ASSESSING TESTAMENTARY CAPACITY IN THE 21ST CENTURY: IS *BANKS V GOODFELLOW* STILL RELEVANT?

KELLY PURSER*

I INTRODUCTION

The assessment of testamentary capacity is growing in complexity and increasingly demands an interdisciplinary approach which utilises the skills of legal and medical professionals. Consideration of the leading case, the 1870 decision of *Banks v Goodfellow* ('*Banks*'),[1] is essential in any testamentary capacity discourse. However, it has recently been suggested, predominantly in the medical literature, that there is now a need to go beyond the tried and tested criteria identified in *Banks*.[2] Indeed, it is remarkable that the testamentary capacity doctrine has undergone so little refinement since its establishment in the 19th century.[3]

The applicability of the doctrine in modern society has been questioned,[4] partly because of the age of the decision. More relevant, however, to proponents of updating the test is the fact that the case focuses on psychosis which has different markers to, for example, dementia.[5] The relevance of dementia to the test for testamentary capacity is especially significant as dementia is one of the main mentally disabling conditions confronting modern society, with the incidences of dementia expected to increase fourfold by 2050.[6] It is the single

* BA/LLB (Hons) (UNE), PhD (UNE), Lecturer, Australian Centre for Health Law Research, Faculty of Law, Queensland University of Technology. The author thanks her PhD supervisors, Professor Eilis Magner and Adjunct Professor Jeanne Madison.

1 (1870) LR 5 QB 549. See also Carmelle Peisah, 'Reflections on Changes in Defining Testamentary Capacity' (2005) 17 *International Psychogeriatrics* 709, 709.

2 Peisah, above n 1, 709; Kenneth I Shulman, Carole A Cohen and Ian Hull, 'Psychiatric Issues in Retrospective Challenges of Testamentary Capacity' (2005) 20 *International Journal of Geriatric Psychiatry* 63, 67.

3 Willis J Spaulding, 'Testamentary Competency – Reconciling Doctrine with the Role of the Expert Witness' (1985) 9 *Law and Human Behaviour* 113, 114.

4 Pamela R Champine, 'A Sanist Will?' (2003) 22 *New York Law School Journal of International & Comparative Law* 177, 181.

5 Peisah, above n 1, 709.

6 Australian Bureau of Statistics, *Australian Social Trends – Future Population Growth and Ageing* (Publication No 4102.0, 2009) 2–3; Access Economics, *Keeping Dementia Front of Mind: Incidence and Prevalence 2009–2050* (Report, August 2009) i <http://www.fightdementia.org.au/common/files/NSW/2010NSWFront_of_Mind_Full_Report1.pdf> ('*Access Economics Dementia Report*').

leading cause of disability in Australians aged 65 years and over, and it is projected that within the next 20 years, it will become the third largest source of health and residential aged-care spending.[7] Dementia cases also significantly outweigh cases in which psychosis is the basis for challenging a will on the grounds of the alleged legal incapacity of the testator.[8] Australia's ageing population, increasing rates of mentally disabling conditions, and growing appetite for litigating the validity of an individual's will are all relevant considerations in determining whether the test for testamentary capacity needs to be updated for 21st century dilemmas.[9] The increasing speed with which people either resort to, or threaten, litigation in turn raises many issues such as: contemporaneous and retrospective assessment; the legal tactics involved in obtaining, or choosing to refrain from seeking, a contemporaneous assessment; who the assessor should be; and the cost of the assessment, both who should bear it and how much they should pay.

In assessing the adequacy of the *Banks* test for modern society, two other issues arise. First, there is a question as to whether the test takes into account the complexity of modern estate planning and testamentary structures. Secondly, when assessments are being conducted there is increasing reliance on medical professionals by legal professionals. This is necessary because mentally disabling conditions, such as dementia, are increasing and each profession has their own specific skill set, neither of which, independently, is enough to satisfactorily assess complex cases where legal capacity is in question. The problem arises because the relationship between the professions is characterised by tension and misunderstanding. This challenge is compounded in this context by questions about the adequacy and application of the test, about the roles of each profession, and about professional liability concerns. Misunderstandings exist as to the very concept that is being assessed and the test that is being applied – not to mention how it is practically being applied. This misunderstanding is further amplified by miscommunication between the professions, both of which can have a negative impact on the assessment, and the autonomy of the individual who is being assessed. This is concerning, especially in practice where such a misinterpretation can have the greatest impact.

Research has been conducted which explores these issues. The primary aims of the research were: to assess the current relevance of the test for testamentary capacity with a view to determining if a more satisfactory assessment model could be developed and, if so, what this should include, and to investigate how legal and medical professionals were assessing testamentary capacity in practice,

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7 *Access Economics Dementia Report*, above n 6, v.

8 Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) [4.9.3].

9 Kenneth I Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity' (2009) 21 *International Psychogeriatrics* 433, 433; Daniel J Sprehe and Ann Loughridge Kerr, 'Use of Legal Terms in Will Contests: Implications for Psychiatrists' (1996) 24 *Bulletin of the American Academy of Psychiatry and the Law* 255, 263. This also appears to be the case in the United Kingdom: Robin Jacoby and Peter Steer, 'Practice Pointer: How To Assess Capacity To Make a Will' (2007) 335 *British Medical Journal* 155, 155.

which necessarily includes an examination of the relationship between professions. A mixed methodology approach was adopted. Doctrinal analysis of relevant legislation, cases, and literature was undertaken before conducting empirical research whereby the perspectives of legal and medical practitioners were explored utilising questionnaires and semi-structured interviews as data collection tools. Given the practical significance of this issue, lawyers and doctors were chosen as the focus of the empirical component – to ascertain if there really is an issue in practice and whether the test from *Banks* does indeed need to be updated, as hypothesised in the medical literature.

This article will explore some of the results of this research. The research design will first be briefly outlined. The current approach to assessing testamentary capacity will then be explored, including the adequacy of the *Banks* test in light of 21st century problems and why it has been questioned. The results of the empirical research conducted with legal and medical practitioners will then be presented, including whether they think the test should be reassessed. Some suggestions as to how to improve the assessment paradigm will then be proposed. Importantly, however, a note on terminology is needed. Some literature makes a distinction between capacity as a medical construct and competency as a legal notion.[10] This however, is not borne out in the practical application of the terms and therefore it seems redundant to try and enforce such academic terminological distinctions. The approach adopted in this article is to, where relevant, discuss concepts of legal capacity/competency or medical capacity/competency.

II RESEARCH DESIGN

Three of the primary aims of this research were to examine: whether the test of testamentary capacity is still relevant; how testamentary capacity is assessed in practice; and whether the assessment process can be improved upon, especially with regard to the relationship between the legal and medical professionals involved in the assessments. To best achieve these aims, a socio-legal research design was adopted comprising doctrinal analysis and empirical research. Before commencing the research, ethics approval was obtained. This Part will outline the doctrinal analysis conducted, as well as the questionnaires and semi-structured interviews used to collect the empirical data. The limitations of the research will then be acknowledged.

The initial hypothesis of this research was that the relationship between legal and medical professionals was characterised by hostility when assessing testamentary capacity and that this tension could negatively affect the assessment. Further, that the test for testamentary capacity needed to be revisited – at the very least, the process of assessment needed to be addressed, to ensure satisfactory assessments occur through clarity of process and communication

10 Liliana B Sousa et al, 'Financial and Testamentary Capacity Evaluations: Procedures and Assessment Instruments underneath a Functional Approach' (2014) 26 *International Psychogeriatrics* 217, 218.

between the professionals involved in the assessment process. This hypothesis was borne out in the doctrinal analysis of relevant cases, legislation, and secondary sources.[11] Given that this is an issue of immense practical significance, legal and medical professionals were then asked to participate in questionnaires and semi-structured interviews to test the hypothesis and doctrinal analysis against what actually occurs in practice. The data from the questionnaires helped refine the approach subsequently adopted in the semi-structured interviews.

