

# Legal capacity then and now: The potential repercussions of neuroscientific studies

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I am but mad north-north-west: when the wind is southerly I know a hawk from a handsaw.<sup>2</sup>

Where in the DSM V spectrum would Hamlet fit? And how would his legal capacity be tested if the occasion were to arise (say, in a testamentary context, in relation to a particular transaction or when considering his ability to instruct legal representatives in the conduct of litigation?).

## Introduction

In 2011, Professor Maxwell Bennett published a paper discussing the repercussions of a number of scientific studies for the criminal law insanity defence.<sup>3</sup> One can envisage other instances where cognitive disability may have relevance in the criminal context (such as in the sentencing context). What I propose to discuss is the potential relevance of those studies in the context of civil law; in particular how, if at all, they may impact on the tests of legal capacity in particular contexts.

I will then turn to the call for supported decision-making, which is increasingly put forward by law reform bodies and disability advocates as a 21<sup>st</sup> century solution to some of the issues raised by Professor Bennett's exploration of studies relating to cognitive ability.

## Legal capacity then and now

Not surprisingly, given the strides in scientific progress (and particularly the developments in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries in neuroscience), the context in which the common law concepts of legal capacity were developed is very

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<sup>1</sup> Judge of Appeal, Supreme Court of New South Wales. I wish to acknowledge the diligent research and invaluable assistance provided by Ms Jessica Natoli, the Court of Appeal researcher, in the preparation of this paper and the incisive observations of my tipstaff, Ms Kate Ottrey.

<sup>2</sup> William Shakespeare, *Hamlet*, Act 2, Scene 2, Lines 378-379.

<sup>3</sup> Maxwell Bennett, 'Criminal law as it pertains to patients suffering from psychiatric diseases' (2011) 8 *Bioethical Inquiry* 45.

different, from a social and scientific perspective, from that of contemporary Australia.

By way of example, the well known test for determining testamentary capacity was laid down in 1870 in *Banks v Goodfellow*:

It is essential to the exercise of such a [testamentary] power that a testator shall understand the nature of the act, and its effects; shall understand the extent of the property of which he disposes; 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 which, if the mind had been sound, would not have been made.<sup>4</sup>

That must be seen in the context of the understanding at that time of cognitive disability. Pope's *Law and Practice of Lunacy*, published in 1890, provides an in-depth explanation of the then current paradigm of mental disability, which conceived all forms of mental impairment as falling within one of two rigidly defined categories – dementia and mania. Congenital dementia was explained as follows:

Congenital dementia consists either of an absolute want of reason, attended by a defective structure of the brain, and marked by entire absence of facial expression, of speech and of memory, when it is called idiocy; or in a partial want of reason, which need not have any corresponding physical defect or peculiarity, but prevents the patient from attaining any considerable amount of knowledge or intelligence, when it is called imbecility.<sup>5</sup>

Non-congenital dementia, (or mental impairment caused by aging), was also divided into two sub-categories, known as 'fatuity' and 'partial dementia'.<sup>6</sup> Modern neuroscience, on the other hand, recognises a far wider range of conditions that can affect cognitive functioning.

By 1954, when the test of transactional capacity was made clear by the High Court in *Gibbons v Wright*,<sup>7</sup> classification of cognitive impairment was still largely based on performance against criteria established for measuring one's intelligence. In the early twentieth century, the Intelligence Quotient (IQ) became highly influential as a means of categorising people with cognitive impairment. As Milton Lewis notes,

There was a tendency to overlook the fact that the IQ was not a good indicator of the whole personality or of the person's social capacity...Individual differences and social needs lost significance in the face of a deep faith in the science of intelligence testing.<sup>8</sup>

The emphasis on measurement of intelligence may go some way to explaining why the test of transactional capacity, laid down in *Gibbons v Wright*, focuses exclusively

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<sup>4</sup> (1870) 5 QB 549, 565 per Cockburn CJ.

<sup>5</sup> H. M. R Pope, *A Treatise on the Law and Practice of Lunacy* (Sweet and Maxwell Ltd, 2<sup>nd</sup> ed, 1890) 8.

<sup>6</sup> *Ibid* 7 – 8.

<sup>7</sup> (1954) 91 CLR 423.

<sup>8</sup> Milton Lewis, *Managing Madness: Psychiatry and Society in Australia 1788 – 1980* (Australian Government Publishing Service 1988) 144.

on the relevant party's ability to understand the legal effect of the particular transaction. As the Hon Michael Kirby AO, writing extra judicially, has pointed out,

The law, as one of the institutions of society, tends to speak to each generation in the language and of the values of previous generations.<sup>9</sup>

The test of transactional capacity is whether the party had such soundness of mind as to be able to understand the nature of the particular transaction when it was explained to them;<sup>10</sup> the starting point in inquiries of this kind being the common law presumption of sanity.<sup>11</sup> This approach was affirmed more recently in *Szozda v Szozda*,<sup>12</sup> by Barrett J, as his Honour then was, when considering an application for a declaration that a general and enduring power of attorney was void for lack of capacity.

