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RENDER UNTO CAESAR:
Medicine and Law in Assessments of (In)capacity

by

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INTRODUCTION

- 1 Lawyers charged with making an assessment of a person's "(in)capacity" often take comfort from medical evidence in various forms, including: (a) evidence from a person's treating doctor; (b) clinical records and evidence explaining the use of technical medical language in such records; and (c) evidence of a medico-legal "expert" witness. Medical evidence comes in different forms.

- 2 Nevertheless, by reference to such evidence, lawyers aim: (a) primarily and explicitly, to bring to the fore "facts" which ground a finding of "(in)capacity" or provide a foundation from which a court can draw inferences in support of such a finding; and (b) implicitly, to share with a respected profession the load of decision-making in despatch of business which the community, not unreasonably, expects necessarily involves a medical perspective as well as a legal perspective.

- 3 Under the general law, unless the courts impose such a requirement upon their own decision-making, medical evidence is not a universal necessity for a judicial determination of a question about a person's (in)capacity.

- 4 In *Timbury v Coffee* (1941) 66 CLR 277 at 282-284 Dixon J upheld a jury verdict that (without the benefit of medical evidence) attributed testamentary incapacity to an alcoholic notwithstanding that the Will thereby invalidated was ostensibly rational. How far one can read Dixon's personal, social experience into such a judgment is at best debatable, but it is not implausible that his confidence in upholding the jury's verdict was, in part, a function of the fact that his father was an alcoholic: Philip Ayres, *Owen Dixon* (Miegunya Press, Melbourne, 2003), pages 4-5, and 75-76.

THE DIFFERENT PERSPECTIVES OF LAW AND MEDICINE

- 5 The law often requires that an assessment of (in)capacity speak of (in)capacity at a particular point in time: for example, at the time a Will, a deed, or a contract is executed. This presents difficulties in a world in which, as observed by medical professionals and the lay community alike, capacity declines over time at unpredictable rates, or intermittently.
- 6 In the adversarial world in which they live, litigation lawyers often expect too much of the medical profession – with an expectation that a medico-legal expert will identify all material facts in available lay and clinical evidence, marshal arguments that might be used by an advocate, and express an opinion on the ultimate question of “(in)capacity” upon which an advocate's submissions can be based.
- 7 Forced to express an opinion about (in)capacity at a particular point in time, a medico-legal expert will commonly insist upon *a longitudinal study* of the subject's health condition and behaviour, across *a broad spectrum* of life experience as is practicable. If forced by the pressures of adversarial debate to express an opinion that, in medical terms, may be little more than a guess, a responsible medical professional is keen to ensure that it is an educated one.
- 8 What the Court generally requires is: first, evidence of primary facts bearing upon the question of “(in)capacity” upon which a finding can reasonably be made; secondly, an explanation of medical terminology used in medical

records; and, thirdly, an impartial identification, and explanation, of medical issues that may inform performance by the Court of its decision-making function. An expression by an expert of his or her opinion on the ultimate question might not be unwelcome; but, if not articulated in terms of reasoning tied to identified facts established by evidence before the Court, it is likely to be of limited or no utility.

- 9 On occasions, usually at the outer reaches of a range of diagnoses, medical evidence can be emphatic and decisive. However, in those cases, a medically trained person might simply be offering to lay observers a technical explanation for what the lay community can, independently, observe. The difficult cases (as are most contested capacity cases) lie not at the ends, but in the middle, of the range of diagnostic opinion.
- 10 The subjective element in a medico's expression of opinion is not uncommonly obscured from view by reference to a "mini-mental state examination (MMSE)" which purports to present a quantitative analysis of a person's capacity with a test "score" out of a possible 30 points.
- 11 Different minds attribute different significance, or no significance, to MMSE results. It may be that whatever value they have lies in a comparison of results over time. Care needs to be taken not to attribute too much significance to a single result: see, for example, *Drivas v Jakopovic* [2019] NSWCA 218 at [59].
- 12 A search for objectivity in analysis will often lead not only to MMSE testing, but to the report of an "Aged Care Assessment Team (ACAT)" – usually a team of social workers – responsible for certifying whether a person should receive home services or be placed in a nursing home.
- 13 Particular care needs to be taken about ACAT Reports because observations they record may be driven by the purpose for which they are prepared (an assessment of what, if any, social welfare services should be provided) rather

than by a clinical assessment of a particular measure of (in)capacity: see, for example, *Drivas v Jakobovic* [2019] NSWCA 218 at [30] and [60].

- 14 Not uncommonly, in capacity cases presented to the Court for decision, the Court's determination is governed not only by medical analysis, much of which:
 - (a) when directed to the past (for example, upon assessment of testamentary capacity in a probate suit), is speculation based upon imperfect knowledge of facts; and
 - (b) when directed to the future (for example, upon assessment of capacity for self-management in protective proceedings), bears the hallmarks of a provisional opinion consistent with the medical profession's experimental approach to the identification and management of risk.
- 15 When, as is commonly the case, a question of (in)capacity presented to the Court for decision is reasonably open to debate in medical terms, competing medical opinions may serve a purpose, principally, of crystallising issues and drawing attention to facts that might need to be taken into account.
- 16 Medicalisation of a reasonably contestable case may fall short of what is required to determine a question of (in)capacity according to legal standards because legal standards generally have embedded in them a broader, or moral, component foreign to clinical medical science.

THE LAWYERS' PLAYFIELD

The Nature of Evidence Required

- 17 Even if it involves an element of “evaluative” decision-making, an assessment of (in)capacity for a legal purpose requires the application of a legal standard to facts properly found.
- 18 Although a decision about whether a particular person does or does not have “capacity” may be powerfully informed by an expression of medical opinion, *based upon articulated observations of fact* and accompanied by an exposition of technical medical terms, the Court’s determination of “capacity” is not, in essence, the province of medical expertise, but of independent judgement by a court applying established criteria to particular facts.
- 19 *Drivas v Jakopovic* [2019] NSWCA 218 provides an illustration of the need of the Court for evidence that assists it in finding facts material to a determination of capacity.
- 20 The Court of Appeal there upheld a judgment in which the primary judge:
- (a) gave significant weight to the evidence of a solicitor who drafted a Will (relying heavily on his evidence of his usual practice in taking instructions, and the fact that his records supported an inference that he had spent considerable time with the testatrix in taking instructions for her will, without discerning any want of testamentary capacity); and
 - (b) gave no significant weight to expert medico-legal evidence which largely took the form of “conclusory” expressions of opinion.
- 21 Macfarlan JA (with whom Bell ACJ and McCallum JA agreed) made the following observations at [51]-[55]:
- “[51] In challenging the primary judge’s conclusion that [the evidence of the solicitor, Mr Taylor] should be regarded as “valuable evidence” in favour of upholding the September 2007 Will, [the Appellant] emphasised the following points:

- (1) Mr Taylor had no independent recollection of his dealings with the deceased and did not keep any notes of what passed between them.
- (2) His Honour's findings that Mr Taylor saw the deceased on her own for at least an hour and a half was not based on direct evidence but only on inference from time stamps on different pages of the September 2007 Will and Mr Taylor's evidence of his usual practices.
- (3) His Honour's finding that the deceased must have requested Mr Taylor to change her will so that it had the effect that [the Appellant] would not take Branka's share if Branka predeceased her mother was also "the product of inference" from Mr Taylor's evidence of his usual practices.
- (4) It is not possible to know what circumstances would or would not have been sufficient to trigger a doubt in Mr Taylor's mind as to the deceased's testamentary capacity.
- (5) Mr Taylor might not have appreciated that the deceased lacked testamentary capacity as there was evidence that the deceased "presented in a fashion which might not have alerted suspicion as to her cognitive limitations". [The Appellant] referred in this regard to Dr Watson's report of June 2007 (at [32] above) which stated that the deceased presented as a "well, pleasant elderly woman" with normal speech.
- (6) Because there was no evidence that a copy of the 1998 Will was provided to Mr Taylor, the significance of the change of the contingent gift in the May 2007 Will would not likely have been apparent to Mr Taylor.
- (7) Mr Taylor did not give evidence that he read the form of will over to the deceased.