With respect to the questionnaires and semi-structured interviews, the target population and sample were carefully chosen to ensure that the legal and medical participants were experienced in assessing testamentary capacity. Snowball sampling was initially employed to access legal professionals.[12] Searches were then conducted of law society databases. Where no appropriate law society database existed, or the law society was unwilling or unable to provide a list of names, other internet searches were performed. Individuals were then chosen at random from these searches. With regard to medical professionals, a similar process accessing the Medical Directory of Australia was conducted to identify potential participants with relevant experience. Relevant professional organisations with a specific interest in the area were also contacted to ask if their members might be interested in participating.

A real concern was that legal and medical professionals would refuse to participate in the research given the time-poor nature of the professions, and the fact that this research asked participants to reflect upon personal practice which could prove uncomfortable. Sixteen legal professionals and 14 medical professionals responded to the questionnaires. Ten legal professionals and 20 medical professionals were interviewed. The interviewees have been de-identified and are referred to here as Legal Participant ('LP') 1 through to LP 10 for the legal participants, and Medical Participant ('MP') 1 through to MP 20 for the medical respondents. Participants were based Australia-wide. It is acknowledged that non-probability sampling can result in samples which are less representative and thus possibly less accurate than probability sampling. However, the target population had the necessary experience to offer constructive insights into the research aims and saturation was reached as no new data was being identified. Given the aim of the research, it is contended that the sample is representative and large enough to produce credible, reliable data.

Pilot studies were carried out with both the questionnaires and semi-structured interviews. Despite the risk of a low return rate, questionnaires were used because of the time, cost, and geographical considerations considering that participants were Australia-wide. The semi-structured interviews facilitated the collection of in-depth data about participant understanding of, and experience with, assessing testamentary capacity. A broad range of predominantly open-ended questions derived from the doctrinal analysis and questionnaires were

11 Kelly Purser, Eilis S Magner and Jeanne Madison, 'Competency and Capacity: The Legal and Medical Interface' (2009) 16 *Journal of Law and Medicine* 789, 789.

12 Snowball sampling occurs where participants are recruited through existing participant networks, eg person A knows person B who knows person C.

asked. Preliminary data analysis occurred simultaneously with the data collection to: identify gaps in the data; critically review the interviewing technique; and identify emerging themes. The data was then analysed in its entirety. A thematic approach was adopted because it facilitated identification of the main themes and data analysis. The identified themes were used as coding categories and the codes were revised to ensure that the correct classification of data within each coding frame was occurring.

The research limitations must be acknowledged. Initially locating legal and medical participants was challenging. This was overcome by accessing relevant professional databases. Geographical and funding considerations resulted in a mixture of in-person and telephone interviews, and although not ideal, this did not affect the quality of the data collected. Consequently, it is contended that the limitations do not detract from the credibility or dependability of the findings.

III TESTAMENTARY CAPACITY

The degree of complexity of a testator's affairs and testamentary wishes directly affects the level of cognitive function required to make a testamentary instrument. That is, the more complex the action, the more cognitive function is required.[13] The unpredictability of the outcomes of testamentary capacity assessment which results from ambiguous assessment standards and processes is problematic.[14] This Part will outline the basic principles of testamentary capacity before turning to the problems of modern assessments of testamentary capacity in the next Part.

A testator must be of sound mind, memory and understanding to make a valid will.[15] Testamentary capacity is task-specific,[16] and is a question of fact.[17] The time at which the testator must be shown to have had legal capacity is usually the point in time at which the will is executed. However, if the instructions were given on a day antecedent to the execution of the document, or the testator loses legal capacity between the giving of the instructions and the execution of the

13 Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 435.

14 Pamela Champine, 'Expertise and Instinct in the Assessment of Testamentary Capacity' (2006) 51 *Villanova Law Review* 25, 31, 75. See also Kenneth I Shulman et al, 'Assessment of Testamentary Capacity and Vulnerability to Undue Influence' (2007) 164 *American Journal of Psychiatry* 722, 724; James E Spar and Andrew S Garb, 'Assessing Competency To Make a Will' (1992) 149 *American Journal of Psychiatry* 169, 169.

15 Harvey D Posener and Robin Jacoby, 'Testamentary Capacity' in Robin Jacoby et al (eds), *Oxford Textbook of Old Age Psychiatry* (Oxford University Press, 4th ed, 2008) 753, 754; A A Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 7th ed, 2013) 48; *Tipper v Moore* (1911) 13 CLR 248, 250 (Griffith CJ).

16 Jacoby and Steer, above n 9, 155; Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 434; Daniel C Marson, Justin S Huthwaite and Katina Hebert, 'Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective' (2004) 28 *Law and Psychology Review* 71, 82.

17 Preece, above n 15, 49.

document, then the relevant time is when the instructions were given.[18] Whether an individual has legal capacity is for a court to decide, although a solicitor has a duty to act on any coherent instructions.[19] The existence of an order under guardianship legislation is not conclusive evidence that an individual lacks testamentary capacity at that point in time.[20]

The landmark case for determining testamentary capacity is *Banks*. In *Banks*, the testator, John Banks, was a bachelor in his 50s who resided with his niece, Margaret Goodfellow. Banks suffered from paranoid schizophrenia. He believed that spirits were chasing him and that a grocer was going to molest him. The grocer in question was deceased. Banks prepared a will in 1863 which left his estate comprising 15 houses to his niece. He died in 1865. Margaret was underage and unmarried. She died shortly after receiving the inheritance which subsequently passed to her half-brother. The fact that he was not related to Banks apparently led the members of Banks' family to contest the will. The ground cited for doing so was that Banks lacked testamentary capacity when he made the will because he suffered from paranoid delusions. It was held that partial unsoundness of mind which does not affect the disposal of property in a testamentary instrument is insufficient to establish testamentary incapacity. This was reaffirmed in the Australian case of *Tipper v Moore*.[21]

In *Banks*, Cockburn CJ stated that it was 'essential' that a testator should

> 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 had been sound, would not have been made. … 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.[22]

The case is authority for the proposition that, basically, a testator must be able to understand the nature and extent of his or her property,[23] the potential beneficiaries who have a moral claim upon them, the effect of making a will, and not have a 'disorder of the mind' which has affected the testamentary intention as evidenced in the will.[24] A specific and detailed knowledge by the testator of his or her assets is not necessary, provided that the testator understands the

18 *Parker v Felgate* (1883) 8 PD 171, 173–4 (Hannen P); *Bailey v Bailey* (1924) 34 CLR 558, 567 (Knox CJ and Stake J), 572 (Isaacs J).

19 *Re Macfarlane* [2012] QSC 20, [3] (McMeekin J); Preece, above n 15, 57; Jacoby and Steer, above n 9, 156.

20 *Fuggle v Sochacki* [1999] NSWSC 1214, [37] (Austin J).

21 (1911) 13 CLR 248.

22 *Banks* (1870) LR 5 QB 549, 565–6.

23 Posener and Jacoby, above n 15, 754.

24 *Boughton v Knight* (1873) LR 3 P & D 64, 74 (Sir J Hannen).

general proportions in which he or she wishes to leave his or her estate, and the reasons for this distribution are rational.[25] As mentioned above however, the more complex the will, the more cognitive function is required. For example, the cognitive function necessary to prepare a will establishing a discretionary trust would be higher than that required for a 'straightforward' will. This increasing complexity of assessment in some circumstances supports contemporaneous assessment in preference to a retrospective attempt to determine if a testator had legal capacity at an earlier point in time.[26] The issue of contemporaneous and retrospective assessments will be discussed later.[27]

In *Banks*, Cockburn CJ queried why the existence of a mental disease should result in the inability to make a will if the disease does not exist in such a degree and form so as to interfere with testamentary capacity.[28] This is an early example of the functional model, emphasising the decision and time specific nature of legal capacity. In this approach Cockburn CJ has, in effect, rejected the status model of assessment based upon the existence of a mentally disabling condition.

