Guidance for Treating Doctor Reports

'Treating doctor' opinion is the new black of expert opinion in retrospective mental capacity cases

By Hayley Bennett and Alisa Green[1]

Retrospective expert evidence

In cases where mental capacity, including testamentary capacity, is in question, evidence as to the underlying medical and/or mental condition of the subject person is critical for a Court to make its determination. Such evidence is often adduced by way of retrospective expert medical opinion, where 'medical' experts often include neuropsychologists, neurologists, geriatricians, and psychiatrists.

The term 'retrospective' is typically used where the expert has not assessed or observed the person at the time the legal transaction in question was executed). A retrospective expert will review contemporaneous documents, and provide an opinion based upon the documents and their specialist knowledge (s 79 *Evidence Act* 1995).

In order to adduce retrospective expert evidence in proceedings, practitioners must seek directions from the Court, often by way of Notice of Motion (*Uniform Civil Procedure Rules* (UCPR), Part 31), which may increase costs and cause delay.

An additional disincentive to reliance on retrospective expert evidence has come from the Court itself, as highlighted by comments of Hallen J in *Starr v Miller* [2021] NSWSC 426 at [487]:

> I have paid close attention to the evidence of Dr [X]. Unlike some other probate cases in which experts called provide an opinion on the deceased's capacity based on a retrospective evaluation and review of the evidence, all of the medical evidence in the present case was given by doctors, and others, who had contact with the deceased. … The evidence of each is important because it is generally recognised that the evidence of treating practitioners is of more assistance to the Court than that of medical experts who lack the opportunity to observe, and assess, the deceased first-hand.

These recent comments echo long standing concerns raised by judges at first instance and the Court of Appeal in relation to retrospective expert opinion (see, for example, *Croft v Sanders* [2019] NSWCA 303).

While the process by which the evidence of a retrospective expert may be adduced and guidance as to the form and substance of a retrospective expert report is well charted (see UPCR Part 31, Sch 7 – Expert witness Code of conduct), there is less certainty for practitioners as to the appropriate form of treating doctor affidavits and reports, including any opinion evidence, or the use the court may make of that evidence.

With this uncertainty as background, the recent decision of Hallen J in *Chant v Curcuruto* [2021] NSWSC 751 has provided a welcome road map for the use of treating doctor evidence.

Curcuruto

Curcuruto was a contested probate case, where the validity of the wills of a husband and wife was questioned on the basis of a lack of testamentary capacity (and lack of knowledge and approval). In order to make its determination, the Court considered contemporaneous medical evidence, retrospective opinion of a treating doctor (geriatrician), and evidence of lay witnesses, including the solicitor who prepared the wills.

In relation to the evidence of the treating doctor, the Court had regard to the doctor's qualifications and experience (at [64]-[65]); contemporaneous medical records, including handwritten notes, letters and reports; diagnoses of cognitive impairment and dementia (at [177]-[221], [229]-[250]).

While the treating doctor did not assess testamentary capacity at the material time, based on his observations and 'professional experience', he was permitted to provide a retrospective opinion as to whether the husband and wife were likely to have had capacity in relation to knowing what a will is, appreciating the nature of the estate, and identifying, evaluating, and discriminating between the claims of potential beneficiaries (at [222]-[228], [251]-[256]).

The Court noted the treating doctor's opinion that it was unlikely the husband and wife 'would have had testamentary capacity (as established in *Banks v Goodfellow*) to make a valid Will' (at [228], [253]). Of this, the Court noted (at [257]):

> … While it is true that he expressed his opinion as to testamentary capacity after the death of each of them (because he did not specifically assess that capacity during his, and her, lifetime, respectively), he based his opinions on the assessments of each made during [the husband and wife's] lifetime, … .

Following a 'holistic' assessment of the whole of the evidence, the Court was not satisfied the husband and wife had testamentary capacity when they made the wills.

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Curcuruto provided a detailed account, both procedural and substantive, of the use a court may make of contemporaneous medical evidence and retrospective treating doctor opinion. Such an approach can be

identified in earlier decisions of the Court, including the recent decision in *Re Estate Charell, deceased* [2021] NSWSC 591, per Lindsay J.

In *Curcuruto*, *Charell*, and *Croft*, the Court has provided practitioners with clear direction as to the preferred form and substance of treating doctor evidence and opinion. Such direction may be applied by practitioners in preparation of treating doctor affidavits, as well as in letters of instruction, where it may be appropriate to provide treating doctors with guidance as to report structure, so as to best assist the court and ensure admissibility and compliance with the Code (*Drivas v Jakopvic* [2019] NSWCA 218).

Of course, any letter of instruction will also include the questions to be addressed in relation to capacity, which will vary in relation to the capacity issue in question (for testamentary capacity questions, see Bennett H (2020) 'M'Naghten's Trial (1843), *Banks v Goodfellow* [1870], and the neurobiology of intellectual and moral functions: Progenitors of the common law principles for determining testamentary capacity today. *Australian Bar Review*, 48, 113-160).

To the extent that practitioners take up the opportunity to adduce treating doctor evidence, further clarity is required regarding the circumstances in which practitioners will be required to seek a UCPR Rule 31 direction in order to rely on retrospective treating doctor opinion evidence. **BN**

ENDNOTES

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