[52] Notwithstanding these matters, I consider that the primary judge was correct to place significant weight on Mr Taylor's evidence. Mr Taylor was a solicitor of considerable experience, including in dealing with elderly clients and their testamentary wishes. As Young J indicated in *Re Crooks Estate* (14 December 1994, unreported, at 29), such evidence is valuable evidence of testamentary capacity because:

"[a]n experienced solicitor or solicitor's secretary gets used to dealing with people making wills and are usually attuned to the red lights that flash when a person who is of suspect capacity comes across their paths [sic]."

[53] It was well open to the primary judge to conclude that Mr Taylor met with the deceased on her own for at least an hour and a half on 10 September 2007 and had met with her alone when she had signed documents in June 2007. Moreover, there was no reason not to accept Mr Taylor's firm evidence that it would not have been in accordance with his practice to make the change to the relevant

contingent gift from that in the May 2007 Will to that in the September 2007 Will without express instructions from his client.

[54] It is well-established that evidence of practice is admissible and, depending upon the circumstances, of considerable weight (*Connor v Blacktown District Hospital* [1971] 1 NSWLR 713 at 721; *BHP Billiton Ltd v Dunning* [2015] NSWCA 55 at [106]-[111]; J D Heydon, *Cross on Evidence* (11th ed, 2017) at [3240]). That the evidence does not identify the individual acts which gave rise to the practice and is general in form does not render it inadmissible (*BHPat* [107]). Whilst, in applying evidence of general practice, a court must consider whether the particular instance before it “may stand apart from the ordinary” (*Amaca Pty Ltd v Ellis* (2010) 240 CLR 111; [2010] HCA 5 at [62] in relation to epidemiological evidence), there is no reason to think that is so in the present case.

[55] In light of Mr Taylor’s extensive experience in dealing with elderly clients, the evidence referred to in [51(5)] above did not deprive Mr Taylor’s evidence of force. His experience and the considerable time he spent alone with the deceased equipped Mr Taylor to form a view about matters which he regarded as his duty to address, namely his client’s ability to appreciate the matters referred to in the *Banks v Goodfellow* test, and therefore her testamentary capacity and instructions to him”.

22 These observations should not be taken as a preference for the evidence of “an experienced solicitor” over the evidence of a medico-legal expert in all cases, but as an expression of the importance attached to the Court’s need to make findings of fact based on evidence presented to the Court in a form that assists the process of finding facts. The Court needs evidence of “facts” from which an inference of (in)capacity might be drawn, not mere expressions of opinion.

23 The importance attached to medical evidence, in general, is perhaps better illustrated by *Photios v Photios* [2019] NSWCA 158 in which Bell P (with whom Gleeson and Leeming JJA agreed) excused delay on the part of a party in the making of an allegation of a want of testamentary capacity because, in the circumstances of the particular case, it was not unreasonable for him to defer the making of an allegation of his father’s lack of testamentary capacity until such time as he had medical support for such an allegation: [60]-[63].

- 24 As observed in *Re Estates Brooker-Pain and Soulos* [2019] NSWSC 671, the proper conduct of proceedings upon an exercise of probate jurisdiction may require that the Court lend its aid to a reasonable investigation of medical records, as well as the records of a solicitor who prepared a will or supervised its execution.
- 25 A practical problem for everybody engaged in the process of a court making a finding about (in)capacity is that, no matter how thorough attempts outside court may have been to make an assessment of (in)capacity, the likelihood is that the full spectrum of facts upon which a court must make a determination of (in)capacity cannot be known until all available evidence is adduced and tested by cross examination. Even then, what brings an end to speculation may be the necessity for court proceedings to end in a final judgment.
- 26 There need be no shame for a diligent solicitor in a court's decision not to accept the solicitor's opinion (express or implied) of a client's capacity notwithstanding the solicitor's best endeavours to assess capacity and to document his or her process of assessment (eg, by a transcript or diary note recording non-leading questions bearing upon criteria governing a determination of capacity in the context of the particular business to be transacted by the client). The reality may be that even the most diligent of practitioners might not be told, or might not be alerted to, all facts later found by a Court to be material.

The Nature of Law Applied

- 27 The legal meaning of "(in)capacity" depends on context; but every use of the word invites the question: "(In)capacity, for what?"
- 28 In legal theory and practice, an assessment of (in)capacity for a legal purpose depends upon the particular purpose for which an assessment is made; the character of the decision-maker authorised, and required, to make an assessment; the purpose served by the jurisdiction conferred on the decision-maker to make an assessment; and the time perspective governing a decision (as a decision contemporaneous with events, prospective or retrospective);

and the nature and availability of evidence bearing upon the decision to be made.

29 In the Australian common law tradition, the starting point for a legal analysis of (in)capacity is, at least implicitly, an assumption that each individual person is autonomous, and lives and dies in a free society, with each individual entitled to have his or her dignity as an individual respected.

30 At a lower level of abstraction, that translates into a presumption (essentially, a working assumption) that “a person of full age is capable of managing his or her affairs” (*Murphy v Doman* (2003) 58 NSWLR 51 at [36]), accompanied by recognition that, despite an attribution of legal incapacity to minors as a class, their capacity to make decisions about their own welfare grows as they mature and needs to be taken into account by those who deal with them (*Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 237-238).

31 In *Gibbons v Wright* (1954) 91 CLR 423 at 437-438, in a joint judgment in which Dixon CJ participated, the High Court summarised essential features of Australian common law relating to a person’s (in)capacity, reproduced here with editorial adaptation:

“The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.... [The] mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained.... [One cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject matter of the particular case].

Ordinarily the nature of the transaction means in this connection the broad operation, the ‘general purport’ of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out....”

32 An assessment of (in)capacity for a legal purpose is individual-specific, fact-sensitive and often transactional (rather than systemic) in focus.

33 This is borne out by an examination of principles which govern an assessment of (in)capacity in exercise of particular branches of the Court's jurisdiction.

**“TESTAMENTARY (IN)CAPACITY” IN PROBATE PROCEEDINGS :
(In)capacity, for what? To make a Will**

34 The utility of medical evidence upon an assessment of testamentary (in)capacity depends upon the principles applied by the Court in making a finding of (in)capacity.

35 In the exercise of its probate jurisdiction the Court looks to the due and proper administration of a particular deceased estate, having regard to any duly expressed testamentary intention of the deceased, and the respective interests of parties beneficially entitled to the estate. The task of the Court is to carry out a deceased person's testamentary intentions, and to see that beneficiaries get what is due to them: *In the Goods of William Loveday* [1900] P 154 at 156; *Bates v Messner* (1967) 67 SR (NSW) 187 at 189 and 191-192.

36 A decision to admit a Will to probate requires the Court to be satisfied that the Will is the last Will of a free and capable testator: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [44]. Whether the Court can be so satisfied is the starting point, guiding light and end point of its assessment of the facts of a case.