In *Sharp v Adam*,[29] a relatively recent English decision, the trial judge indicated that there may be a requirement that the testator have a 'rational, fair, and just' will. The Court of Appeal, however, held that this did not alter the elements contained in the *Banks* test.[30] In *Sharp*, it was alleged that the testator, who died shortly after executing his last will in 2001, did not have testamentary capacity. The testator had executed a previous will in 1997 in which his two daughters were the principal beneficiaries. They were disinherited in the 2001 will. The testator had suffered from secondary progressive multiple sclerosis. At the time of his death in 2002, the testator could not speak or read, and communicated through hand, head and eye gestures. The Court held that the testator lacked testamentary capacity because it could not be demonstrated that the will was made by a legally competent person or that his feelings for his daughters were not affected by a mentally disabling condition. Although an English decision, *Sharp* serves to highlight the importance of the fourth limb of *Banks* 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'.[31]

It has been suggested that a more complex definition of testamentary capacity has been developed *for clinicians* based on *Read v Carmody* ('*Read*').[32] In *Read*, the appellant sought to have the grant of probate in common form of a will dated 5 February 1993 revoked on the grounds that the testator lacked testamentary capacity when the will was made. The appellant instead sought probate in solemn

25 *Kerr v Badran* [2004] NSWSC 735, [49] (Windeyer J); Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 435.
26 Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 436.
27 See below Part IV(A) and Part VII(C).
28 *Banks* (1870) LR 5 QB 549, 565–6.
29 *Sharp v Adam* [2006] WTLR 1059.
30 Jacoby and Steer, above n 9, 155.
31 *Banks* (1870) LR 5 QB 549, 565 (Cockburn CJ).
32 [1998] NSWCA 182. See Peisah, above n 1, 710. See also O'Neill and Peisah, above n 8, [4.9.5.2].

form of one of three earlier wills dated 3 February 1993, 11 December 1992 and 14 July 1988 respectively. Justice of Appeal Powell noted that seeking a grant of probate with respect to the will dated two days previous to the one in question was 'to say the least incongruous'.[33] *Read* reinforces that the testator needs to appreciate or at least be aware of the significance of making a will; must be aware in general terms of the nature, value and extent of the estate; and of the potential beneficiaries who may have a claim upon the estate; and finally must have the ability to evaluate and determine each claim.[34] Justice of Appeal Powell noted that it is necessary to determine if the testator, at the relevant time, suffers from a mental illness such as psychosis, or a mental disorder which includes higher cognitive function and dementia which 'detrimentally affects … consciousness or sense of orientation, or has brought about disturbances to … intelligence, cognition, thought content and thought processes, judgment and the like'.[35] Justice of Appeal Powell further noted that, although the conditions may be transient, manageable or reversible, it is 'more probably than not' that if they exist then the testator will be held to lack testamentary capacity.[36]

The amended formulation suggested by Peisah to emerge from *Read* poses the following questions:

i. Is it likely that any impairment was present which may have compromised the deceased's capacity with respect to an awareness and appreciation of the significance of the act of making a will?

ii. Is it likely that any impairment was present which may have compromised the deceased's capacity with respect to an awareness in general terms of the nature and extent of his estate?

iii. Is it likely that any impairment was present which may have compromised the deceased's capacity with respect to an awareness of those who might reasonably have been thought to have a claim on the deceased's testamentary bounty?

iv. Is it likely that any impairment was present which may have compromised the deceased's capacity with respect to ability to identify, evaluate and discriminate between the respective strengths of the claims of such persons?

v. Is it likely that any disorder of mind such as delusions and hallucinations which would influence the deceased's awareness of facts or reasoning and decision-making ability specifically with regard to the above four capacities?[37]

Further, to ensure that dementia is not affecting testamentary dispositions, testators should be able to demonstrate an awareness of the complex issues that can arise in conjunction with executing a will, including issues with respect to potential beneficiaries. They should also be able to provide reasons for the testamentary intentions demonstrated or any changes to them.[38]

33 *Read* [1998] NSWCA 182, 20.
34 Ibid 2–3. See also Peisah, above n 1, 710.
35 *Read* [1998] NSWCA 182, 3.
36 Ibid.
37 Peisah, above n 1, 710.
38 Ibid 711.

It is not documented in the literature how widely, if at all, this amended formulation is being implemented by legal and/or medical professionals. The formulation is also aimed at clinicians, whereas the assessment of testamentary capacity is a legal question. The utility of clinicians developing their own assessment paradigms to address legal issues without input from legal professionals is questionable. Further, while *Read* does offer some guidance on mental illness, mental conditions and their effects on testamentary capacity, adequate direction as to the actual assessment process and guiding principles in light of meeting the legal criteria for establishing testamentary capacity is still lacking. Thus, the problem remains that assessments are conducted on an ad hoc basis dependent on the skill set, ability, and knowledge of the individual assessor or assessors.

A testator may be either completely legally incompetent or suffer from periods of legal incompetency, delusions, and/or lucid intervals. A delusion has been defined as 'a fixed and incorrigible false belief which the victim could not be reasoned out of'.[39] An insane delusion 'is a belief that has absolutely no foundation in fact; even slight evidence that provides a basis for the belief negates the conclusion that it constitutes an insane delusion'.[40] A delusional belief must be distinguished from a paranoid ideation which is a suspicion usually acquiescent to reason.[41] The existence of a delusion, however, does not automatically deprive a testator of legal capacity.[42] The validity of the will is not impinged upon if the delusion has no influence on the disposition and whether it does have such influence is a question of fact.[43] If the court decides that the testator suffers from an insane delusion which is unchanging, persistent and which they cannot be reasoned out of,[44] as well as finding that the delusion affected the testamentary disposition, then a determination of legal incapacity will most likely follow.[45] Insanity is distinguished from insane delusions.[46] Mental illness does not preclude a testator from having the requisite testamentary capacity if the will was executed during a lucid interval.[47]

The phrase 'insane delusion' is an example of the legalese complained about by those advocating plain English, or who are unfamiliar with the legal discipline. Legally, the delusion is 'insane' if it remains in the face of a reasoned and truthful challenge. A testator may demonstrate legal incapacity centring on a particular individual or property and thus delusions are only relevant to the issue

39 *Bull v Fulton* (1942) 66 CLR 295, 339 (Williams J) ('*Bull*').
40 Michael L Perlin et al, *Competence in the Law: From Legal Theory to Clinical Application* (John Wiley & Sons, 2008) 225.
41 Damien Mullins, 'Testamentary Capacity and Undue Influence' (Paper presented at the Queensland Law Society Succession Law Conference, Brisbane, 27 October 2006) 4.
42 *Bull* (1942) 66 CLR 295, 342 (Williams J).
43 *Woodhead v Perpetual Trustee* (1987) 11 NSWLR 267, 272 (Needham J).
44 *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284, 290–2 (Gleeson CJ).
45 *Woodhead v Perpetual Trustee* (1987) 11 NSWLR 267, 273 (Needham J).
46 O'Neill and Peisah, above n 8, [4.9.3.7].
47 Perlin et al, above n 40, 224.

of testamentary capacity when they affect distributions contained in a will.[48] In the English decision *Estate of Bohrmann*,[49] it was held that the part of the will that was affected by the testator's delusions could be severed. In the more recent Australian decision of *Woodhead v Perpetual Trustee*, Needham J took the view that delusions must either invalidate all or none of the will, but never a part of it.[50] The position appears to be that delusions do not automatically invalidate a will unless they specifically affect the testator and influence a particular disposition.[51] An associated issue is whether testamentary capacity is dependent upon sanity. If it is not, but delusions affect legal capacity, the issue is whether the disposition arising from the delusion is severable from the will. Further, a testator who is generally legally incompetent may experience lucid intervals in which they are able to make a will.[52]

Interestingly, the medical literature suggests that 'lucid intervals' are actually legal fictions, which enable legal professionals and the courts to resolve complex matters, rather than a medical reality.[53] In fact, the phrases testamentary capacity, lucid interval, undue influence, and insane delusion have all been called legal terms of art.[54] This is indicative of the gulf that can exist between legal and medical professionals, where one profession understands their profession-specific language with little thought as to how that translates to others who also need to engage with foreign terminology, but who lack the necessary understanding. It also highlights the need for clarity not only of process, but also communication between legal and medical professionals when involved in capacity assessments. This is critical because, practically speaking, if a solicitor feels that a client has a mentally disabling condition that will affect their capacity to make a will, then it is not uncommon for a medical assessment of capacity to be sought. It is at this juncture that the issue of the relationship between the professions, and the nature of the assessment process becomes vital. It has also meant that the current test for assessing testamentary capacity is now open to wider scrutiny from multiple disciplines about its relevance and usefulness in the modern assessment context.