By 1976, Michael Sorgen argued that such thinking was only just starting to be challenged. Calling for a more nuanced approach, he stated:

Two widely held erroneous notions are being, and must be, dispelled. The first is that the term 'mentally retarded' refers to a homogenous group. The second is the popular image that almost all mentally retarded persons are near the low end of the intelligence scale...<sup>13</sup>

How then does the more modern nuanced understanding of cognitive ability or disability have the potential to challenge the way we think about legal capacity?

Professor Bennett explores a series of studies demonstrating that people with abnormalities in their orbitofrontal cortex have impaired decision-making ability. More specifically, abnormalities in this area of the brain cause increased impulsiveness, and may also cause 'delay aversion', which is behaviour associated with a difficulty in turning down an immediate reward for the sake of achieving a greater long-term outcome.<sup>14</sup> The orbitofrontal cortex is associated with addiction, and changes in this area of the brain can be caused by the use of addictive drugs such as cocaine and methamphetamine.<sup>15</sup> Patients with lesions in the orbitofrontal cortex, caused by disease or injury, may also display impulsive behaviour, and people with borderline personality disorder, who have been shown to have decreased activity in this region of the brain, tend to exhibit impulsiveness as a 'major characteristic' of their condition.<sup>16</sup> Bennett states:

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<sup>9</sup> The Honourable Justice M D Kirby, 'Forward', in Susan C Hayes and Robert Hayes, *Mental Retardation: Law, Policy and Administration* (The Law Book Company Limited 1982) vii.

<sup>10</sup> *Gibbons v Wright* (1954) 91 CLR 423, 438.

<sup>11</sup> *Attorney General v Parnter* (1792) 29 ER 632; *Murphy v Doman* [2003] NSWCA 249, [36]; both quoted in *Szozda v Szozda* [2010] NSWSC 804, [20]-[21].

<sup>12</sup> [2010] NSWSC 804.

<sup>13</sup> Michael S Sorgen, 'The Classification Process and Its Consequences' in Michael Kindred et al (eds) *The Mentally Retarded Citizen and the Law* (Collier Macmillan Publishers 1976) 215 – 216.

<sup>14</sup> *Ibid* 50.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid*.

Neurodegeneration in the OFC that leads to loss of synaptic connections in this brain structure, gives rise to actions made without prior thought – and so poorly planned, premature, inappropriate for the context and therefore often with adverse consequences.<sup>17</sup>

Where, if at all, does cognitive disability of this kind fall in the traditional tests for incapacity?

### *Transactional capacity*

Decision-making impairments of the kind Bennett describes at first blush seem unlikely to fall within the ambit of incapacity of this kind.

The test for transactional capacity articulated in *Gibbons v Wright*, requires an assessment of the relevant party's ability to understand the *nature* of the transaction in issue – so, for example, the ability to understand 'the general purport of the instrument,<sup>18</sup> or in other words, its legal effect.

There, the capacity of two sisters to execute a mortgage and a memorandum of transfer which had the indirect effect of severing their joint tenancy was challenged. It was held that it was not sufficient for the sisters merely to have had the capacity to understand the direct legal effect of the respective instruments. Rather, it was necessary:

that the two sisters should have been capable of understanding, if the matter had been explained to them, that by executing the mortgages and the memorandum of transfer they would be altering the character of their interests in the properties concerned, so that instead of the last survivor of the three joint tenants becoming entitled to the whole, each of them would be entitled to a one-third share which would pass to her estate if she still owned it at her death.<sup>19</sup>

They did not possess the requisite capacity.

Diminished capacity to evaluate whether or not the transaction is prudent, by weighing its risks and potential long-term repercussions, or to resist otherwise impulsive judgment calls would not, under the test in *Gibbons v Wright*, preclude the party entering into the transaction being capable of understanding, at the relevant time, the nature of the transaction (say, for example, that entry into a mortgage would mean that his or her property was charged as security for the repayment of his or her debt or, perhaps, the consequences for a guarantor of default by a debtor for whom a guarantee was being provided on security of the guarantor's property).

In *Szozda*, the donor of a power of attorney had substantial assets that were managed through family companies, which held the assets as trustees of discretionary trusts. His Honour held that it was necessary for the plaintiff (challenging the donor's capacity) to prove that the donor did not have the capacity

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<sup>17</sup> Ibid 55 – 56.

<sup>18</sup> *Gibbons v Wright* (1954) 91 CLR 423, 438.

<sup>19</sup> Ibid.

to understand the nature and extent of those assets and the kinds of things the attorney could do in relation to them. His Honour also drew attention to the principle in *Crago v McIntyre*,<sup>20</sup> that where a power of attorney is granted in order to facilitate a particular transaction, the donor must not only have had the capacity to understand the nature of the power of attorney itself, but also the nature of the transaction it was intended to facilitate.<sup>21</sup>

In *Szozda*, while the donor's solicitors had explained to her in broad terms the nature of a general and enduring power of attorney, they had not discussed with her the acts that the attorney would be empowered to perform with respect to herself and the family companies and trusts. Nor did they ask her questions about her property and affairs, the answers to which may have allowed them to clarify the effect of the power of attorney, to ensure the donor's informed understanding.<sup>22</sup> Based on his assessment of the medical evidence his Honour concluded that, due to the donor's dementia, even if such a discussion had taken place she would not have had the capacity to understand it.<sup>23</sup>

A person whose ability to consider the long term consequences of his or her actions is compromised, due to an abnormality in the relevant area of the brain, may nevertheless be perfectly capable of understanding the concept of a mortgage and the nature of a mortgage transaction. If so, the test for incapacity would not be established even though neuropsychological evidence is relevant in other contexts (such as applications for guardianship or financial management orders) to demonstrate that a person's ability to assess the repercussions of their actions, or plan for the future, has been diminished.