37 In contested probate proceedings, when the validity of a Will is in issue, the logic of the Court's paradigm of decision-making allows for disputation to focus on one or more standard grounds for challenging the validity of a Will: (a) Was the Will duly executed?; (b) Did the testator have testamentary capacity to make a Will?; (c) Did the testator know and approve the contents of the Will?; (d) Was execution of the Will procured by fraud?; and (e) Was execution of the Will procured by an exercise of undue influence (meaning coercion)?

38 In working through these questions, the Court traditionally relies upon a standard allocation of onus of proof and what are traditionally described as “presumptions” of fact. The propounder of a will bears the onus of proving

due execution, testamentary capacity and knowledge and approval. A person who alleges fraud or undue influence bears the onus of proving it.

- 39 Probate presumptions might now best be seen, not as some form of rigid rules, but as standardised inferences which arise from common experience that the existence of one fact means that another fact also exists: *Mekhail v Hana* [2019] NSWCA 197 at [163]-[172].
- 40 In *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [43]-[49] and [51]-[53] Meagher JA (with whom Basten and Campbell JJA agreed) provided an extended discussion about how the traditional probate paradigm of decision-making fits together.
- 41 For present purposes, with a focus on testamentary (in)capacity, it is sufficient to extract paragraphs [45]-[48] (with emphasis added):

“[45] **If the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally competent. That presumption may be displaced by circumstances which raise a doubt as to the existence of testamentary capacity.** Those circumstances shift the evidential burden to the party propounding the will to show that the testator was of "sound and disposing mind": *Waring v Waring* (1848) 6 Moo PC 341 at 355; 13 ER 715 at 720; *Sutton v Sadler* (1857) 3 CB NS 87 at 97-98; 140 ER 671 at 675-676; *Smith v Tebbitt* (1867) LR 1 P & D 398 at 436; *Bull v Fulton* [1942] HCA 13; 66 CLR 295 at 343; *Kantor v Vosahlo* [2004] VSCA 235 at [49], [50]. That doubt, unless resolved on a consideration of the evidence as a whole, may be sufficient to preclude the court being affirmatively satisfied as to testamentary capacity: *Bull v Fulton* at 299, 341; *Worth v Clasohm* [1952] HCA 67; 86 CLR 439 at 453.

[46] **Upon proof of testamentary capacity and due execution there is also a presumption of knowledge and approval of the contents of the Will at the time of execution. That presumption may be displaced by any circumstance which creates a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator.** In *Thompson v Bella-Lewis* [1997] 1 Qd R 429 McPherson JA (dissenting in the result) said (at 451) of the circumstances able to raise a suspicion concerning knowledge and approval that, except perhaps where the will is retained by someone who participated in its preparation or execution or who benefits under it, "a circumstance must, to be accounted 'suspicious', be related to the preparation or execution of the will, or its intrinsic terms, and not to events happening after the testator's death". See also *McKinnon v*

Voigt [1998] 3 VR 543 at 562-563; *Robertson v Smith* [1998] 4 VR 165 at 173-174. Once the presumption is displaced, the proponent must prove affirmatively that the testator knew and approved of the contents of the document: *Barry v Butlin* at 484-485; 1091; *Cleare v Cleare* at 658; *Tyrrell v Painton* at 157, 159; *Nock v Austin* at 528.

[47] **Evidence that the testator gave instructions for the will or that it was read over by or to the testator is said to be "the most satisfactory evidence" of actual knowledge of the contents of the will:** *Barry v Butlin* at 484; 1091; *Gregson v Taylor* [1917] P 256 at 261; *Re Fenwick* [1972] VR 646 at 652. **What is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case;** for example in *Wintle v Nye* [1959] 1 WLR 284 the relevant circumstances were described (at 291) as being such as to impose "as heavy a burden as can be imagined". **Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice.** Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it. In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction: *Fulton v Andrew* at 472; *Tyrrell v Painton* at 160. **That requires that it be affirmatively established that the testator knew the contents of the will and appreciated the effect of what he or she was doing so that it can be said that the will contains the real intention and reflects the true will of the testator:** *Tyrrell v Painton* at 157, 160; *Nock v Austin* at 523-524, 528; *Fuller v Strum* [2001] EWCA Civ 1879; [2002] 1 WLR 1097 at [33]; *Dore v Billinghamurst* [2006] QCA 494 at [32], [42].

[48] In this context the statements prescribing "vigilance" and "careful scrutiny" and referring to the court being "affirmatively satisfied" as to testamentary capacity and knowledge and approval are not to be understood as requiring any more than the satisfaction of the conventional civil standard of proof: see *Worth v Clasohm* at 453. What such statements do is emphasise that the cogency of the evidence necessary to discharge that burden will depend on the circumstances of each case and in particular the source and nature of any doubt or suspicion in relation to either of these matters: *Kantor v Vosahlo* at [22], [58]; *Dore v Billinghamurst* at [44]. They also recognise that deciding whether a document is indeed a person's last will is a serious matter, so any decision about whether the civil standard of proof is satisfied should be approached in accordance with *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 or, now, s 140(2) of the *Evidence Act 1995*".

42 It is in this context that one turns to *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 for the classic statement of what the law has traditionally held to be the elements of a finding of "testamentary capacity":

“It is essential to the exercise of [a power to make a will] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made”.

- 43 I acknowledge the opinion of my co-presenter, (Dr) Hayley Bennett of the NSW Bar, that, judged against modern neuroscience, *Banks v Goodfellow* remains relevant today.
- 44 Judges of the NSW Court of Appeal (in particular, Basten and Leeming JJA) have recently doubted the utility of adhering to this language as if it were a legislative text: *Carr v Homersham* (2018) 97 NSWLR 328 at [6] and [133]-[134]; and *Mekhail v Hana* [2019] NSWCA 197 at [1] and [164].
- 45 An antidote to a narrow, mechanistic reading of the “test” for testamentary capacity found in *Banks v Goodfellow* at (1870) LR 5 QB at 565 is to read the classic extract of Sir Alexander Cockburn’s judgment in its broader context, extending at least to the following treatment of the topic at (1870) LR 5 QB 563-566 (with emphasis added):

“The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, **a moral responsibility of no ordinary importance attaches to the exercise of the right thus given.** The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the **objects of their affection.** Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same **motives** will influence him in the exercise of the right of disposal when secured to him by law. **Hence arises a reasonable and well warranted expectation on the part of a man’s kindred surviving him,** that on his death his effects shall become theirs, instead of being given to strangers. **To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these**

considerations. On the contrary, had they stood alone, it is probable that the power of testamentary disposition would have been withheld, and that the distribution of property after the owner's death would have been uniformly regulated by the law itself. But [564] there are other considerations which turn the scale in favour of the testamentary power. **Among those, who, as a man's nearest relatives, would be entitled** to share the fortune he leaves behind him, some may be better provided for than others; some may be more deserving than others; some from age, or sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have **claims that ought not to be disregarded.** In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attentions which are one of its chief consolations. As was truly said by Chancellor Kent, in *Van Alst v Hunter*, 'It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities'. **For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it.** The law of every country has therefore conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion, of that which he possesses. The Roman law, and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of **claims that ought to be attended** to, yet, the **instincts, affections, and common sentiments of mankind** may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

[565] It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of **a power thus involving moral responsibility**, the possession of **the intellectual and moral faculties common to our nature** should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he **ought** to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his **sense of right**, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Here, then, we have the measure of the degree of mental power which should be insisted on. If **the human instincts and affections, or the moral sense**, become perverted by mental disease; if insane suspicion, or aversion, take the place of **natural affection**; if reason and judgment are lost, and the mind

becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances **ought** not to stand. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a **rational and proper** will is the result; **ought** we, in such case, to deny to the testator the capacity to dispose of his property by will?