IV THE ADEQUACY OF THE EXISTING ASSESSMENT PARADIGM

The adequacy of current methods to assess testamentary capacity is questionable, not least because of the tension and misunderstanding that exist between the legal and medical professions.[55] This problem is further exacerbated

48 *Tipper v Moore* (1911) 13 CLR 248, 250 (Griffith CJ).
49 [1938] 1 All ER 271.
50 (1987) 11 NSWLR 267, 274–5.
51 Jacoby and Steer, above n 9, 155.
52 *Timbury v Coffee* (1941) 66 CLR 277, 282 (Dixon J), applied in *Challen v Pitt* [2004] QSC 365, [100] (Douglas J).
53 Marson, Huthwaite and Hebert, above n 16, 78.
54 Sprehe and Loughridge Kerr, above n 9, 255.
55 Purser, Magner and Madison, above n 11; O'Neill and Peisah, above n 8, [4.9.5.2].

by the lack of a consistent and transparent assessment paradigm and the absence of judicial guidance regarding what amounts to satisfactory evidence to demonstrate the absence of testamentary capacity. Consequently, questions have arisen about the relevance of the test for testamentary capacity in the modern context. How can a testator understand the nature and extent of his or her estate given the complex estate planning mechanisms that can be used? Is a test from 1870 adequate to assess testamentary capacity given the increase in mentally disabling conditions, such as dementia, which were not envisioned when the test was first developed? Who is going to conduct these assessments? Are these assessors accessible to people, for example, in regional areas? And, ultimately, who is going to pay for them? This Part will address the adequacy of the existing approach to assessing testamentary capacity.

A The Modern Relevance of the Test

In applying the *Banks* test, practical concerns exist regarding a modern testator's ability to understand the nature and extent of his or her financial assets and resources. The increase in personal wealth (for example, with the price of property and superannuation funds) means that $1 million is no longer the yardstick it once was. Further, it is not uncommon for an estate plan to utilise a potentially complicated series of mechanisms, such as trusts, companies and self-managed superannuation funds, to ensure wealth management, retention, and protection. As a result, however, an individual's ability to understand the nature and extent of his or her property, even in a more general sense, is arguable.

The assessment of testamentary capacity in light of 21st century concerns has also been questioned by the medical profession.[56] What is being queried is, first, the capability of the current test to take into account the nuances of all the potentially mentally disabling conditions, as well as the transitory nature of capacity. Connected to this is the fact that people do not always undertake a rational decision-making process, which is at odds with the legal models of assessing capacity.[57] Secondly, there are calls for legal actors (lawyers and members of the judiciary) to expand their knowledge base when it comes to the effect that mentally disabling conditions, such as Alzheimer's disease, can have on testamentary capacity.[58] It has been suggested that doing this will enhance the ability of the law to satisfactorily respond to issues arising from a lack of testamentary capacity.[59] Admittedly, these comments were made in an American context, but they are equally as relevant in Australia where there have been calls to develop standards and guidelines for solicitors to better identify clients who

56 See, eg, Glenise Berry, 'Testamentary Capacity & Undue Influence, Testamentary Capacity – Medical Aspects' (Paper presented at the Queensland Law Society Succession Law Conference, Brisbane, 27 October 2006) 1; Shulman, Cohen and Hull, above n 2, 63.

57 Jennifer Moye, Daniel C Marson and Barry Edelstein, 'Assessment of Capacity in an Aging Society' (2013) 68 *American Psychologist* 158, 167.

58 Shulman et al, 'Assessment of Testamentary Capacity and Vulnerability', above n 14, 725.

59 Ibid.

may have questionable testamentary capacity.[60] From a medical practitioner's perspective, it seems that timing is key and is something lawyers are not adept at handling when it comes to assessments. Medical practitioners want to be able to give a 'timely' assessment, a reference to contemporaneous as distinct from retrospective assessments.[61] Medical professionals are also proposing that the elements that need to be assessed should go beyond the criteria in *Banks*, although the specifics of what that would entail have not been elucidated.[62]

B The Effect of Dementia on Testamentary Capacity

Significantly, issues arising from a diagnosis of dementia and its effect on testamentary capacity have received little scholarly legal and medical attention.[63] The existence of neurodegenerative diseases, such as dementia, does not automatically result in testamentary incapacity.[64] It is possible that an individual may have dementia, and be unsure as to the date and location, and yet meet the *Banks* test.[65] Identifying the form of dementia can assist in the assessment process because education or treatment plans may be implemented to facilitate testamentary capacity.[66] Nevertheless, the effects of the increasing incidences of dementia on testamentary capacity must be acknowledged, and addressed. There is currently no method of assessment which determines the exact effect of the specific type of dementia on testamentary capacity.[67]

C Cost

Not only is it important to be clear about the standard being assessed and who is doing the assessing, but also about who is paying for the assessment and how it is to be calculated – for example, whether pursuant to an hourly rate or fixed fee. The question arises as to whether assessments should be specifically covered by Medicare or a user-pays system. Currently, there is no Medicare claim number for assessing capacity. Arguably, there are more pressing concerns for the Medicare system than providing contemporaneous assessments in will contests based upon the incapacity of the testator. However, any such 'contest' will be indicative of larger concerns confronting society as a whole, including the increase in cognitively degenerative diseases such as dementia and the impact this has on systems and services, including the legal system. Similarly, a user-pays system raises public policy considerations such as how many testators are actually going to seek legal capacity assessments when they are not going to be alive to deal with the consequences of failing to do so. However, this then raises

60 Berry, above n 56, 4.
61 Ibid; See also Shulman, Cohen and Hull, above n 2, 66.
62 Berry, above n 56, 4; See also Shulman, Cohen and Hull, above n 2, 68.
63 Benjamin Liptzin et al, 'Testamentary Capacity and Delirium' (2010) 22 *International Psychogeriatrics* 950, 950.
64 Perlin et al, above n 40, 224.
65 Posener and Jacoby, above n 15, 755.
66 O'Neill and Peisah, above n 8, 3.
67 Berry, above n 56, 2.

the issue that contemporaneous assessments are more reliable than retrospective assessments and so, perhaps this should be encouraged. Providing avenues for funding would be one such way to achieve this. Funding, as ever, is a crucial concern with no easy answer. Nevertheless, it is a very real possibility that people will increasingly contest wills based on allegations of testamentary incapacity and to ignore this would be ill-considered.

V MEDICAL ASSESSMENT OF TESTAMENTARY CAPACITY

Although the ultimate determination of an individual's legal capacity is to be conducted by a court,[68] medical (including psychological and neuropsychological) opinion is increasingly being utilised by the courts in order to accurately assess this.[69] The growing involvement of the medical profession recognises that legal professionals are not trained to detect neurodegenerative diseases or the effects of these diseases on an individual's testamentary capacity.[70] As noted by LP 1, a legal participant in the empirical research:

> in those days you could make a simple will, but now I believe it's beyond the capacity of the average lawyer to make a reasonable will for most people, particularly people in business. Because you've got to take into account the law relating to superannuation and what provision is being made there and how you get around the problems. … So getting back to what, look I think there are so many lawyers who make wills who are not really competent to make them.[71]

However, as seen above, the growing involvement of medical professionals in assessing testamentary capacity has led to that discipline questioning the relevance of the current *legal* test in light of *medical* considerations. This is not a bad thing if the end result is the improvement of the assessment process. Another issue, however, which also arises from the increasingly interdisciplinary nature of the legal capacity assessment, is that of the quality of 'expert' medical evidence. Further, if there are competing legal and medical opinions, which is to be preferred, and on what basis is this decision made given the fundamentally different training and skill sets informing the different opinions? This Part will examine these issues.