### *Testamentary capacity*

The test for testamentary capacity focuses on the testator's ability, among other things, to engage in a considered reasoning process with respect to his or her testamentary dispositions. Where a concern is raised that the testator suffered from a delusion of mind that affected his or her testamentary capacity, difficult issues may arise. As Williams J pointed out in *Bull v Fulton*,

The mere existence of a delusion does not deprive a testatrix of testamentary capacity.<sup>24</sup>

The relevant question is whether there was a material delusion that affected the testator's testamentary dispositions.<sup>25</sup> Where a delusion was present which did not influence testamentary disposition, testamentary incapacity will not be established.

If even a deluded testator may have testamentary capacity, why should a testator unable to control his or her impulses be in any different position? The answer lies in

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<sup>20</sup> [1976] 1 NSWLR 729.

<sup>21</sup> *Szozda v Szozda* [2010] NSWSC 804, [31].

<sup>22</sup> *Ibid* [119].

<sup>23</sup> *Ibid* [120].

<sup>24</sup> *Bull v Fulton* (1942) 66 CLR 295, 342.

<sup>25</sup> *Timbury v Coffee* (1941) 66 CLR 277, 285.

the fact that the focus of the test of testamentary capacity is wider than the testator's ability, or lack thereof, to understand the act of making a will. Therefore, it is possible that cognitive disability of the kind considered by Professor Bennett may be able to be taken into account.

Where the line would be drawn, at a point earlier than dementia or some other disorder affecting the full range of cognitive functions is perhaps not clear. Nevertheless, logic suggests that testamentary incapacity might be able to be established by a disorder less severe than advanced dementia if the condition severely affected the testator's ability to think about the repercussions of his or her actions, even where the testator's other faculties remained intact.

In *Seeley v Back*,<sup>26</sup> for example, the testator's son sought an order revoking a grant of probate on the basis of testamentary incapacity caused by alcohol induced mental degeneration. The testator was a middle-aged man who had struggled with alcoholism for many years, before suddenly being admitted to hospital with thrombosis. Within a few hours of leaving the hospital he gave his solicitor instructions for the preparation of a will, under which he left 10% of his estate to his only son, and the remainder (worth over \$5 million) to his real estate agent.

Superficially, at least, this conduct is consistent with the type of neurological impairment Bennett describes. The testator's fixation with making a will immediately upon leaving the hospital, his apparently spur of the moment decision to leave the bulk of his estate to a business acquaintance and seeming failure to consider the long-term repercussions for his son, could be fairly described as impulsive. If this was conduct indicative of a cognitive disorder of the kind considered by Bennett, as might be indicated by the effect of alcohol addiction, then the capacity to make a reasoned judgment as to his testamentary bounty might have been affected.

The relevant inquiry in such a case is not whether the testator in fact engaged in a rational reasoning process with respect to his or her testamentary dispositions. Rather, it is to determine whether the testator was capable of engaging in such a process.

Although the circumstances in which the will was executed, and the surprising nature of the testamentary dispositions, would not be determinative of a lack of capacity, considered with medical evidence as to the effect on the reasoning process of the testator's condition this might be sufficient to establish incapacity.

Cogent evidence as to the effect of alcoholism on a person's cognitive function (such as expert evidence linking chronic alcohol abuse to neurodegeneration in the orbitofrontal cortex), coupled with evidence of increasingly impulsive or irrational behaviour might therefore permit a conclusion that the testator did not retain the

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<sup>26</sup> *Seeley v Back – Estate of John Michael Pegus Seeley* [2005] NSWSC 68.

ability to *reflect* and to *reason*, at the time of making the will, as to the claims on his testamentary bounty.

### *Capacity to conduct litigation*

Again, when considering what is required for a party to have capacity to conduct litigation, the test focuses not on an understanding of the subject-matter of the controversy as such but on the ability of a person to consider and *evaluate* the advice of his or her legal representatives as to matters such as the risks, costs, effort and likely outcome of litigation.

Section 3(1) of the *Civil Procedure Act* provides that:

*person under legal incapacity* means any person who is under a legal incapacity in relation to the conduct of legal proceedings (other than an incapacity arising under section 4 of the *Felons (Civil Proceedings) Act 1981*) and, in particular, includes:

- (a) a child under the age of 18 years, and
- (b) an involuntary patient, a forensic patient or a correctional patient within the meaning of the *Mental Health Act 2007*, and
- (c) a person under guardianship within the meaning of the *Guardianship Act 1987*, and
- (d) a protected person within the meaning of the *NSW Trustee and Guardian Act 2009*, and
- (e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.