It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a **rational will** is a better disposition than any that can be made by the law itself. If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with **the capacity to make a rational [566] disposal of property**, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only **legitimate or rational** ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the **considerations which ought to be present** to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, **ought** not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.

It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause - namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below **the ordinary standard**, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is enough if, to use the words of Sir Edward Williams, in his work on Executors, 'the mental faculties retained sufficient strength fully to comprehend the testamentary act about to be done'...".

- 46 In references here to “moral responsibility”, the word “ought” and the like, one sees the genesis of the family provision jurisdiction presently encapsulated in sections 59(1)(c) and (2) of the *Succession Act 2006 NSW*:

“59(1) The Court may [on an application for family provision relief] make a family provision order in relation to the estate of a deceased person, if the Court is satisfied that:

- (a) ...

- (b) ...
- (c) at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made by the will of the deceased person, or by the operation of the intestacy rules in relation to the estate of the deceased person, or both.

(2) The Court may make such an order for provision out of the estate of the deceased person as the Court thinks ought to be made for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made”.

47 For those who seek coherence in the law, this may present itself as an example. On one view, the family provision jurisdiction allows a deceased’s estate to be held to performance of moral obligations which the community expects a testator, by will, to have performed.

48 That the traditional language of probate law and practice needs to be understood in a contemporary setting may be illustrated by two judgments of the Court of Appeal.

49 In *Zorbas v Sidiropoulos (No. 2)* [2009] NSWCA 197 at [64]-[65] Hodgson JA (with whom Young JA and Bergin CJ in Eq. agreed) wrote as follows (with emphasis added):

“[64] As regards the applicable law, I would adopt the exposition of it by Windeyer J in *Kerr v Badran* [2004] NSWSC 735 at [48]-[50]:

[48] Both medical experts were referred to the passage in *Banks v Goodfellow* which since that time has been accepted as the proper test in cases where testamentary capacity is the issue. I set it out once again, because this case requires proper attention to be paid to it. The test is at p 565 of the judgment as follows:

It is essential to the exercise of such a power that a testator shall understand the nature of the act, and its effects; shall understand the extent of 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.

The onus of proof is explained in *Bailey v Bailey* (1924) 34 CLR 558 and *Estate of Hodges, dec'd*; *Shorter v Hodges* (1988) 14 NSWLR 698.

[49] **In dealing with the *Banks v Goodfellow* test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995.** The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years: the average life expectation of males in Australia in 1995 was 75 years. Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. **Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing “the extent” of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate. What is required is the bringing of the principle to bear on existing circumstances in modern life.** The decision of Gleeson CJ in *Estate of Griffith dec'd; Easter v Griffiths* (1995) 217 ALR 284 at 290 must be kept in mind where he said:

The formulation of the onus of proof, well established by authority and not in dispute in the present case, invites caution. The power freely to disclose one's assets by will is an important right, and a determination that the persons lacked (or, has not been shown to have been possessed) a sound disposing mind

memory and understanding is a grave matter. Where a testatrix exhibits florid symptoms of psychotic disturbance, such a conclusion may be reached relatively easily. However where, as in the present case, what is claimed is that a woman who presented to the world an appearance of intelligence and rationality, had formed an aversion to her child so unfounded and unreasoning that it evidences an unsoundness of mind, the decision may be very difficult.

This, of course, was a case of alleged delusion, but the general requirement for care is involved in all contested probate actions. Although he was in dissent, Kirby P in para 8 of his judgment, emphasised the need for caution and stated that medical evidence must be carefully looked at to ensure that it was considered in light of the relevant test and not what the medical expert using medical terminology considered to be the legal position.

[50] Next it is important to bear in mind the decision in *Worth v Clasohm* (1952) 86 CLR 439. This explained that in a case where a doubt as to capacity is raised — thereby as explained in *Shorter*, satisfying the evidentiary onus on the defendant, the onus passing to the propounder to satisfy the court that the will propounded is valid — this does not mean that a doubt is enough; the doubt must be such that the court considers it sufficient to prevent its finding for the will propounded’.

[65] **The criteria in *Banks v Goodfellow* are not matters that are directly medical questions, in the way that a question whether a person is suffering from cancer is a medical question. They are matters for common sense judicial judgment on the basis of the whole of the evidence. Medical evidence as to the medical condition of a deceased may of course be highly relevant, and 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. Indeed, perhaps the most compelling evidence of understanding would be reliable evidence (for example, a tape recording) of a detailed conversation with the deceased at this time of the will displaying understanding of the deceased’s assets, the deceased’s family and the effect of the will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation”.**

50 Young JA (with whom Bergin CJ in Eq. agreed) made the following additional observations at [94]-[95]:

“[94] I should particularly note that I wholeheartedly endorse Hodgson JA’s adoption of the view of Windeyer J in *Kerr v Badran* [2004] NSWSC 735 at [49] **that even though this Court continues to accept the**

general authority of *Banks v Goodfellow* (1870) LR 5 QB 549, 567, insofar as that case asserts that a testator must be seen to have recollected the property he or she has to dispose of, it is not necessary that the testator know precisely the nature and worth of each and every asset in his or her portfolio.

[95] Another matter that I should mention is that I have taken the view in the past that there is a lot to be said for the proposition that **when the court is sitting in rem in probate, lawyers for the parties are obliged to assist the court by putting before the court all the expert material that they have collected, whether favourable or unfavourable, and not merely place before the court those experts who have finally agreed with their client's case.** I do not know whether this view is commonly held, however, I believe that in the current atmosphere of impartial expert evidence before the court, it should be the rule. It may well be that when a judge in probate is considering whether to give leave to call expert evidence, he or she should ask whether all the expert evidence on the point amassed by the party concerned is going to be called, and not give leave to call selected experts unless assured that it is the most eminent expert who is giving evidence, or that there is some other good reason for calling that particular expert".

51 In *Carr v Homersham* (2018) 97 NSWLR 328 at [5]-[6] and [41]-[46] Basten JA (with whom Leeming JA agreed) wrote the following (with emphasis added):

"[5] **Testamentary capacity is not a statutory concept but is derived from the case-law**, from which the primary judge fairly took as his starting point the decision of Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549 at 565. **The concept is sometimes divided into component parts, with affirmative and negative elements. The primary judge accepted that there were three affirmative elements, namely:**

- (a) **the capacity to understand the nature of the act of making a will and its effects;**
- (b) **understanding the extent of the property the subject of the will, and**
- (c) **the capacity to comprehend moral claims of potential beneficiaries.**

[6] **The negative elements, commonly identified in archaic language, do no more than identify the conditions which might be understood to interfere with full testamentary capacity.** They include "disorders of the mind" and "insane delusions". **Too much attention should not be paid to the precise language of the negative elements; importantly, although they tend to be expressed in general terms, they are only relevant to the extent**

that they are shown to interfere with the testator's normal capacity for decision-making.

...