A The Evidence of Legal and Medical Professionals

A challenging relationship exists between the evidence of legal and medical professionals. Medical evidence is not necessarily conclusive in courts of the existence, or otherwise, of testamentary capacity.[72] Distrust of the expertise of the medical profession can exist, which means that reliance is placed upon the

68 Posener and Jacoby, above n 15, 753.
69 Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 434.
70 Berry, above n 56, 3.
71 Interview with LP 1 (Telephone Interview, 15 April 2010).
72 Fiona R Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *University of New South Wales Law Journal* 145, 161.

contents of the will unless the medical professional was the treating physician.[73] In *Kerr v Badran*, Windeyer J commented on the failure of the parties to call the testator's treating physician, noting that 'evidence would have been of great value in determining this case and certainly of far more assistance than the evidence of expert psychiatrists who did not see or treat the deceased'.[74] Justice Windeyer also commented on the differences in society, especially the management of assets, from the time of *Banks* to modern society and suggested that the test has to be applied in light of these societal changes.[75]

In *Bertoldo v Cordenos*, the inquiries made by the solicitor into the testator's capacity to make a will and ability to communicate in English were criticised as being 'shallow, to say the least'.[76] It was noted that the records of the solicitor, Mr Anthony, fell 'far short of the standard required of solicitors dealing with the preparation of wills for aged, enfeebled or ill clients'.[77] The solicitor was relying upon the medical professional's assessment as to the testator's capacity but, as noted by Jones J, this does not relieve the solicitor from the responsibility of making his own inquiries and keeping a suitable record of the investigation made.[78] This was highlighted by the fact that the solicitor, by his own admission, was unaware that the testator suffered from both depression and dementia for some time prior to giving instructions.[79]

Increasing reliance on the opinions of medical professionals does not, however, guarantee that the medical evidence regarding legal capacity will be accepted.[80] O'Neill and Peisah, in their 2011 work, commented that solicitors will increasingly be expected by the courts to not only obtain expert advice on the issue of an individual's testamentary capacity, but to also rely on it, often above their own assessment.[81] The concern is who that expert will and should be, what training they will have undertaken, and what process they will be applying to satisfactorily assess testamentary capacity. The medical profession appears to hold the view that legal professionals are unable to satisfactorily assess capacity and overcome the (legally) competent facade which dementia sufferers, for example, can erect. This is a fair suspicion when legal professionals are trained in the intricacies of the legal system, not the differences between a deluded mind and one which simply overvalues an idea because of a mentally disabling condition. However, medical professionals lack training in understanding the *legal* tests to be applied.

The concern is that medical opinion is being erroneously discounted in situations where differing legal and medical conclusions are reached. Although Dixon CJ stated in *Middlebrook v Middlebrook* that 'ultimately the comparison

73 Champine, 'Expertise and Instinct', above n 14, 59. See also Spaulding, above n 3, 130.
74 [2004] NSWSC 735, [39].
75 Ibid [49].
76 [2010] QSC 79, [21] (Jones J).
77 Ibid [10] (Jones J).
78 Ibid.
79 Ibid.
80 Sprehe and Loughridge Kerr, above n 9, 255.
81 O'Neill and Peisah, above n 8, [4.4].

must be between conflicting judgements formed on different material and involving no necessary conflict of veracity',[82] Sir James Hannen in *Boughton v Knight* noted that it is a question to be guided by common sense 'and that it does not depend solely on scientific or legal definition'.[83]

A legal professional should interview an individual in person if there are any allegations of legal incapacity. If the legal professional determines that it is necessary, medical opinion should then be sought. However, there is little guidance generally provided to medical professionals as to what such an opinion should contain. The evidence regarding testamentary capacity should be beyond reproach, based on a consistent and transparent assessment methodology.

B The Role of the Medical Expert

The important role of medical evidence could and should be more strongly highlighted. A clinical assessment ideally includes taking a detailed medical, psychiatric and family history, as well as determining mental status using appropriate cognitive and functional tests.[84] The challenge is identifying which cognitive and functional tests should be applied, and who should administer them. Connected to this is the issue of the role of 'expert' evidence when that 'expert' may never have even seen the testator, distinct from the evidence offered by, for example, a lay person who had daily contact with a testator. These issues will be considered in this Sub-part.

In *Woodhead v Perpetual Trustee*, three medical professionals gave evidence.[85] Dr Norris was a general practitioner who had known the testator. In Dr Norris' opinion the testator was legally capable. The remaining two medical practitioners, both psychiatrists who had never met the testator, disagreed about the testator's testamentary capacity. Dr Roberts diagnosed the testatrix with *paranoia vera*. Dr Smith's diagnosis was that she suffered paranoid schizophrenia. Dr Roberts testified that it was his opinion that none 'of the delusions or hallucinations from which the testatrix suffered would have affected her capacity to assess the moral claims on her of potential beneficiaries',[86] whereas Dr Smith testified that 'if the testatrix, at the time of making the will, had delusions concerning her relations, that would seriously affect her capacity to sum up her moral obligations to her family'.[87] In this instance, the court preferred the evidence of Dr Roberts. Although an example of the court's acceptance of expert psychiatric evidence, Windeyer J has commented in *Revie v Druitt* that evidence from treating physicians is often to be preferred to that of

82 (1962) 36 ALJR 216, 217.
83 (1873) LR 3 P & D 64, 67.
84 Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 437.
85 (1987) 11 NSWLR 267.
86 Ibid 269–71 (Needham J).
87 Ibid.

specialists who have never seen the deceased.[88] This was confirmed in *Zorbas v Sidiropoulos*.[89]

The evidence of the treating physician may be preferred to expert evidence because the treating physician will often have interacted with the testator over a period of time, possibly years, which enables them to assess any unusual or changing cognitive, behavioural or emotional characteristics. It is also contemporaneous evidence of testamentary capacity whereas often expert opinions are not sought until after the testator's death. Consequently, the 'expert' has to form his or her view on the documentary and third-party evidence available to them without ever being able to assess the individual in question. However, it is clear that a court does not always prefer the evidence of the treating physician when determining if a testator was legally competent.

In *O'Connell v Shortland*, the court criticised a solicitor for not obtaining a medical professional to witness a will where the testator's capacity was in question.[90] The court also criticised the medical professional involved for avoiding the solicitor because the medical professional did not want to be involved. *Fuggle v Sochacki* presents another example of the tension which can exist between the legal and medical professions in this context.[91] In this case, the New South Wales Supreme Court discounted the evidence of a medical professional, a specialist geriatrician with 13 years' experience assessing individuals with dementia, to reach a finding that the testator had testamentary capacity. This was despite the fact that the Court was impressed with the evidence of Dr Fairfull-Smith, the specialist geriatrician.[92] The Court explained this decision stating that the antagonism that the testator felt towards the English relatives that led to them being disinherited had an objective basis which was not irrational.[93] Justice Austin commented that 'perhaps the only slightly surprising aspect of the last will is that the English relatives figured in it at all'[94] given that one relative, Mrs Faulkner-Camden, had aggravated the testator so much that she was personally excluded from the 1992 will. This was compounded by Mrs Faulkner-Camden initiating Protective Division proceedings in 1993.[95]

As noted in *Zorbas v Sidiropoulous [No 2]*, medical evidence 'may sometimes directly support or deny a capacity in the deceased to have understanding of the matters in the *Banks v Goodfellow* criteria. However, evidence of such understanding may come from non-expert witnesses'.[96] This statement is a cause for concern because labelling an individual as incapable has enormous legal, social and psychological repercussions. While evidence from

88 [2005] NSWSC 902, [34].
89 [2008] NSWSC 1041, [52] (Debelle AJ).
90 (1989) 51 SASR 337, 348 (White J).
91 [1999] NSWSC 1214.
92 Ibid [43] (Austin J).
93 Ibid [66] (Austin J).
94 Ibid.
95 Ibid.
96 [2009] NSWCA 197, [65] (Hodgson JA), [77] (Young JA agreeing), [99] (Bergin CJ in Eq agreeing).

non-experts can be central with respect to the testator's wishes, behaviours and morals, it is of a different category to expert medical evidence.

Testamentary capacity assessment is a specialised area. This is not to deny the importance of lay evidence, but given the increasing complexity of cases coming before the courts, the need for expert capacity assessors who are versed in both the legal and medical concepts needs greater consideration.[97] However, to date, the role of the 'expert' in this context has been somewhat ill-defined, and 'inconsequential'.[98] Additionally, there is uncertainty over whether the 'expert' should be the general practitioner who has interacted with the individual, or a specialist such as a neuropsychologist or perhaps a neurologist or geriatrician.[99] The selection of the 'expert' will depend on numerous factors including the individual's circumstances as well as cost. The variability of the assessor further highlights the importance of ensuring that the assessment process is satisfactory.