This is a non-exhaustive definition, which enables the court to find that a person is incapable of conducting legal proceedings for some other reason.<sup>27</sup>

To this must be added what Basten JA has described as the ‘supplementary definition’ in UCPR rule 7.13, which provides that a ‘person under legal incapacity includes a person who is incapable of managing his or her affairs’.<sup>28</sup>

However, doubt has been expressed as to whether the test used for ascertaining capacity in the context of financial management is appropriate for assessing capacity to conduct litigation. As Campbell JA pointed out in *Doulaveras v Daher*, a finding of incapacity in the financial management context results in someone else being appointed to manage a person’s entire estate, as opposed to conducting a specific

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<sup>27</sup> *Rappard v Williams* [2013] NSWSC 1279, [71].

<sup>28</sup> *Tanamerah Estates Pty Ltd as the trustee for Alexander Superannuation Fund v Tibra Capital Pty Ltd* [2013] NSWCA 266, 19, quoted in *Rappard v Williams* [2013] NSWSC 1279, [66].

piece of litigation.<sup>29</sup> His Honour also noted that the test should be simple enough that it can be applied by solicitors in everyday practice, as the appointment of a tutor often occurs without any formal instrument, court order, or consideration of medical evidence.<sup>30</sup>

In *Rappard v Williams*, Hallen J concluded that the appropriate test for ascertaining whether a person is under legal incapacity in relation to the conduct of legal proceedings (where that person does not fall within any of the specifically enumerated types of incapacity set out in section 3(a)-(e) of the *Civil Procedure Act*) was that articulated by Chadwick LJ in *Masterman-Lister v Brutton & Co*, namely that:

The test to be applied...is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings.<sup>31</sup>

His Honour then elaborated as to the kinds of things this might involve, which included:

Seeking advice as to the nature of the proceedings, about the difficulties, risks, costs and effort, involved in pursuing the claim, and the likely result, including the type of order that may be made, comprehending and evaluating that advice, and engaging in the continuing process of co-operation, interaction and decision-making that exists between lawyer and client in running any civil action.<sup>32</sup>

Hallen J approved the finding in *Dalle Molle v Manos*, that whether a person is capable of understanding the issues in legal proceedings is 'issue specific,' and 'relates to the facts and subject-matter of the particular case.'<sup>33</sup> His Honour also approved the statement in *Murphy v Doman*, that a litigant in person would require a higher level of capacity than a person represented by counsel.<sup>34</sup> Finally, his Honour appeared to apply the presumption of sanity in determining the application for removal of the applicant's tutor, suggesting that the reverse onus identified with respect to the revocation of financial management orders does not apply in this context.<sup>35</sup> McDougall J adopted his Honour's conclusions in *Stokes v McCourt*.<sup>36</sup>

The test has been regarded as being one in which there is a low threshold. Nevertheless the requirement that there be an ability to consider or evaluate legal advice suggests that a person must be capable of applying the advice to their personal circumstances and of appreciating the repercussions that would flow should any of the risks materialise (for example, if an adverse costs order were to be

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<sup>29</sup> [2009] NSWCA 58, [156]-[157].

<sup>30</sup> Ibid.

<sup>31</sup> [2003] 3 All ER 162, quoted in *Rappard v Williams* [2013] NSWSC 1279, [77].

<sup>32</sup> Ibid [78].

<sup>33</sup> *Dalle-Molle (by his next friend Public Trustee) v Manos* (2004) SASR 193; (2004) 233 LSJS 276; [2004] SASC 102, [23], quoted in *Rappard v Williams* [2013] NSWSC 1279, [79].

<sup>34</sup> *Murphy v Doman* at [2003] NSWCA 249, [25]; cited in *Rappard v Williams* [2013] NSWSC 1279, [88].

<sup>35</sup> *Rappard v Williams* [2013] NSWSC 1279, [82].

<sup>36</sup> [2014] NSWSC 61.



made against them). Impairment of the kind that Bennett describes might in at least some cases prevent a person from satisfying that test.

### *Financial management applications*

The tests of capacity discussed thus far are used to challenge specific instruments that have already been executed. In other words, their focus is retrospective and any orders obtained extend only to the particular transaction in issue.

Financial management orders, by contrast, are prospective in their focus and, generally speaking, encompass a protected person's entire estate. Under a financial management order either the NSW Trustee or some other suitable person or body is appointed to manage the affairs of the incapable person. In New South Wales financial management orders can be made by the Civil and Administrative Tribunal, the Supreme Court and the Mental Health Review Tribunal.<sup>37</sup> The Supreme Court, in addition to its jurisdiction under the *NSW Trustee and Guardian Act*, may make financial management orders in its inherent *parens patriae* jurisdiction.

Persons who have neurological impairment (such as an inability to control impulsive behaviour) would seem to be prime examples of those lacking capacity to manage 'the ordinary routine affairs of living'.