[41] The case-law in relation to the proof of wills is rife with statements as to when and where a burden of proof arises. Statements are commonly expressed in generic terms without attention to the specific issues raised. In other respects, their meaning may be obscure. As Campbell JA aptly noted in *Tobin v Ezekiel* (2012) 83 NSWLR 757, it is frequently important to know "who has the onus of proving some particular matter relevant to that litigation, and in what circumstances there is a shifting of the onus of adducing evidence concerning that matter." He continued, "the onus of adducing evidence concerning one matter relevant to the litigation might be shifted by evidence that is not enough to shift the onus of adducing evidence concerning another matter relevant to the litigation."

[42] In cases involving allegations of incapacity, discussion frequently commences by reference to the reasoning of the High Court in *Worth v Claohm* (1952) 86 CLR 439. That case provides a valuable starting point for present purposes because the facts bore a general resemblance to those in the present case. Further, it is necessary to give some explanation of the facts in order to appreciate the statement as to the burden of proof which appears in the last paragraph of the judgment.

[43] Unlike many cases of that era which involved jury trials, the appeal came from the Supreme Court of South Australia, where the trial had been conducted by a judge alone. The High Court summarised the findings below in the following passage [at 86 CLR 441-442]:

'Due execution of the document as a will was proved, and the contest was confined to the issue of testamentary capacity. The learned judge found that at the date of the will the deceased, who may be called the testatrix, was suffering from senile degeneration and was subject to two delusions. One delusion was that people were stealing her possessions, but his Honour seems to have put this delusion on one side as having had no bearing upon her testamentary dispositions. The other delusion was that her food was being poisoned by certain relatives with whom she was living, and this delusion the learned judge thought was calculated to affect the mind of the testatrix in the matter of her dispositions. His Honour considered that, having regard to the course of a series of dispositions which she made over a period of some months before the date of the will propounded, a suspicion arose that her mind was affected by this delusion; and, feeling unable to say that the plaintiff had satisfied him judicially that the will was that ... of a free and capable testatrix, he dismissed the action.'

[44] In the final paragraph of the judgment, the Court expressed its approach and conclusions in the following terms [at 86 CLR 453]:

'A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon

the plaintiff the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. ... The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution.'

- [45] In *Re Estate of Griffith* (1995) 217 ALR 284, Gleeson CJ commenced his discussion of the relevant legal principles by reference to this passage in *Worth v Clasohm*. He continued [at 217 ALR 290]:

'This formulation of the onus of proof, well established by authority and not in dispute in the present case, invites caution. The power freely to dispose of one's asset by will is an important right, and a determination that a person lacked (or has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter. Where a testatrix exhibits florid symptoms of psychotic disturbance, such a conclusion may be reached relatively easily. However where, as in the present case, what is claimed is that a woman, who presented to the world an appearance of intelligence and rationality, had formed an aversion to her child so unfounded and unreasoning that it evidences an unsoundness of mind, the decision may be very difficult. ... Nevertheless, difficult though its application may be in individual cases, the law treats as critical the distinction between mere antipathy, albeit unreasonable, towards one who has a claim, and a judgment which is affected by a disorder of the mind.'

- [46] **There is a ready temptation to reformulate these propositions in the language of presumptions and shifting burdens, and by reference to burdens of adducing evidence and burdens of proof. However, such complexity is unlikely to be helpful and may distract from a determination of what is in substance a purely factual issue, the resolution of which will turn on the nature of the particular matters raised, and by whom".**

PROTECTIVE PROCEEDINGS : **(In)capacity, for what? Self-Management**

- 52 A determination of testamentary capacity in a *probate* case (otherwise than on an application for a statutory will) is necessarily directed to *past* events, *in the absence of the person* whose capacity is under scrutiny, in relation to one or more *specific transactions*.

- 53 By way of contrast, the focus of *protective* proceedings is upon *present and future* events – an exercise in risk management – relating to *a living person* where the question is often whether that person needs *systemic protection*. The past may be a guide to the present and the future, but is not the primary focus.
- 54 If a problem with medico-legal expert evidence in a contested probate suit is that it tends to include an element of speculation based on imperfect knowledge of past events, a corresponding problem with such evidence in contested protective proceedings is that it shares with everybody the difficulty of predicting the future. It tends, also, to give insufficient attention to identification, and analysis, of the non-medical context in which a person in need of protection is likely to be required to make day-to-day decisions.
- 55 Medical evidence is perhaps most useful in routine protective cases (generally dealt with by a judge in chambers), demonstrating that a respected professional person, trained in a medical science and the humanities, has assessed “(in)capacity” independently of family members or others who might have a vested interest in securing a finding of incapacity for self-management.
- 56 As Lord Eldon noted in *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99; 35 ER 878 (extracted in *W v H* [2014] NSWSC 1696 at [38]-[40]), an exercise of protective jurisdiction generally requires that the Court (treating as paramount the welfare of the person in need of protection) seek the assistance of people who are able to give to the Court information as to the person’s circumstances. A medical professional familiar with such a person may not be well placed to speak of his or her property or the like, but may be very well placed to provide an objective insight into the person’s engagement with everyday life and the availability or otherwise of family or other community support. This is not necessarily “medical” evidence in the strict sense, but it is commonly evidence that a doctor can give.
- 57 Whether a person has capacity for self-management (that is, without the intervention of a “financial management order” or a “guardianship order”, by

whatever name known) not uncommonly depends upon factors beyond any focus on the mental capacity of the person in need of protection, including:

- (a) the person's physical health;
- (b) the nature of his or her property and income entitlements; and
- (c) the availability of reliable support structures within his or her family or broader community.

58 An assessment of (in)capacity for self-management (whether of "the person" or "the estate") has, at least, an historical association with mental illness (in the old language, the "lunacy jurisdiction" of the Supreme Court); but, as the Court of Appeal noticed in *David by her tutor The Protective Commissioner v David* (1993) 30 NSWLR 417, since enactment of the *Protected Estates Act* 1983 NSW (now replaced by the *NSW Trustee and Guardian Act* 2009 NSW, and to be read in conjunction with the *Guardianship Act* 1987 NSW) the focus of the Court's attention has shifted from attribution to a person of "mental illness" to a person's functionality for self-management.

59 In *David by her tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 436E-437C made the following observations (with emphasis added):

"The *Protected Estates Act* 1983 when it was introduced was novel in New South Wales in that it enabled the estate of a person incapable of managing his or her affairs to be made subject to management under the Act regardless of whether that person was mentally ill or suffered from mental infirmity, arising from disease or age; compare sections 38, 39 and 52 of the *Mental Health Act* 1958. In the language of the then Minister for Health:

'The purpose of the *Protected Estates Bill* is to reform and modernise the procedures and powers relating to protective management. Clause 13 will allow the Supreme Court to order that a person's estate be subject to management where it is satisfied that the person is incapable of managing his or her affairs. **This new section will not limit the making of management orders to situations of mental infirmity due to disease or age**, [as] was the case under the old section 39 of the *Mental Health Act* 1958. That provision caused the Supreme Court great difficulties in certain cases such as where a person had been badly injured in a motor vehicle accident, or where a person was the victim of a stroke. The new clause 13 simply refers to

a situation where a person is incapable of managing his or her affairs. It should not be thought that this provision is excessively wide. It is being enacted in the context of the traditional protective jurisdiction of the Supreme Court and is subject to judicial interpretation in terms of this traditional jurisdiction. It is not intended to cover, and will not cover, the merely eccentric or those who have trouble balancing their accounts each month. It only applies to those who are incapable in a narrow sense.'