VI TESTAMENTARY CAPACITY ASSESSMENT: PRACTICAL PERSPECTIVES

The literature is divided. Legally, there is little to no mention of the need to update the test for testamentary capacity or improve the assessment process, but calls are coming from the medical literature that the test, and assessment paradigm, should be revisited. This Part will present the results of the empirical research, detailing the beliefs of the legal and medical practitioners actually assessing testamentary capacity. This will include exploring whether there is a consistent and transparent method of assessment and/or guiding principles, and whether such assessments can be conducted in a way that promotes a satisfactory methodology.

The majority of respondents, six legal (60 per cent)[100] and 18 medical (90 per cent),[101] do not appear to think that the actual test for testamentary capacity as

97 Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 434; Perlin et al, above n 40, 244–5.

98 Spaulding, above n 3, 121.

99 O'Neill and Peisah, above n 8, [4.9.4.1].

100 Interview with LP 3 (Telephone Interview, 13–14 May 2010); Interview with LP 6 (Armidale, 10 April 2010); Interview with LP 4 (Telephone Interview, 12 April 2010); Interview with LP 10 (Armidale, 29 April 2010); Interview with LP 7 (Telephone Interview, 14 April 2010); Interview with LP 2 (Telephone Interview, 13 April 2010).

101 Interview with MP 18 (Telephone Interview, 19 May 2010); Interview with MP 5 (Telephone Interview, 4 May 2010); Interview with MP 7 (Telephone Interview, 7 May 2010); Interview with MP 2 (Telephone Interview, 20 April 2010); Interview with MP 16 (Telephone Interview, 19 April 2010); Interview with MP 8 (Telephone Interview, 28 April 2010); Interview with MP 19 (Telephone Interview, 22 April 2010); Interview with MP 15 (Telephone Interview, 16 April 2010); Interview with MP 11 (Telephone Interview, 21 April 2010); Interview with MP 6 (Telephone Interview, 23 April 2010); Interview with MP 1 (Telephone Interview, 3 May 2010); Interview with MP 13 (Telephone Interview, 17 May 2010); Interview with MP 10 (Telephone Interview, 22 April 2010); Interview with MP 20 (Telephone Interview, 11 May 2010); Interview with MP 12 (Telephone Interview, 21 April 2010); Interview with MP 14 (Telephone Interview, 19 April 2010); Interview with MP 3 (Telephone Interview, 19 May 2010); Interview with MP 9 (Telephone Interview, 27 April 2010).

established in *Banks* needs to be modified but that its application does need to be rethought in light of modern challenges. As LP 7 stated, '[i]t is still an applicable base line but there needs to be a recognition that medical technology has advanced and our lives are somewhat more complex than they were once'.[102] MP 16 (that is, a medical participant) noted, however, that the test established in *Banks* demonstrates 'what lawyers do': they set precedents and then blindly follow them without due consideration.[103] Three medical participants (15 per cent) thought the wording could be modernised.[104]

Only two legal participants (20 per cent) thought that the test needed to be reconsidered to take account of the variability of capacity.[105] However LP 5 picked up on a more general theme noting the difficulties associated with assessing testamentary capacity in light of the fourth *Banks* criterion:

> I think it is a very general test. I don't think it's, you know, it gives you the hallmark criteria – there's a lot under each of those things, but yes. I think it does need to be reconsidered to a degree. … I guess one of the difficulties is the last one, when you talk about a disease of the mind that might poison their affections, that is. That is still relevant, but the difficulty we more have these days is the ability for people to wax and wane in their capacity. So, they may be affected by a disease that could poison their affections but it doesn't at that particular time.[106]

MP 16 takes this further, stating that there needs to be clarity and information about assessing *all* of the elements in *Banks*, '[b]ut the point was, in interpreting *Goodfellow* you need to really specify, and this is where the finesse comes in, and there needs to be a lot more work in actually trying, there almost needs on each item there needs to be a whole book'.[107] Generally, guidelines and guiding principles were thought to be a useful tool in augmenting the test established in *Banks*.[108]

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102 Interview with LP 7 (Telephone Interview, 14 April 2010).

103 Interview with MP 16 (Telephone Interview, 19 April 2010).

104 Interview with MP 1 (Telephone Interview, 3 May 2010); Interview with MP 13 (Telephone Interview, 17 May 2010); Interview with MP 10 (Telephone Interview, 22 April 2010); Interview with MP 20 (Telephone Interview, 11 May 2010).

105 Interview with LP 5 (Telephone Interview, 16 April 2010); Interview with LP 8 (Telephone Interview, 20 April 2010).

106 Interview with LP 5 (Telephone Interview, 16 April 2010).

107 Interview with MP 16 (Telephone Interview, 19 April 2010).

108 Interview with LP 10 (Armidale, 29 April 2010); Interview with LP 7 (Telephone Interview, 14 April 2010); Interview with LP 8 (Telephone Interview, 20 April 2010); Interview with LP 2 (Telephone Interview, 13 April 2010); Interview with LP 5 (Telephone Interview, 16 April 2010); Interview with LP 4 (Telephone Interview, 12 April 2010); Interview with MP 15 (Telephone Interview, 16 April 2010); Interview with MP 17 (Telephone Interview, 8 April 2010); Interview with MP 14 (Telephone Interview, 19 April 2010); Interview with MP 9 (Telephone Interview, 27 April 2010); Interview with MP 5 (Telephone Interview, 4 May 2010); Interview with MP 12 (Telephone Interview, 21 April 2010); Interview with MP 4 (Armidale, 30 April 2010); Interview with MP 8 (Telephone Interview, 28 April 2010); Interview with MP 6 (Telephone Interview, 23 April 2010); Interview with MP 18 (Telephone Interview, 19 May 2010); Interview with MP 7 (Telephone Interview, 7 May 2010); Interview with MP 2 (Telephone Interview, 20 April 2010).

LP 1 discussed the case of *Re Clare*,[109] noting that it states that *Banks* should not be elevated to the status of statutory authority.[110] It also seemed that the current test established in *Banks* contains elements that medical professionals would intuitively examine, without necessarily realising that these were required for legal capacity.[111] Of the medical participants, eight (40 per cent) stated that medical professionals were not familiar with the test set out in *Banks*[112] while nine (45 per cent) thought that medical professionals knew of the test generally but were unaware of where it originated.[113] Three legal respondents (30 per cent) noted that there was a danger that medical professionals would just 'go through the motions' when it came to assessing testamentary capacity.[114] On this point and the importance of going beyond merely regurgitating the elements from *Banks*, LP 1, in relation to a matter that he was aware of, stated:

> the solicitor believed that the guy had capacity but he gets a negative report from the treating psychiatrist. But, in my view, the letter from the treating psychiatrist, on its own, would be thrown out by the court because it just virtually dot points those points that are mentioned in *Banks v Goodfellow*. It doesn't go on to talk about them.[115]

Further from LP 1 about the same matter, 'it doesn't give any background, and I think that that doctor has just, it's almost as if he's pulled out a precedent letter and said "print the same as you did for Bob Jones the other day"'.[116] In a more extreme case, LP 5 noted that, 'I've had a one sentence letter that says, "I saw Mrs Jones and she's got capacity" full stop, which was just totally unhelpful and the court throws it in the bin basically'.[117] A medical practitioner, MP 16, voiced a similar concern:

> The *Goodfellow* test is all very legalese and legal precedent so it's appropriate that the lawyers know that. It's just, now that we are thinking about it how, ah. How, it's almost we're writing to you about testamentary capacity and the formula

109 (2009) QSC 403.

110 Interview with LP 1 (Telephone Interview, 15 April 2010).

111 Interview with MP 12 (Telephone Interview, 21 April 2010); Interview with MP 14 (Telephone Interview, 19 April 2010); Interview with MP 3 (Telephone Interview, 19 May 2010); Interview with MP 9 (Telephone Interview, 27 April 2010); Interview with MP 7 (Telephone Interview, 7 May 2010).