It is uncontroversial that the subject of an application for a financial management order has the benefit of the presumption of sanity, and the onus of proving incapacity lies on the party so alleging. The reverse is true, however, in applications for the revocation of existing financial management orders, where the onus of proving capacity lies on the protected person on the balance of probabilities.<sup>38</sup> (Talia Epstein has pointed out that this reverse onus is at odds with the legislative regime for the making of guardianship orders, where orders are for a maximum term of five years, are automatically reviewed after the expiry of the term, and where on review the person again has the benefit of the presumption of sanity and the tribunal must satisfy itself afresh of the person's incapacity).<sup>39</sup>

In terms of the criteria for determining whether a financial management order should be made, section 41 of the *NSW Trustee and Guardian Act* provides that the court must be 'satisfied that a person is incapable of managing his or her affairs.'

The test was laid down by Powell J in *PY v RJS* as follows:

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

- (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and

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<sup>37</sup> *Guardianship Act 1987* (NSW) s 25E; *NSW Trustee and Guardian Act 2009* s 41; *Mental Health Act 2001* (NSW) s 34 in combination with *NSW Trustee and Guardian Act 2009* s 44.

<sup>38</sup> *Re GHI (a protected person)* [2005] NSWSC 581, [22]-[23].

<sup>39</sup> Talia Epstein, 'Financial Management and the Rights of People with Disability: A Fine Balance' (2011) 34(3) *UNSW Law Journal* 835, 844.

(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 money or property which he or she may possess may be dissipated or lost<sup>40</sup>

Powell J went on to emphasise the high threshold that must be met before a person can be held incapable of managing his or her affairs:

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 matters in the most efficient manner.<sup>41</sup>

Young J, as his Honour then was, echoed this sentiment in *Re C and the Protected Estates Act*, pointing out that the relevant question is not whether somebody else could manage the affairs of the alleged incapable person better.<sup>42</sup> His Honour said:

There is no room in the legislation for benign paternalism. A person is allowed to make whatever decision she likes about her property, good or bad, with happy or disastrous effect, so long as she is capable.<sup>43</sup>

As Campbell J stated in *Re GHI (a protected person)*, the test in *PY v RJS* has been repeatedly applied in New South Wales over the past several decades,<sup>44</sup> and the language ‘the ordinary routine affairs of man’ has been interpreted as requiring the application of an objective test. The content of this objective test has been the subject of much discussion in the case law. In *H v H* Young J was of the opinion that:

The ordinary affairs of mankind do not just mean being able to go to the bank and draw out housekeeping money. Most people’s affairs are more complicated than that, and the ordinary affairs of mankind involve at least planning for the future, working out how one will feed oneself and one’s family and how one is going to generate income and look after capital. Accordingly, whilst one does not have to be a person who is capable of managing complex financial affairs, one has to go beyond just managing household bills.<sup>45</sup>

In *OM v NM* Windeyer J said:

The ordinary affairs of man does not just mean going down to the shop and buying ordinary household goods, it means being able to manage ordinary household funds and ordinary investments and it does involve the ability not only to understand that advice ought to be

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<sup>40</sup> [1982] 2 NSWLR 700, 702.

<sup>41</sup> Ibid.

<sup>42</sup> [1999] NSWSC 456, [10].

<sup>43</sup> Ibid [17].

<sup>44</sup> *Re GHI (a protected person)* [2005] 221 ALR 589, 591; citing *CF v TCML* [1983] 1 NSWLR 138 at 139–40; *M and the Protected Estates Act 1983* (1988) 12 NSWLR 96 at 99, 101; *G v G (No 2)* (unreported, NSWSC, Powell J, No 41/98, 7 February 1989); *N v N* (unreported, NSWSC, Hodgson J, 13 March 1997); *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 at [11] per Young J; *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501 at [3], [46] per Young J; *H v H* (unreported, Young J, 20 March 2000); *P v R* [2003] NSWSC 819 at [8] per Barrett J.

<sup>45</sup> *H v H* (unreported, Supreme Court of New South Wales, 20 March 2000) [7]-[8].

obtained for the investment of a large sum of money but to be able to properly consider that advice.<sup>46</sup>

In the Victorian case *Re MacGregor*, Starke J declined to apply an objective test, finding that to do so would be inconsistent with the statutory language, which required an assessment of the alleged incapable person's ability to manage 'his affairs,' not 'the ordinary routine affairs of man'.<sup>47</sup> As a result, Victorian courts developed a subjective test of capacity, which calls for an assessment of the person's ability to manage their own affairs as they exist in actuality. As was recognised in *EMG v Guardianship and Administration Board of Victoria*, under the Victorian test a person is more likely to be held incapable if they have substantial assets and complex affairs, (as was suggested in *Szozda v Szozda*, with respect to the capacity of a donor to execute an enduring power of attorney).<sup>48</sup>

Recently, in *Re D*,<sup>49</sup> White J suggested that criticism of the objective test expressed in *Re MacGregor* may also be merited in the NSW statutory context. His Honour pointed out that section 41 of the *NSW Trustee and Guardian Act* requires the court to assess a person's capacity to manage 'his or her affairs,' and remarked that,

Uninstructed by authority one would think that the question is whether the person is capable or incapable of managing his or her *own* affairs, not the hypothetical affairs of an abstract persona. That appears not to be the law in this state.<sup>50</sup> [my emphasis]