The need for the reform remarked upon by the minister is illustrated by the reasoning of the judge in the Protective Division, Powell J, in *GPG v ACF* [1983] 1 NSWLR 54 and *GNM v ER* [1983] 1 NSWLR 144. In these cases his Honour indicated that a person suffering mental retardation (in the sense of a state of arrested or incomplete development of mind or of subnormal intelligence) was not mentally ill and might not be suffering from mental infirmity arising from disease or age and that a person who had suffered a stroke as a result of which she was incapable of managing her affairs might not be suffering a disability constituting mental infirmity. **I have no doubt that, supported by judicial experience, the legislature perceived a need to liberate the Court's power to protect the estates of persons incapable of managing their affairs from complicated questions of aetiology...."**

60 The purposive character of the Court's protective jurisdiction, and how it operates in practice, can be discerned in the following extract from *CJ v AKJ* [2015] NSWSC 498 at [27]-[43] (with emphasis added):

"[27] In the absence of an express legislative definition, the expression '(in)capable of managing his or her affairs' should be accorded its ordinary meaning, able to be understood by the broad community (lay and professional) it serves, remembering that:

- (a) the concept of incapacity for self-management is an integral part of the protective jurisdiction which, historically, arose from an obligation of the Crown (now more readily described as the State) to protect each person unable to take care of him or her self: *Marion's Case* (1992) 175 CLR 218 at 258, citing *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243.
- (b) **of central significance is the functionality of management capacity of the person said to be incapable of managing his or her affairs, not: (i) his or her status as a person who may, or may not, lack "mental capacity" or be "mentally ill"; or (ii) particular reasons for an incapacity for self-management: *PB v BB* [2013] NSWSC 1223 at [5]-[9] and [50].**
- (c) the focus for attention, upon an exercise by the Court of its protective jurisdiction (whether inherent or statutory), is upon protection of a particular person, not the benefit, detriment or convenience of the State or others: *Re Eve* [1986] 2 SCR 388 at 409-411, 414, 425-428, 429-430, 431-432 and 434; (1986) 31 DLR (4th) 1 at 16-17, 19, 28-30, 31, 32 and 34; *JPT v DST* [2014] NSWSC 1735 at [49]; *Re RB, a protected estate family settlement* [2015] NSWSC 70 at [54].

- (d) the “affairs” the subject of an enquiry about “management” are the affairs of the person whose need for protection is under scrutiny, not some hypothetical construct: *Re R* [2014] NSWSC 1810 at [94]; *PB v BB* [2013] NSWSC 1223 at [6].
- (e) an inquiry into whether a person is or is not capable of managing his or her affairs focuses not merely upon the day of decision, but also the reasonably foreseeable future: *McD v McD* [1983] 3 NSWLR 81 at 86C-D; *EB & Ors v Guardianship Tribunal & Ors* [2011] NSWSC 767 at [136].
- (f) the operative effect given to the concept of capacity for self-management, upon an exercise of protective jurisdiction by the Court (whether inherent or statutory), is informed, *inter alia*, by a hierarchy of principles, proceeding from a high to a lower level of abstraction; namely:
 - (i) an exercise of protective jurisdiction is governed by the purpose served by the jurisdiction (protection of those not able to take care of themselves): *Marion’s Case* (1992) 175 CLR 218 at 258.
 - (ii) upon an exercise of protective jurisdiction, the welfare and interests of the person in need of protection are the (or, at least, a) paramount consideration (the “welfare principle”): *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238B-C and 241A-B and F-G; *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 at [146]-[147].
 - (iii) the jurisdiction is parental and protective. It exists for the benefit of the person in need of protection, but it takes a large and liberal view of what that benefit is, and will do on behalf of a protected person not only what may directly benefit him or her, but what, if he or she were able to manage his or her own affairs, he or she would, as a right minded and honourable person, desire to do: H.S. Theobald, *The Law Relating to Lunacy* (London, 1924), pages 362-363, 380 and 462; *Protective Commissioner v D* (2004) 60 NSWLR 513 at 522 [55] and 540 [150].
 - (iv) whatever is to be done, or not done, upon an exercise of protective jurisdiction is generally measured against what is in the interests, and for the benefit, of the person in need of protection: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238D-F and 241G-242A; *GAU v GAV* [2014] QCA 308 at [48].

[28] The Court’s inherent jurisdiction has never been limited by definition. Its limits (and scope) have not, and cannot, be defined: *Marion’s Case* (1992) 175 CLR 218 at 258, citing *Re Eve* [1986] 2 SCR 388 at 410; (1986) 31 DLR (4th) 1 at

16; *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243; and *Wellesley v Wellesley* (1828) 2 Bli. NS 124 at 142; 4 ER 1078 at 1085.

- [29] The jurisdiction, although theoretically unlimited, must be exercised in accordance with its informing principles, governed by the purpose served by it.
- [30] Although the concept of “a person... incapable of managing his or her affairs” is foundational to the Court’s protective jurisdiction in all its manifestations (inherent and statutory), the purposive character of the jurisdiction is liable, ultimately, to confront, and prevail over, any attempt at an exhaustive elaboration of the concept in practice decisions.
- [31] From time to time one reads in judgments different formulations of the, or a, “test” of what it is to be “a person (in)capable of managing his or her affairs”. Convenience and utility may attach to such “tests”, but only if everybody remembers that they provide no substitute for a direct engagement with the question whether the particular person under scrutiny is, or is not, “(in)capable of managing his or her affairs”, informed by “the protective purpose of the jurisdiction” being exercised, and the “welfare principle” derived from that purpose.
- [32] The general law does not prescribe a fixed standard of “capacity” required for the transaction of business. The level of capacity required of a person is relative to the particular business to be transacted by him or her, and the purpose of the law served by an inquiry into the person’s capacity: *Gibbons v Wright* (1954) 91 CLR 423 at 434-438.
- [33] The same is true of “capacity” for self-management, upon an exercise of protective jurisdiction, governed by the protective purpose of the jurisdiction, viewed in the context of particular facts relating to a particular person in, or perceived to be in, need of protection.
- [34] Once this is accepted, there is scope for appreciation of different insights available into the meaning, and proper application, of the concept that a person is “(in)capable of managing his or her affairs”.
- [35] Four different formulations of the concept may serve as an illustration of this.
- [36] First: Without any gloss associated with “the ordinary affairs of man” Powell J’s formulation, in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E, of what it is to be “a person incapable of managing his or her affairs” might usefully be recast as follows:

“... a person is not shown to be incapable of managing his or her own affairs unless, at least, it appears:

- (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with [his or her affairs]; and

- (b) that, by reason of that lack of competence there is shown to be a real risk that either:
 - (i) he or she may be disadvantaged in the conduct of such affairs; or
 - (ii) that such moneys or property which he or she may possess may be dissipated or lost (see *Re an alleged incapable person* (1959) 76 WN (NSW) 477); it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner: See *In the Matter of Case* (1915) 214 NY 199, at page 203, per Cardozo J... [emphasis supplied]".

[37] Secondly: An alternative formulation, found in *EB and Ors v Guardianship Tribunal and Ors* [2011] NSWSC 767 at [134] per Hallen AsJ, is to the effect that a person can be characterised as “incapable of managing his or her affairs” if his or her financial affairs are of such a nature that action is required to be taken, or a decision is required to be made, which action or decision the person is unable to undertake personally, and which will not otherwise be able to be made unless another person is given the authority to take the action or make the decision.

[38] Thirdly: An approach which commends itself to me, in this case, is to record that, in considering whether a person is or is not capable of managing his or her affairs:

- (a) a focus for attention is whether the person is able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation; and
- (b) in considering whether a person is “able” in this sense, attention may be given to: (i) past and present experience as a predictor of the future course of events; (ii) support systems available to the person; and (iii) the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests.