112 Interview with MP 10 (Telephone Interview, 22 April 2010); Interview with MP 8 (Telephone Interview, 28 April 2010); Interview with MP 15 (Telephone Interview, 16 April 2010); Interview with MP 14 (Telephone Interview, 19 April 2010); Interview with MP 20 (Telephone Interview, 11 May 2010); Interview with MP 3 (Telephone Interview, 19 May 2010); Interview with MP 9 (Telephone Interview, 27 April 2010); Interview with MP 7 (Telephone Interview, 7 May 2010); Interview with MP 2 (Telephone Interview, 20 April 2010).

113 Interview with MP 18 (Telephone Interview, 19 May 2010); Interview with MP 16 (Telephone Interview, 19 April 2010); Interview with MP 1 (Telephone Interview, 3 May 2010); Interview with MP 17 (Telephone Interview, 8 April 2010); Interview with MP 19 (Telephone Interview, 22 April 2010); Interview with MP 13 (Telephone Interview, 17 May 2010); Interview with MP 5 (Telephone Interview, 4 May 2010); Interview with MP 11 (Telephone Interview, 21 April 2010); Interview with MP 6 (Telephone Interview, 23 April 2010).

114 Interview with LP 1 (Telephone Interview, 15 April 2010); Interview with LP 5 (Telephone Interview, 16 April 2010); Interview with LP 3 (Telephone Interview, 13–14 May 2010).

115 Interview with LP 1 (Telephone Interview, 15 April 2010).

116 Ibid.

117 Interview with LP 5 (Telephone Interview, 16 April 2010).

> indicates that this is what we should say so we'll say it without necessarily stepping through whether it is appropriate or not. But that is what the legal profession does, doesn't it? It just sets precedents and that precedent sets the tone so that now they are just stepping through the tone. But there is very little, and this will get onto I suppose where we are going, there's not a great deal of substantive analysis about what actually happens and what was the capacity and competency. It is rather these are the criteria …[118]

Some legal respondents also commented that medical professionals may be reluctant to help with assessments or to be involved in witnessing wills.[119] It seems that medical practitioners have been told to avoid them[120] because they are a 'mine field',[121] highlighting the impact that concerns about professional liability can have on assessments.

There was also discussion of the tension between the legal and medical professions in the event of conflicting evidence regarding whether an individual was or was not legally capable, echoing the cases discussed above. For example, LP 1 noted, 'the evidence of the solicitor will be much more important'.[122] Overall, there seemed a general consensus among legal and medical practitioners that although the test is adequate, there should be a better understanding by both professions about how to assess testamentary capacity.[123] Further, guidelines augmenting the application of each limb of the test are needed.[124]

VII THE ASSESSMENT PROCESS: SOME SUGGESTIONS

The traditional legal formulation in *Banks* for assessing testamentary capacity has obviously withstood the test of time. The issue, however, is whether, in a modern context with modern problems such as increasing incidences of dementia, this remains the *best* way to assess testamentary capacity. This research has demonstrated that despite the questions about its usefulness, including in the medical literature, it is a sound, general formulation of the legal elements necessary to be examined when assessing testamentary capacity. There

118 Interview with MP 16 (Telephone Interview, 19 April 2010).

119 Interview with LP 1 (Telephone Interview, 15 April 2010); Interview with LP 3 (Telephone Interview, 13–14 May 2010).

120 Interview with LP 6 (Armidale, 10 April 2010); Interview with LP 2 (Telephone Interview, 13 April 2010); Interview with LP 10 (Armidale, 29 April 2010); Interview with MP 1 (Telephone Interview, 3 May 2010). Three legal participants (although no medical participants) commented that it was dangerous for legal professionals who did not ordinarily practise in this area to 'dabble' in wills: Interview with LP 5 (Telephone Interview, 16 April 2010); Interview with LP 1 (Telephone Interview, 15 April 2010); Interview with LP 4 (Telephone Interview, 12 April 2010). LP 10 noted the dangers of working without additional medical information: see Interview with LP 10 (Armidale, 29 April 2010).

121 Interview with MP 14 (Telephone Interview, 19 April 2010).

122 Interview with LP 1 (Telephone Interview, 15 April 2010); Interview with MP 12 (Telephone Interview, 21 April 2010).

123 Interview with MP 18 (Telephone Interview, 19 May 2010).

124 Interview with MP 16 (Telephone Interview, 19 April 2010); Interview with MP 20 (Telephone Interview, 11 May 2010); Interview with LP 4 (Telephone Interview, 12 April 2010); Interview with LP 10 (Armidale, 29 April 2010).

is no need to discard or replace it in its entirety. However, it is only a general statement which, alone, does not (and indeed cannot) address all the challenges presented by assessing testamentary capacity. This Part will discuss some suggestions for improving testamentary capacity assessment in the modern context.

A The Need for Guidelines

Clearly when assessing testamentary capacity the fundamental elements established in *Banks* need to be taken into consideration. The test itself does not need to be substantially updated. However, there is an issue about the education of the professions and the unfair expectation that the medical professional ought to know, and understand, the legal standard when there is inadequate communication between the professions about the nature of the legal capacity being assessed.[125] National guidelines and general principles are needed to address this – to establish the *procedure* to be followed and information which should be given, and sought, when an assessment is to occur.

The *Banks* formulation was never intended to take on the importance of a statutory provision. Whether Chief Justice Cockburn's comments have, in effect, been elevated to legislative authority is arguable. While there are legal and medical professionals who use the *Banks* criteria as the guideline it was intended to be, there are those from both professions who mechanically assess testamentary capacity in line with the four elements. Little regard and, in some cases, questionable understanding exists concerning the nuances that can affect testamentary capacity which have to be taken into consideration in any determination. What is apparent is that the continued use of the elements identified in *Banks* in the 21st century requires recognition of modern techniques, data and information. The existence of mentally disabling conditions which were unheard of in 1870 reinforce the need to develop unambiguous and nationally accepted assessment paradigms for both the legal and medical professions which augment the test established in *Banks*.

The development of guidelines, or a general code of practice and ethical standards, would help combat the inconsistent and unpredictable assessment of testamentary capacity, as well as counter terminological confusion. This is especially important given the individual, ad hoc basis on which assessments are currently being conducted by legal and medical professionals with varying degrees of experience and training, challenges which are exacerbated by misunderstandings and miscommunication between the professions. Guidelines would be especially useful in emergency situations where time is of the essence.[126] Any such guidelines should be developed with the input of all relevant stakeholders including information about what any report should contain. The

125 Interview with MP 16 (Telephone Interview, 19 April 2010).

126 Malcolm Parker and Colleen Cartwright, 'Mental Capacity in Medical Practice and Advance Care Planning: Clinical, Ethical and Legal Issues' in Berna Collier, Chris Coyne and Karen Sullivan (eds), *Mental Capacity – Powers of Attorney and Advance Health Directives* (Federation Press, 2005) 56, 89.

information should go further than merely regurgitating the elements established in *Banks*.

B The Role of the Medical Professional

The problem is that there is generally little to no guidance from the legal profession to the medical profession as to how legal capacity should be assessed. What is clear is the necessity of obtaining *useful* medical evidence that aids the court in determining the existence, or otherwise, of testamentary capacity; of defining the relationship between the legal and medical professions; and of establishing processes to facilitate the gathering of relevant evidence in the face of potential litigation. This was evident in, for example, *Re Macfarlane*.[127] In this case the testator had two wills dated 11 May 2000 and 16 April 2008. The testator's testamentary capacity at the time of making the second will was in issue because the death certificate listed 'multi infarct dementia' as a cause of death. The executors initially sought to administer the estate in accordance with the second will. After legal advice as to the problems presented with seeking probate of the second will, the executors sought and were granted probate for the first will. Of particular interest here is the evidence, or lack thereof, of two medical professionals. The testator's general practitioner was not prepared to express an opinion as to the testator's testamentary capacity, which serves as a practical example of the reluctance of some medical professionals to become involved. The solicitors acting for the executors then sought a report from a second general practitioner, Dr Easton, regarding the testator's capacity. Dr Easton provided two reports. In the first, he indicated that the testator would have had testamentary capacity, whereas in the second, he expressed the opinion that the testator did not have the requisite capacity. It was unclear what Dr Easton's involvement was with the testator and little weight was given to the two reports.