His Honour went on to note, relevantly, that when given the opportunity in *Re M and the Protected Estates Act*, Powell J did not address the point made in *Re MacGregor*, that the test as formulated in *PY v RJS* substituted a different concept from the words actually used in the statute.<sup>51</sup> His Honour also noted that despite the objective test being 'repeatedly endorsed' in NSW, in practice it has been difficult for courts to apply.<sup>52</sup> By way of example, His Honour pointed out that in *H v H*.<sup>53</sup>

The applicant, H, adduced medical and psychological evidence to the effect that he was quite capable of handling his own finances and was capable of making reasonable decisions regarding the disposition of his moneys in relation to his family and general responsibilities. The evidence was not rejected. Other evidence that appears to have been accepted included evidence that H regularly reviewed the family budget and gave direction as to the size and application of regular allowances and attended to the payment of household bills.<sup>54</sup>

In *H v H*, the court also took into account H's desire to purchase a taxi plate, invest in a unit or acquire a trucking business, in light of the medical evidence and H's actual

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<sup>46</sup> *OM v MN* [2008] NSWSC 36, [8].

<sup>47</sup> [1985] VR 861, 866.

<sup>48</sup> *EMG v Guardianship and Administration Board of Victoria* [1999] NSWSC 501, [46].

<sup>49</sup> [2012] NSWSC 1006.

<sup>50</sup> *Ibid* [46].

<sup>51</sup> *Ibid* [55].

<sup>52</sup> *Ibid* [56]-[57].

<sup>53</sup> Unreported, Supreme Court of New South Wales, Young J, 20 March 2000.

<sup>54</sup> *Re D* [2012] NSWSC 1006, [57].

financial circumstances, including the value of his capital and the fact that he would not be entitled to social security benefits for a further five years.<sup>55</sup>

Ultimately in *Re D*, White J applied Barrett J's reformulation of the test, set out in *P v R*,<sup>56</sup> which his Honour felt was more consistent with the statutory language.<sup>57</sup> In that case, Barrett J stated:

The task of the court, upon an application such as this, is to make a judgment as to the capacity and ability of the person concerned to cope with the ordinary routine affairs of living, particularly as they concern the person's property...*the point to be emphasized is that the requisite judgment is to be made in the light of objective physical facts concerning the relevant person's property, money and other assets and the way the person is able to look after them.*<sup>58</sup> [emphasis mine]

The plaintiff in *Re D* had sustained a brain stem injury approximately 30 years previously, and had received an award of damages, which was being managed on her behalf by the NSW Trustee. At the time of the application for revocation of the order, these funds had been reduced to approximately \$5000. The plaintiff had a history of incurring significant debts without consulting the NSW Trustee, and continued to believe that her assets totaled somewhere between \$180,000 and \$5m, despite being presented with evidence to the contrary. In applying the test as reformulated by Barrett J, White J concluded that 'the ordinary routine affairs of living' in the plaintiff's case involved surviving on a very limited budget. The ability to exercise sound judgment as to what expenses could be safely incurred at a given time was therefore crucial, and the plaintiff's capacity to make decisions of this kind was severely compromised by her inability to appreciate the limited nature of her estate. The application was dismissed.

In *Re GHI (a protected person)*, a serious brain injury following a car accident left significantly impaired the plaintiff's ability to control his behaviour. An expert neuropsychiatrist concluded that the plaintiff had 'marked problems with impulsivity (i.e acting without thinking, doing the first thing that comes to mind)' and 'difficulties in stopping doing something even if he knows that he shouldn't be doing it'.<sup>59</sup> Some more extreme examples of the plaintiff's impulsive behaviour included making bomb threats and carrying out an assault. The neuropsychiatrist concluded:

I would expect the deficiencies in emotional/behavioural monitoring and control to compromise GHI's ability to manage the substantial but finite funds awarded to him as compensation for his injuries in a manner that will satisfy his financial requirements in the longer term. I would expect GHI to be at high risk of social and financial exploitation, and of impulsive and irresponsible spending.<sup>60</sup>

The plaintiff's application to revoke an existing financial management order made against him was dismissed.

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<sup>55</sup> Ibid [57]-[58].

<sup>56</sup> *P v R* [2003] NSWSC 819.

<sup>57</sup> *Re D* [2012] NSWSC 1006, [61]-[62].

<sup>58</sup> quoted in *Re D* [2012] NSWSC 1006, [61]-[62].

<sup>59</sup> *Re GHI (a protected person)* 221 ALR 589, [90].

<sup>60</sup> Ibid [91].

