

**COLLEGE OF LAW**  
**ELDER LAW WORKSHOP**  
**SYDNEY, 30 JULY 2019**

**(IN)CAPACITY – FOR WHAT?**

by

**Justice Geoff Lindsay**  
**Probate & Protective List Judge**  
**Equity Division, Supreme Court of NSW**

- 1 Questions of “(in)capacity” are frequently encountered in the solution of legal problems involving, or potentially involving, an exercise of the protective or probate jurisdictions of the Supreme Court of New South Wales.
  
- 2 Upon an exercise of those two types of jurisdiction the Court often encounters three statutory constructs, each of which has profoundly affected the practice of law in Australian society, and all of which involve questions relating to a person’s capacity or otherwise.
  
- 3 They are:
  - (a) an enduring power of attorney, in NSW governed principally by the *Powers of Attorney Act 2005* NSW;
  
  - (b) an enduring guardianship appointment, governed by the *Guardianship Act 1987* NSW; and
  
  - (c) a court authorised (“statutory”) will, governed by the *Succession Act 2006* NSW.

- 4 Experience of legal practice in the probate, protective and family provision jurisdictions of the Court may inform decision-making in those areas, as suggested in *Re MP's Statutory Will* [2019] NSWSC 331; *Re MP's Statutory Will (No. 2)* [2019] NSWSC 491 (appeal pending).
- 5 Questions of "(in)capacity" often arise in other contexts as well: for example, in deciding whether a person has, or had, testamentary capacity; and in deciding whether a person has, or had, the mental capacity to transact business.
- 6 The meaning of the word "capacity" and its variants can vary according to context, and involve widely different legal contexts. A reference to "(in)capacity" implicitly invites attention to the question, "(In)capacity for what?" What is it a person is said to be, or to have been, incapable of doing?
- 7 In the criminal law, the *McNaghten Rules* (1843) 10 Cl. & F. 200 are famous. Their focus was upon the capacity of a person to know that what he or she was doing was "wrong", a central concern of the criminal law.
- 8 In probate law, the classic test for testamentary capacity associated with *Banks v Goodfellow* (1870) LR 5 QB, 549 at 565 focuses upon the capacity of a person "to remember, reflect and reason", pre-requisites for "the due exercise of a power [that is, a power to make a will] involving moral responsibility".
- 9 In the protective jurisdiction, when consideration is given to the appointment of a committee of the estate (a protected estate, or financial, manager) or a committee of the person (a guardian), the focus is upon the capacity for self-management of the person in need of protection: *CJ v AKJ* [2015] NSWSC 498. Under modern NSW law, questions about capacity for self-management, are not necessarily one and the same as a question about mental capacity: *David by her tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 436E437C; *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [252].

- 10 Similar principles may arise upon consideration of whether a person has capacity to manage litigation without a tutor: *Rappard v Williams* [2013] NSWSC 1279 at [62]-[63]; *A v A* [2015] NSWSC 1778 at [53]-[82], *IA v TA* [2016] NSWCA 179 at [55]; *Re WS* [2017] NSWSC 745.
- 11 In contract law, a person will lack 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 437-438; *Hanna v Raoul* [2018] NSWCA 201.
- 12 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. Whether that is so in a particular case may depend upon the nature of the particular transaction.
- 13 In broad overview, the following general observations can be made about concepts of “(in)capacity” in Australian (NSW) law:
  - (a) Generally, concepts of “(in)capacity” are premised upon the ideal of a free society constituted by autonomous individuals living and dying in community, with special regard directed towards those individuals not able (without assistance) satisfactorily to transact “business” on their own account. Even where “infants” as a class are regarded as lacking legal capacity, an assessment of the capacity of an individual infant (eg, to consent to medical treatment) may require an assessment of the maturity of the particular individual: *Marion’s Case* (1992) 175 CLR 218 at 237-238.
  - (b) The law does not prescribe any fixed standard of capacity as requisite for the validity of all transactions. It requires, in relation to each particular piece of business the subject of a transaction,

that each party shall have such soundness of mind as to be capable of understanding the general nature of what he or she is doing: *Gibbons v Wright* (1954) 91 CLR 423 at 437.

- (c) Australian law generally views questions of “(in)capacity” as:
  - (i) individual specific, and
  - (ii) task specific.
- (d) Accordingly, implicit in consideration of any question of “capacity” is the question, “capacity, for what?”
- (e) That question might lead to a series of related questions such as:
  - (i) capacity, to perform what functions?
  - (ii) capacity, when?
  - (iii) capacity, to be assessed by whom and according to what criteria?
  - (iv) incapacitated, why?

14 How one approaches a question of “(in)capacity” can depend critically upon the purpose of the inquiry as to capacity, and any time perspective inherent in the inquiry:

- (a) If consideration is being given to whether a financial manager or guardian should be appointed, the focus for attention is the present time, *looking forward* with a view to *risk management*, and the tasks to be performed by a person in need of protection. A focus, here, is on a *system* for prospective decision-making.

- (b) If consideration is being given to a proposal to transact a particular item of business (eg, entry into a contract, the making of a will, or the execution of an enduring power of attorney or an enduring guardianship appointment) the focus for attention may be on, not only the welfare of the subject person, but on both a prudent assessment of capacity and the creation of contemporaneous evidence of the process and fact of assessment.
  
- (c) If consideration is being given to a challenge to the validity of a past transaction, the focus for attention may be directed, not only to an *ex post facto* assessment of capacity, but to how such an assessment might connect with a variety of other concepts, including *non est factum*, undue influence, fiduciary obligations, unconscionable conduct and statutory remedies available under legislation such as the *Contracts Review Act 1980 NSW*. *Hanna v Raoul* [2018] NSWCA 201 provides an example of this, all the more relevant because a finding of contractual incapacity was displaced on appeal, but supplemented by findings of unconscionability and “unjust contract”.

15 Where an assessment of capacity is sought to be made *ex post facto* in relation to a person now deceased, the process of assessment may be purely forensic in character, essentially clinical.

16 Where, however, an assessment of capacity is required in relation to a living person (a person whose present and prospective welfare might be affected by the assessment) there is a sense in which the stakes are higher. Difficult decisions may have to be made about whether particular steps should, or should not, be taken to effect an assessment of capacity; to protect a person whose capacity may be in doubt; and to involve others in decision making affecting the subject person.

- 17 There are no off-the-shelf, easy or universal answers to how a legal practitioner should approach such questions.
- 18 However:
- (a) the identity of the practitioner's client must be kept in view: *Hanna v Raoul* [2018] NSWCA 201; *McFee v Riley* [2018] NSWCA 322 and *Riley v Riley* [2017] NSWSC 1419.
  - (b) the practitioner must be alive to conflicts of duty and interest, and be prepared to insist that boundaries be observed.
  - (c) with these precautionary warnings, it is generally prudent to consider whether (and, if so, how) decision-making affecting a person who is, or may be, in need of protection can be shared.– for example: (i) by obtaining a medical report; (ii) by consulting family and significant others; and (iii) by facilitating an application to the Court, or NCAT, for the appointment of a financial manager or guardian, by whatever name known.

GCL 28/8/19