In addition to the importance of clearly defining the information being sought to ensure that the evidence is useful, *Re Macfarlane* highlights two issues. First is the role of both legal and medical professionals. A solicitor in a situation where the assessment of testamentary capacity is necessary needs to not only consider the nature of the legal capacity to be assessed and the best evidence, but also the person best placed and/or qualified to offer an opinion as to the existence, or otherwise, of testamentary capacity. Conversely, the medical professional must also examine their role in the assessment process and, if desirous of more information, should discuss their concerns with the solicitor. Secondly, and echoing the empirical research conducted, is the reluctance of medical professionals to become involved in legal proceedings, either as a potential witness in, or subject of, litigation.

127 [2012] QSC 20.

When a medical professional is involved in an assessment, the medical professional's role should be defined as much as possible.[128] Clear guidelines and principles regarding the legal capacity to be assessed should be provided by the legal professional to the medical practitioner. It is also vital for the method of communicating the assessment findings to be established. Medical professionals who are asked to provide an opinion should determine whether it is the legal professional or the testator who is requesting the assessment, and for what purpose. If it is the legal professional, then it must be determined whether the testator has agreed to undertake such an assessment. Further, the question arises as to whether the request for an assessment arises from the legal professional's determination or from the concerns of a third party. This may draw attention to issues of undue influence which assessors should be aware of. The testator should understand the nature and purpose of the assessment and consent to participate.

It is acknowledged that a standard approach may be too rigid, discouraging new initiatives from being developed. However, it is not intended that the proposed guidelines and supporting principles remove the flexibility that is undeniably necessary in this area. They would instead establish a standard, yet flexible, process to underpin testamentary and decision-making capacity assessment. Such a paradigm would create both transparency and consistency of approach. The guidelines and general principles should be reviewed at regular intervals ensuring that they reflect best practice. Further, they are not intended to replace diagnostic tools. It is when these diagnostic means are used in conjunction with the skills of the legal profession in a systemised way that clarity and uniformity of process should occur. Guidelines would facilitate this process. The test for testamentary capacity is undisputedly a legal test. However, the complexities of the human mind and body, as well as new medical knowledge require the increasing involvement of the medical profession in the assessment of testamentary capacity.

C Contemporaneous and Retrospective Assessment

Thought also needs to be given to whether there should be a contemporaneous, as opposed to a retrospective, assessment of testamentary capacity. Although retrospective assessment is more common, contemporaneous assessment is ideal because it enables assessment of a living testator at the time of, or as near as possible to, the execution of the will. As noted by MP 19, 'a doctor really can't do a retrospective assessment unless there was absolutely clear-cut evidence that the person was not competent'.[129] This can be contrasted to the need to rely on documents and evidence from parties other than the testator as is the case when capacity is assessed retrospectively, which is often referred

128 The British Medical Association and the Law Society, *Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers* (Law Society Publishing, 3rd ed, 2011) 163. See also Perlin et al, above n 40, 244–5.

129 Interview with MP 19 (Telephone Interview, 22 April 2010).

to as a 'neuropsychological autopsy'.[130] Contemporaneous assessment can also heighten a testator's chances of being assessed as legally competent.[131] This is because the testator may be able to gain an understanding of the process, enabling them to increase their ability to be found capable at law. Contemporaneous assessment can help improve the testator's understanding of any conflict in their environment as well as the effect of their decision to include or exclude particular individuals who may expect to be beneficiaries. Subsequently, any allegations of impaired capacity, including any behavioural or psychiatric symptoms, can be addressed when the testator is still alive. However, if contemporaneous assessment occurs it can highlight that testamentary capacity may be an issue, which can be tactically problematic if litigation is a possibility.

D A National Body/Specialist Assessors

The concept of a national body of assessors emerged throughout this research.[132] For example, such a specialist body could implement and monitor capacity assessments. This may offer a feasible structure in which to satisfactorily assess capacity. Such clinics may be able to provide specialist assessors, legal and/or medical specialists. The loss of legal capacity is stressful enough without people being forced into foreign environments for such assessments.[133] To have qualified people make the determinations in an environment familiar to the individual in question could serve to heighten their ability to retain legal capacity.[134] This was not originally envisioned as part of this research and requires further exploration.

E Practitioner Liability Concerns

An incorrect label of legal incapacity will place individual autonomy at risk. Consequently, the ability of legal and medical professionals to accurately and uniformly assess issues of capacity is paramount and must be beyond reproach. With testamentary capacity assessment growing in complexity, it is possible that issues surrounding practitioner liability, for both legal and medical professionals, and the assessment process itself will increase. For lawyers, it has been suggested that the actual assessment of capacity may go beyond a legal requirement to a definite duty.[135] What is currently clear is that a legal practitioner does have a duty to prepare a will in accordance with their client's instructions. It is then up to the court to decide whether it is a valid document. Of concern however, is the fact that many legal professionals are not aware of the effect that mentally disabling conditions can have on testamentary capacity and, consequently, may

130 Shulman et al, 'Contemporaneous Assessment of Testamentary Capacity', above n 9, 436.
131 Ibid. See also Perlin et al, above n 40, 244.
132 Department of Lands (NSW), *Review of the Powers of Attorney Act 2003* (Issue Paper, 2009) 6.
133 The British Medical Association and the Law Society, above n 128, 1517.
134 Pēteris Dārziņš, D William Molloy and David Strang (eds), *Who Can Decide? The Six Step Capacity Assessment Process* (Alzheimer's Australia, 2000) 14–18.
135 Preece, above n 15, 57.

not realise that their client's instructions could be 'tainted'. This is especially the case if it is a new client, from which the solicitor has no reference base to determine if triggers exist that capacity could be in issue. Further, general practitioners and nursing staff in retirement villages often miss the existence of dementia,[136] which raises the question of how a solicitor, under time restraints, can correctly identify both that testamentary capacity is an issue and, subsequently, what to do about it. As noted in *Legal Services Commissioner v Ford*, legal professionals need to be aware of circumstances which give rise to issues of capacity assessment.[137]

Medical practitioners are also concerned about professional liability in this context, perhaps to a greater degree than the legal professionals. Their concerns principally lay around the issue of having to give evidence in court proceedings, and possibly being the subject of legal proceedings, especially when that evidence, and thus possibly their practice, might be critically reviewed.[138] While this is the nature of the Australian legal system, it is not something medical professionals are necessarily used to, and thus can be confronting and intimidating. Consequently, if guidelines exist to establish a base standard and a legal and/or medical professional is able to explain the reasons for deviating from this standard, this may help address issues of practitioner liability.[139]

VIII CONCLUSION

The doctrine of testamentary capacity stagnated in the 20th century and this must not be allowed to continue in the 21st century.[140] Paramount to this aim is reviewing the test for establishing testamentary capacity. The test is well established in *Banks*. However, assessing testamentary capacity is only becoming more complex and challenging with Australia's ageing population and the increasing prevalence of mentally disabling conditions, such as dementia. Questions have therefore been raised as to whether the 1870 formulation is still sufficient in the modern context. This research, which adopted a socio-legal methodology including doctrinal and empirical research, has demonstrated that although general, the test itself is still valid. However, mechanisms need to be established which facilitate the satisfactory assessment of testamentary capacity.

The assessment paradigm should facilitate transparent and substantiated determinations regarding an individual's testamentary capacity or lack thereof with reference to the legal test and standard on which the assessment is based. This requires an interdisciplinary approach utilising the skills and knowledge of

136 O'Neill and Peisah, above n 8, [4.9.2].

137 [2008] QLPT 12 (Unreported, Fryberg J, 22 August 2008).

138 Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) 90, 111–12.

139 American Bar Association Commission on Law and Aging and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (Handbook, 2005) 2.

140 Champine, 'Expertise and Instinct', above n 14, 93.

both legal and medical professionals. Clear assessment processes based on national guidelines and supporting principles will help counter any miscommunication and misunderstanding that can exist between the legal and medical professions, especially with respect to discipline specific vocabularies. Contemporaneous assessment should be promoted, where possible, in an attempt to protect a testator's wishes. Additionally, there is a need for further education and information sharing between legal and medical practitioners to ensure that the professionals assessing testamentary capacity understand exactly what it is they are assessing, and how they are to conduct the assessment to best preserve the autonomy of the individual whose capacity is in question. This approach will not only assist with the assessment but also begin to address professional liability concerns faced by both, but particularly the medical, professions.