[39] Fourthly: Drawing upon the legislation that governs the Guardianship Division of NCAT in determining whether or not to make a financial management order (*Guardianship Act*, Part 3A, particularly sections 25E and 25G, read with sections 3(2) and (4)), it might be said that, in

common experience, whether a person is or is not “capable of managing his or her own affairs” might be determined by reference to the following questions:

- (a) whether the person is “disabled” within the meaning of sections 3(2) (a)-(d). That is, whether the person is: intellectually, physically, psychologically or sensorily disabled; of advanced age; a mentally ill person; or otherwise disabled;
- (b) whether, by virtue of such a disability, the person is (within the meaning of section 3(2)) “restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation”; and
- (c) whether, despite any need he or she has for “supervision or social habilitation” (section 3(2)):
 - (i) he or she is reasonably able to determine what is in his or her best interests, and to protect his or her own welfare and interests, in a normal, self-reliant way without the intervention of a protected estate manager (sections 4 (a)-(c), 4(f), 25G (b) and 25G (c)).
 - (ii) he or she is in need of protection from neglect, abuse or exploitation (sections 4(a), 4(g), 25G(b) and 25G(c)).

[40] **The utility of each of these formulations depends on whether (and, if so, to what extent) it is, in the particular case, revealing of reasoning justifying a finding that a person is or is not (as the case may be) capable of managing his or her affairs, having regard to the protective purpose of the jurisdiction being exercised and the welfare principle.**

[41] In each case care needs to be taken not to allow generalised statements of the law or fact-sensitive illustrations to be substituted for the text of any legislation governing the particular decision to be made and, in its particular legislative context, the foundational concept of capacity for self-management.

[42] Whatever form of words may be used in elaboration of that concept, it needs to be understood as subordinate to, and of utility only insofar as it serves, the purpose for which the protective jurisdiction exists.

[43] Likewise, ultimately, whatever is done or not done on an exercise of protective jurisdiction must be measured against whether it is in the interests, and for the benefit, of the particular person in need of protection: *GAU v GAV* [2014] QCA 308 at [48]. That touchstone flows from the core concern of the Court’s inherent jurisdiction with the welfare of the individual, and it finds particular expression in the *NSW Trustee and Guardian Act*, section 39(a)”.

61 Medical evidence remains important in many cases upon an exercise of protective jurisdiction, but an exercise of the jurisdiction is generally not tied to technical concerns of modern medicine.

**CIVIL LITIGATION (Enforcement of rights):
(In)capacity, for what? Transaction of business**

62 Under the general law, a person lacks the mental capacity to enter into a binding transaction if they are not capable of understanding the general nature of what they are doing or they do not have the capacity to understand the transaction when it is explained to them: *Gibbons v Wright* (1954) 91 CLR 423 at 438; *Hanna v Raoul* [2018] NSWCA 201.

63 Doubts about whether a person lacked the mental capacity to enter into a contract may arise not directly but submerged in broader disputation about whether:

- (a) the contract was void, on an allegation of *non est factum* (*Petelin v Cullen* (1975) 132 CLR 355); or
- (b) the contract is liable to be set aside in equity, as an unconscionable dealing properly characterised as a “catching bargain” (*Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia Limited v Armadio* (1983) 151 CLR 447) or as a transaction secured by an exercise of undue influence (*Johnson v Buttress* (1936) 56 CLR 113; *Quek v Beggs* (1990) BPR [97405]; *A v N* (2012) NSWSC 354); or
- (c) whether (as in *Hanna v Raoul* [2018] NSWCA 201) the contract was an “unjust contract” within the meaning of the *Contracts Review Act* 1980 NSW, or otherwise liable to be the subject of a grant of relief under other legislation.

64 A contract purportedly made by a “protected person” within the meaning of the *NSW Trustee and Guardian Act* 2009 NSW (that is, a person in respect of

whom a “financial management order” has been made by the Court or NCAT) may be void or voidable by reason of the fact that, by operation of section 71 of the Act, a protected person’s power to deal with his or her estate is suspended in respect of so much of the estate as is subject to management under the Act. See *David by her Tutor the Protective Commissioner v David* (1993) 30 NSWLR 417.

- 65 The capacity to make a voluntary settlement *inter vivos* (that is, a gift) has been held to require the same capacity as is required to make a valid will, rather than the capacity required for a transaction for consideration: *Crago v McIntyre* [1976] 1 NSWLR 729.
- 66 Nevertheless, although testamentary capacity and contractual capacity may, in a particular case, involve similar concerns, they may not always be equivalent concepts: *Photios v Photios* [2019] NSWCA 158 at [60].

**CIVIL LITIGATION (Need for a Tutor):
(In)capacity, for what? To manage proceedings**

- 67 The jurisdiction of the Court to require the appointment of a tutor, or to appoint a tutor, for the conduct of particular proceedings – whether under rules of court (by reference to the definition of “person under legal incapacity” in section 3(1) of the *Civil Procedure Act* 2005 NSW and Division 4, rules 7.13-7.18, of Part 7 of the *Uniform Civil Procedure Rules* 2005) or upon an exercise of inherent jurisdiction (*Bobolas v Waverley Council* [2012] NSWCA 126 at [60]-[62]) – is an exercise of protective jurisdiction (*Bowering v Knox* [2014] NSWSC 1107 at [58]-[62]) directed towards protection of a person incapable of managing the particular proceedings without the intervention of a “case guardian”, as the office of a tutor is sometimes called.
- 68 A decision about the need for, or appointment of, a tutor must necessarily be made in the context of particular proceedings and an assessment of what is required in management of those proceedings (*Rappard v Williams* [2013] NSWSC 1279 at [62]-[83]). Such a decision, in that context, may be complicated by a need in the court: (a) to find a tutor willing and able to act,

ordinarily (absent a protective costs order) subject to exposure to a potential liability under costs orders made by the Court (*Smith v NRMA Insurance Ltd* [2016] NSWCA 250); (b) to make decisions about a tutor with due regard to such, if any, interest in those decisions as may be had by parties other than the party in need of protection; and (c) to make decisions in the context of management of the proceedings generally.

- 69 Sometimes decisions of this nature are complicated by the possibility that the person in need of protection might be thought, because of his or her disabilities, to be an undeclared “vexatious litigant”. Nobody (whether trained in law or medicine) quite knows how to deal with such a person.
- 70 In a paper entitled “Acting for the Incapable – A delicate balance” (2012) 35 *Australian Bar Review*, 244, Brereton J offers practical guidance to lawyers having to deal with a client on the edge of incapacity and possibly in need of a tutor or protected estate manager.
- 71 Where a party is self-represented, the level of mental capacity required for him or her to be found “capable” of managing his or her affairs (within the meaning of rule 7.13 of the *Uniform Civil Procedure Rules 2005* NSW) for the purpose of the conduct of proceedings may be greater than that required to instruct a lawyer because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation: *Murphy v Doman* (2003) 58 NSWLR 51 at 58.
- 72 In *Murphy v Doman* the Court of Appeal, responding to the facts of the particular case, viewed the concept of (in)capacity from the perspective of law (civil and criminal) relating to insanity, drawing upon *Gibbons v Wright* (1954) 91 CLR 423 at 437-438 and *McNaghten’s Case* (1843) 10 Cl & F 200 at 210; 8 ER 718 at 722.
- 73 Drawing upon the text of Division 4 of Part 7 of the UCPR, the Court of Appeal in *Mao v AMP Superannuation Limited* [2015] NSWCA 252 implicitly articulated the concept of (in)capacity for self-management in terms of the

necessity for the conduct of proceedings that each party be, or be represented by, a person “able to make reasoned and sensible forensic decisions”. This may be seen in paragraph [48] of the Court’s joint judgment:

“Division 4 of Part 7 of the UCPR proceeds on the basis that, if, as a matter of fact, a person is under legal incapacity, that person may not commence or carry on proceedings except by a tutor. There is considerable justification for such a scheme. A person under legal incapacity should not be permitted to commence or carry on proceedings to the detriment of that person unless represented by another person who is able to make reasoned and sensible forensic decisions on behalf of the first person in relation to the proceedings.”