Whether financial management is appropriate in circumstances such as this has recently become a topic of some debate. Karen Sullivan, a clinical neuropsychologist with considerable experience conducting capacity assessments, has noted that:

‘contemporary views suggest decision-making capacity is not an all-or-none attribute...Rather it is an attribute that people are thought to possess in varying degrees.’<sup>61</sup>

In *Re GHI*, although the plaintiff’s long-term financial planning skills were affected by his brain injury, he had demonstrated (by participating in a financial trial) that he was capable of paying household bills on time, of budgeting for his short-term needs and of making some complex financial decisions.<sup>62</sup>

Did he lack the capacity to manage his affairs? Of concern in that case was that the plaintiff had settled his personal injury claim for in excess of a million dollars. He had, by virtue of that lump sum payment, become subject to a pension preclusion period of 26 years, which was not due to expire until the year 2027.<sup>63</sup> There was evidence that he had consistently expressed an intention to invest in various poorly conceived business ventures,<sup>64</sup> such that it was accepted that there was a very real risk that he would dissipate his assets (which by virtue of his pension preclusion position would have had serious financial consequences for him). In his case, the fact that the application was to revoke a financial management order was relevant.

### **Supported decision-making?**

When a more subtle neurological condition impairs a person’s ability to make appropriate financial decisions, but the impairment is not severe enough to meet the criteria for the making of a financial management order and it is not clear that the person is legally incapable of entry into transactions that may objectively be seen to be unwise, what then? Benign paternalism has been rejected as an appropriate approach by the courts (as noted above).

Bennett makes it clear that impulsiveness disorders exist on a spectrum, with the level of impulsiveness increasing in accordance with the level of grey matter loss in the particular area of the brain.<sup>65</sup> Even impairments at the lower end of the spectrum may render the impaired person more vulnerable than the general population to exploitation, or simply put that person at an increased risk of making poor decisions with respect to their assets.

The notion that capacity exists on a continuum, and that many people may not be susceptible of categorisation within the legal dichotomy of capable or incapable, is

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<sup>61</sup> Karen Sullivan, ‘Measuring Mental Capacity: Models, Methods and Tests’ in Berna Collier et al (eds) *Mental Capacity: Powers of Attorney and Advance Health Directives* (The Federation Press 2005) 93, 109.

<sup>62</sup> *Re GHI (a protected person)* 221 ALR 589, [39].

<sup>63</sup> *Ibid* [35]-[36].

<sup>64</sup> *Ibid* [104]-[113].

<sup>65</sup> Bennett, above n 3, 50.

one rationale for “supported decision-making”. Another motivation is the discernable shift towards a human rights paradigm of disability, as opposed to the traditional protective approach exemplified by the NSW guardianship and financial management laws. This shift is signalled most clearly in the Convention on the Rights of Persons with Disabilities (CRPD),<sup>66</sup> ratified by Australia in 2008, which advocates supported decision-making as the preferred model where a person suffers from a decision-making impairment. The CRPD also states that all such persons should be recognised as having legal capacity.

Article 12 of the Convention provides:

12(2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

12(3) States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 12(4) goes on to emphasise that the support provided by States must be *proportional and tailored to the person’s circumstances*.

The central proposition of supported decision-making is that people who have difficulty making decisions alone may be capable of making reasonable and appropriate decisions with the assistance of a trusted friend or family member.

While such support systems already operate informally in the community, the implementation of a statutory framework formalising these arrangements may allow some people to avoid the loss of autonomy that occurs with the appointment of a substitute decision-maker.

Legislation implementing supported decision-making already exists in a number of Canadian provinces. For example, in Yukon supported decision-making is designed to provide a middle ground for people who are ‘substantially able to manage their affairs’ but whose decision-making ability is nevertheless impaired.<sup>67</sup> Adults with decision-making impairments have the option of entering a ‘Supported Decision-making Agreement’, which grants a designated support person legal status to ‘be with the adult, and participate in discussions with others, when the adult is making decisions and attempting to obtain information’.<sup>68</sup>

The Victorian Law Reform Commission has recently proposed amendments to the *Guardianship and Administration Act 1986* to incorporate supported and co-decision-making mechanisms in relation to financial decision-making. The amendments are not designed to completely replace substitute decision-making, such as financial management and enduring powers of attorney, but rather are intended to provide a range of alternatives that allow people to retain a greater

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<sup>66</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (entered into force 3 May 2008).

<sup>67</sup> Victorian Law Reform Commission, *Guardianship*, Report no 24 (2012), 129.

<sup>68</sup> *Ibid.*

measure of autonomy in appropriate cases. These mechanisms are designed to reflect the reality that decision-making impairments exist on a continuum. The Commission expresses this idea as follows:

While the legal concept of capacity is based on the assumption that there is a clear dividing line between those people 'with capacity' and those who 'lack capacity', the reality is quite different. There is increasing recognition of a continuum of decision-making abilities, and of the difficulty in defining the boundaries of 'capacity'. There is also increasing recognition of the fact that decision-making ability is not solely dependent on the person's cognitive abilities, but may also be affected by their environment and, in particular, the availability of appropriate support.<sup>69</sup>

The proposed amendments also recognise that:

Financial decisions often have a very significant impact on a person's wellbeing and that some people experience loss of control over these decisions as a deep infringement upon their autonomy and dignity.<sup>70</sup>

