explanation of the extent to which that condition affects a man's power to remember, to reflect and to form a reasoned judgment. It is to those questions that doctors should address themselves.

Apart from the general considerations I have discussed, there are some faults in medical evidence, which are constantly manifested and to which it may be helpful to draw attention.

1. Doctors express an opinion of what condition a man suffers from, without considering, or at least stating, whether the symptoms could indicate a different condition and, if so, without excluding the other condition. That occurs almost invariably where the diagnosis is senile dementia, the symptoms of which might arise from a different cause, for example: a toxic condition, malnutrition, drugs, or a brain injury. It is not uncommon to find a doctor expressing an opinion of the mental condition of a hospital patient without even inquiring what treatment he is receiving. A failure to consider and exclude other causes is not only faulty diagnosis, but, in the examples I have given, is a failure to distinguish between a condition that is reversible and one that is not.

2. Doctors are prone to pre-judge testators. Thus, they accept what members of a family may tell them and either put the onus of disproving it on the testator, or simply disbelieve what he may say to the contrary. If a doctor is told that a man wanders in the streets, or loses his way near his home, or forgets that he has had his lunch, doctors frequently accept it without inquiry and do not even ask the patient what he has to say about it. Again, they will put down as a delusion an expressed belief of a testator, on no better ground than that they disbelieve it and without attempting to satisfy themselves of its truth or falsity. Thus, I have heard doctors swear that a man was deluded because he said his son was trying to poison him, on no better ground than that they thought the statement absurd. For all they knew, it may well have been the fact, or he may have had good reason to believe that it was. In another case a doctor gave evidence that a woman was suffering from hallucinations, because she told relatives she was getting messages over the air. Had he investigated that with his patient, he would have found that she was taking part in a radio competition and was in fact getting messages over the air. Too often doctors do not approach their tasks objectively and with an open mind. Jumping to conclusions may depreciate the value of the whole of a doctor's evidence.

3. The third fault to which I wish to draw attention is largely attributable to the legal profession. It is the failure to describe how a diagnosed condition may be expected to have affected the relevant mental faculties of the person concerned. One gets symptoms, but no consequences. In a case I recently tried, three doctors described in detail the symtoms of a testator and all concluded that he was suffering from senile dementia. There the matter was left. None was asked and therefore none said, what was its degree, or what effect it probably had on the mental powers of their patient.

The remarks I have made are critical of the manner in which medical evidence is given, but they are not critical of doctors who give it. Indeed, the responsibility rests largely on the legal profession, which presents the evidence and should know the form of evidence that is most helpful. A probate suit needs thought and planning. As far as testamentary capacity is concerned, the ultimate problem is the mental powers that the testator possessed at the relevant time and medical and other evidence must all be directed to that question.

A doctor's opinion of a person's testamentary capacity is neither admissible nor helpful. It may be founded on misconceptions of law, or errors of fact and almost certainly the adverse party will prove some facts of which the doctor was not aware at all. Indeed, doctors usually approach the question of testamentary capacity from the wrong angle, by a general *in globo* assessment of mentality, instead of separate consideration of each of the faculties concerned. A delusional state which may extend to the merits of one of his potential beneficiaries may destroy his capacity to make a will, though otherwise his powers of reasoning may be good and his memory perfect.

The party who succeeds in a probate suit will invariably fail to prove everything that he set out to prove, but he will establish a substantial part. His opponent will also prove some contrary facts and the court will therefore be left with a picture of the testator that will not be quite the same picture as that presented to the doctor for his opinion. It is that new picture to which the medical evidence must be applied and there will be no difficulty in applying it, despite the changes, if it has been correctly directed.

I add this observation. My remarks have been directed only to medical evidence in cases where testamentary capacity is in dispute. There are many cases in which a doctor's own observations are sufficient to enable him to come to a conclusion. They are all cases in which soundness of mind is so clearly absent or present that other circumstances could not affect the result. But when a doctor has to rely of the observations of others, or on information supplied by others, he is treading on treacherous ground, where he may easily be deceived, and he must keep that constantly in mind.

In contested suits, no matter how doubtful the outcome, a doctor can hardly avoid forming a view of the testator's capacity and in any case the solicitor will probably ask him for his opinion, but when he comes to give evidence, he must leave that to the court. His task is the exposition of the testator's mental powers and if he can persuade the court of its correctness, he will have done all that he can do to achieve the result which those who engage him contend for.