74 In a succession of cases (*Farr v State of Queensland* [2009] NSWSC 906 at [15]; *Murray v Williams* [2010] NSWSC 1243 at [26]; *Stokes v McCourt*[2014] NSWSC 61 at [31]; *Bowering v Knox* [2014] NSWSC 1107 at [14] and [38]; and *Walton v Hartman* [2017] NSWSC 1432 at [33]), Divisional judges of the Court have found assistance in the following observations of the English Court of Appeal, referable to English rules of court, in *Masterman-Lister v Brutton & Co. (Nos 1 and 2)* [2003] 1 WLR 1511; [2003] 3 All ER 162 at [75]:

“For the purposes of [the English rule] the test to be applied... is whether the party to legal proceedings [in respect of whom appointment of a tutor is under consideration] is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his [or her] consent or decision is likely to be necessary in the course of those proceedings. If he [or she] has capacity to understand that which he [or she] needs to understand in order to pursue or defend the claim, [there is no reason] why the law – whether substantive or procedural should require the imposition of a [tutor]”.

75 That this “test” is not of assistance in all cases is demonstrated by its assumption that the person perceived to be in need of protection has, and manifestly can maintain, an ongoing relationship with legal advisers and other experts. That assumption is not made out in some cases, where the person in need of protection is a litigant in person, unable to maintain a stable, ongoing relationship with solicitors, if not other professionals as well.

76 On a broader reading of *Masterman-Lister*, it contains observations about legal incapacity that are consistent with *Gibbons v Wright*: [2003] 1 WLR 1511 at [18]-[20], [22]-[27], [29], [54], [58]-[60] and [62].

- 77 Nevertheless, in this area of law, as in others in which the equity tradition has played a significant role, caution is required in adaptation of modern English case law to Australian conditions. For some years following 1 November 1960, the protective jurisdiction of the English High Court which, here, would be described as “inherent” or *parens patriae* jurisdiction over persons incapable of managing their affairs (as distinct from minors) was displaced by a combination of legislation and local English practice, until it was (as subsequent English cases have described it) “rediscovered” by the House of Lords in *In re F (mental patient: sterilisation)* [1990] 2 AC 1; *Masterman-Lister v Brutton & Co (Nos. 1 and 2)* [2003] 1 WLR 1511 at [70]; *In re L (vulnerable adults with capacity: Court’s Jurisdiction) (No. 2)* [2012] EWCA Civ 253; [2012] 3 WLR 1439 at [55], approving *In re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (Fam); [2006] 1 FLR 867. In NSW law and practice, the inherent jurisdiction has never been similarly displaced, and it continues to inform our legislative regime and rules of court.
- 78 Confirmation that there is no universal “test” for assessment of whether a person is “(in)capable of managing his or her own affairs” might be drawn from those limbs of the definition of “person under legal incapacity” in CPA section 3(1) that feed into Division 4 of Part 7 of the UCPR without reference to the concept of a “protected person”, based upon the currency of a protected estate management order. The categories of person who need to be accommodated because of that statutory definition include minors, forensic patients and “a person under guardianship” within the meaning of the *Guardianship Act*.
- 79 The primary meaning of the expression “person under legal incapacity”, within the CPA section 3(1) definition, is, essentially, “any person who is under a legal incapacity in relation to the conduct of legal proceedings”. Given the diversity of cases that need to be accommodated by reference to “incapacity” concepts, the fact-specific and purposive character of concepts of “capacity”, the observation in *Gibbons v Wright* (1954) 91 CLR 423 at 437 that “the law does not prescribe any fixed standard of [capacity] as requisite for the validity of all transactions” comes to mind.

80 In each case, a decision-maker needs both: (a) to consult the welfare and interests of the particular person in need of protection as the paramount consideration, and (b) to test everything done, or not done, by measuring it against what is in the interests, and for the benefit, of that person (*Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238 D-F and 241G-242A; *GAU v GAV* [2014] QCA 308 at [48]). Considerations of practical utility are never far from the surface.

81 As noted in *Re WS* [2017] NSWSC 745 at [31], drawing upon *Slaveski v Victoria* (2009) 25 VR 160 at 184-185 [32], the following questions might be relevant to a determination whether a self-represented plaintiff has the requisite capacity to conduct his or her legal proceedings:

- (a) Does the plaintiff understand the factual framework for his or her claims and the type of evidence required to succeed in his or her claims?
- (b) Is the plaintiff capable of understanding what is relevant to the proceedings or what is not relevant when those matters are explained to him or her?
- (c) Is plaintiff capable of assessing the impact of particular evidence on his or her case?
- (d) Is the plaintiff able to understand the court processes and the basic rules for conducting his or her case when those matters are explained to him or her?
- (e) Is the plaintiff able to understand court rulings made during the trial when they are explained to him or her?
- (f) Assuming the plaintiff is able to understand court processes, the basic rules of conducting his or her case and court rulings, is he

or she capable of complying with them and directions given by the judge?

- (g) Does the plaintiff understand the roles of counsel for the defendant, witnesses and the judge and is he or she capable of respecting those roles and allowing the relevant individuals to discharge their duties without inappropriate interference or abuse?
- (h) Is the plaintiff able to control his or her emotions and behave in a non-abusive and non-threatening manner when events do not go his or her way during the trial (such as when adverse rulings are made by the judge, questions are asked in cross-examination on sensitive issues or unfavourable answers are given by witnesses)?
- (i) Does the plaintiff have an insight into the possible adverse consequences of his or her behaviour in court, including delay in the resolution of claims, the defendant incurring additional costs that the plaintiff might have to pay if claims are unsuccessful and the tying up of scarce judicial resources when such matters are explained to him or her?
- (j) Does the plaintiff understand that he or she could possibly lose the case in whole or in part when that possibility is explained to him or her?
- (k) If the cumulative effect of the evidence is such that a lay person of reasonable intelligence and common sense would form the view that a particular claim will fail, would the plaintiff be capable of forming such a view?
- (l) Is the plaintiff capable of assessing any settlement proposal on its merits, having regard to the state of the evidence, the parties'

submissions and other developments in the proceedings as at the time such a proposal is made?

- (m) If a trial of the proceedings is long and complex, is there a risk that the stress and pressure of the litigation might harm the plaintiff's physical or mental health?

CONCLUSION

82 In practical terms, in most cases in which a question of (in)capacity is to be litigated, access to medical evidence (if only contemporaneous clinical records) is indispensable to proper preparation of each parties' case.

83 Equally, case preparation requires an appreciation of the utility, and limits, of medical evidence – judged against the legal standard to be applied and all the available evidence bearing upon a full spectrum of facts material to an application of that standard.

GCL

13/9/2019