The Commission recommends that people with decision-making impairments should have the option of personally appointing a financial 'supporter', through an instrument called a 'supported decision-making appointment'.<sup>71</sup> Where doubt exists as to an individual's capacity to personally appoint a 'supporter', VCAT would be empowered to make 'supported decision-making orders' with the consent of both parties involved.<sup>72</sup> Appointments and orders would clearly set out the areas of decision-making in respect of which the supporter is empowered to act, and any limitations or conditions to which the appointment is subject.<sup>73</sup> State Trustees and professional financial advisors would not be eligible to be appointed as supporters, as the position is designed to be filled by a person in a relationship of trust with the supported person, such as a family member or close friend.<sup>74</sup> Supporters would be empowered to collect information on behalf of the supported person, discuss this information with the person, and assist them in making a decision.<sup>75</sup> Crucially, in the context of the impulsiveness literature previously discussed, this would include helping the person to consider the various options available, and to appreciate their consequences. Although many people with decision-making impairments already receive support from family and friends of the kind contemplated by the proposed amendments, giving these relationships the force of law would enable third parties, such as banks, government departments and other service providers, to deal with supporters with greater confidence.<sup>76</sup>

The Commission has also devised a number of safeguards, which are intended to minimise the risk of supporters abusing their positions of power. First and foremost,

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<sup>69</sup> Ibid 157.

<sup>70</sup> Ibid 140.

<sup>71</sup> Ibid 137.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid 139.

<sup>75</sup> Ibid 141.

<sup>76</sup> Ibid 135.

the legislation would expressly state that supporters are not permitted to exercise substitute decision-making power, or to exercise their powers without the knowledge and consent of the supported person.<sup>77</sup> While financial supporters would not be held personally liable for decisions made under an appointment, fiduciary obligations would arise by virtue of the special relationship of trust and confidence between the supporter and the supported person, and supporters acting in breach of these obligations would expose themselves to equitable remedies.<sup>78</sup> An online register of supported decision-making appointments would be maintained, to allow service providers and other third parties to confirm the authenticity of the asserted supported-decision-making relationship.<sup>79</sup> Finally, and perhaps most importantly, it is proposed that VCAT would have an oversight function, and any person with an interest would have standing to apply for review of a supported decision-making appointment or order.<sup>80</sup> Appointments and orders could be challenged, for example, on the basis that the supporter is in breach of their responsibilities, or where it is alleged that the supported person no longer has the capacity to participate in a supported decision-making arrangement.<sup>81</sup>

The Commission has also proposed a co-decision-making option for individuals whose capacity is more limited than that of a supported person, but is not limited enough to justify the loss of autonomy inherent in financial management. In other words, financial management orders are conceived as a last resort, which should only be exercised where less restrictive options are clearly inappropriate. This is consistent with the requirement in article 12(4) of the CRPD, that support must be ‘proportional and tailored to a person’s circumstances’.

While there are many similarities with supported decision-making, the principal difference is that under a co-decision-making arrangement the person is required to make particular decisions, (those that fall within the scope of the orders), jointly with a co-decision-maker. Such decisions, if made by the person alone, would lack legal validity.<sup>82</sup> As co-decision-making impinges upon individual autonomy to a greater extent than occurs with supported decision-making, the Commission has proposed that co-decision-making arrangements should only be available by order of the tribunal.

Although the Commission’s recommendations have not yet been implemented, Victoria’s new Mental Health Act, which will commence on 1 July 2014, establishes what is being described as a ‘supported decision-making model of treatment and care’.<sup>83</sup>

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<sup>77</sup> Ibid 142.

<sup>78</sup> Ibid 147 – 148.

<sup>79</sup> Ibid 146.

<sup>80</sup> Ibid 145.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid 152.

<sup>83</sup> Department of Health (Vic), ‘The Mental Health Bill 2014: An Explanatory Guide’ (February 2014), Ministerial forward.



NSW courts and tribunals may also soon be grappling with a supported decision-making regime. In 2010 a New South Wales Legislative Council Standing Committee on Social Issues report, recommended that the NSW government consider amending the legislation so as to implement supported decision-making mechanisms.<sup>84</sup> A supported decision-making pilot, which is a joint project of Aging, Disability and Home Care, the NSW Trustee and Guardian and the Public Guardian, is currently taking place in Western Sydney, involving a number of people with disabilities and their supporters. The Pilot is due to finish in mid 2014, and will then be subject to a process of independent evaluation. The NSW government fact sheet states that:

Supported decision making is an important part of building the capacity of people with disability to have greater choice and control in the transition to the NDIS. Supporting people with disability to make their own decisions may also offer alternatives to guardianship and financial management in NSW.<sup>85</sup>

## **Conclusion**

Questions of capacity arise in various contexts in civil matters. What Professor Bennett's review of the neuropsychological studies raises for consideration is how, if at all, a greater understanding of the range of cognitive disability will impact upon the application of the various tests of legal incapacity. At the very least, it indicates that consideration needs to be given to ways in which persons suffering cognitive disabilities (but who otherwise remain legally capable to take steps the imprudence of which might not be understood by them due to those cognitive disabilities) and those dealing with them who wish to be able to rely on transactions entered into by them, might be able to be protected.

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<sup>84</sup> Victorian Law Reform Commission, above n 67, 155.

<sup>85</sup> Family and Community Services, Aging, Disability and Home Care (NSW), 'Supported Decision Making Pilot' (Fact sheet, Issue No 1, October 2013).