

NEW SOUTH WALES BAR ASSOCIATION
PERSONAL INJURY AND COMMON LAW CONFERENCE

Saturday, 11 March 2017

(Revised, 15 March 2017)

**THE INCAPACITATED PLAINTIFF
AND PERSONAL INJURY COMPENSATION PROCEEDINGS**

by

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(1) INTRODUCTION

1 The object of this paper is:

- (a) to explain how, and why, the Supreme Court of NSW's protective jurisdiction operates as it does in the context of a claim at common law for damages for personal injury;
- (b) to explore territory (principally, the management of property of persons incapable of managing their own affairs) at the intersection of common law personal injury compensation litigation and the protective and equity jurisdictions of the Court, including commentary on problems that commonly present themselves for the Court's consideration;

- (c) to outline the institutional, and statutory, framework of “the protective jurisdiction” exercised by the Supreme Court, and other courts and tribunals, in NSW; and
 - (d) to identify the main cases, legislation and texts bearing upon an exercise of protective jurisdiction in NSW.
- 2 The perspective from which the subject matter of the paper is viewed is that of the Supreme Court’s Protective List judge (recognising that other perspectives are available, particularly those of the Guardianship Division of the NSW Civil and Administrative Tribunal (“NCAT”) and the NSW Trustee) addressing an audience composed, primarily, of barristers experienced in the conduct of Common Law claims for damages for personal injuries.
- 3 The protective jurisdiction of the Supreme Court of NSW, by that name known, is most often encountered by lawyers who practise in the equity and probate jurisdictions of the Court, often dealing with cases known by the label “Elder Law” or characterised by a focus on “estate administration” transitioning from a contemplation of death to the reality.
- 4 Recent expositions of the protective jurisdiction in that context can be found in a special issue of the *Australian Bar Review* entitled *Estate Administration in Probate, Family Provision and Protective Cases* (December 2016) 41 *Aust Bar Rev* 1-287. Of particular, present interest are:
 - (a) Chapter 1, “A Province of Modern Equity : Management of Life, Death and Estate Administration” by me; and
 - (b) Chapter 6, “Protective Jurisdiction in NSW” by Martin Gorrick.
- 5 The focus of the present paper involves a shift in emphasis from the protective jurisdiction’s intersection with the equity and probate jurisdictions to its intersection with the common law jurisdiction, where, although the concept

of “estate administration” remains prominent, the forensic dynamic can be markedly different.

- 6 Leaving aside criminal law cases (which deserve separate treatment) the protective jurisdiction, in its intersection with the common law jurisdiction, often focuses on the conduct of proceedings by or against an incapacitated person (through a tutor), or the transition from an adversarial contest on a claim for compensation on behalf of an incapacitated person to management of an award of compensation *post-litigation*.
- 7 The nature, scope and terms of the protective jurisdiction defy analyses not tied to the purposive character of the jurisdiction.

(2) THE “PROTECTIVE JURISDICTION”

- 8 A convenient point of entry into an understanding of the jurisdiction is found in the following observations by the High Court of Australia about “the *parens patriae* jurisdiction” (another name for “the protective jurisdiction”) in *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* (1992) 175 CLR 218 at 258-259:

“...The history of [the *parens patriae* jurisdiction] was discussed at some length by La Forest J in *Re Eve* [1986] 2 SCR 388 at 407-417; (1986) 31 DLR (4th) 1 at 14-21. His Lordship pointed out [at 410,16] that ‘[t]he Crown has an inherent jurisdiction to do what is for the benefit of the incompetent. Its limits (or scope) have not, and cannot, be defined.’ In *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243, Lord Eldon LC, speaking with reference to the jurisdiction of the Court of Chancery, said:

‘[I]t belongs to the King, as *parens patriae*, having the care of those who are not able to take care of themselves, and is founded on the obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves, particularly in cases where it is clear that some care should be thrown round them.’

When that case was taken on appeal to the House of Lords, Lord Redesdale noted [in *Wellesley v Wellesley* (1828) 2 Bli NS 124 at 131; 4 ER 1078 at 1081]:

‘Lord Somers resembled the jurisdiction over infants, to the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown, in the same way.’

Lord Redesdale went on to say [at 136, 1083] that the jurisdiction extended ‘as far as necessary for protection and education’.

To the same effect were the comments of Lord Manners who stated [at 142, 1085] that ‘[i]t is not... impossible to say what are the limits of that jurisdiction’. The more contemporary descriptions of the *parens patriae* jurisdiction over infants invariably accept that in theory there is no limitation upon the jurisdiction: see *In Re X (a minor)* [1975] Fam 47 at 51-52, 57, 60-61, 61-62. That is not to deny that the jurisdiction must be exercised in accordance with principle. ...

No doubt the jurisdiction over infants is for the most part supervisory in the sense that the courts are supervising the exercise of care and control of infants by parents and guardians. However, to say this is not to assert that the jurisdiction is essentially supervisory or that the courts are merely supervising or reviewing parental or guardian care and control. As already explained, the *parens patriae* jurisdiction springs from the direct responsibility of the Crown for those who cannot look after themselves; it includes infants as well as those of unsound mind. So the courts can exercise jurisdiction in cases where parents have no power..., as well as in cases in which they have the power. ...”

- 9 The “protective jurisdiction” here spoken of is the “inherent” jurisdiction of the Supreme Court. References to “lunatics” and “those of unsound mind” can be taken as references to those who are “incapable of managing their own affairs”: *PB v BB* [2013] NSWSC 1223.
- 10 Having been endorsed by the High Court, the historical exposition of the protective jurisdiction in *Re Eve* is worthy of study as a definitive account of the origins of the jurisdiction.
- 11 The more recent history of the jurisdiction in NSW is canvassed in *PB v BB* [2013] NSWSC 1223; *M v M* [2013] NSWSC 1495; and *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245.
- 12 The focus of the jurisdiction has shifted from “status” to “function” over the past two centuries of Anglo-Australian law. At the beginning of the period (which coincided with establishment of the Supreme Court of NSW) the focus was on whether a person could be found to be an “idiot” or “natural fool”; a “lunatic”; or (as Lord Eldon accepted) a person who, although neither an idiot nor a lunatic, was incapable of managing his or her own affairs, unaided, without undue exposure to exploitation. The present

focus is (almost) entirely upon functionality: Is the particular person thought to be in need of protection incapable of managing his or her own affairs?

- 13 The field of operation of the protective jurisdiction is not static. Australians generally have an expectation that problems arising from incapacity (particularly incapacity associated with old age and the approach of death) can be “managed”, with scope for individual autonomy (within systems for management) recognised as a high priority. Historical distinctions between the common law, equity, probate and protective jurisdictions of English courts which still define the jurisdictional foundations of the Supreme Court of NSW are breaking down as modern solutions must be found to modern problems.
- 14 This can be observed most clearly in the promotion by government of enduring powers of attorney and enduring guardianship instruments (unknown to the law before the late 20th century); resort to financial management and guardianship orders available from NCAT as an administrative tribunal; the availability of “statutory wills” (another late 20th century innovation) for persons, of any age, lacking testamentary capacity; and an expansive family provision jurisdiction (yet another 20th century phenomenon) which lies in wait for estates not carefully managed in life.
- 15 The common law personal injury jurisdiction does not stand apart from “the managed society”. An example of this can be found in the jurisdiction under section 82 of the *Civil Procedure Act* 2005 NSW to award “interim damages”; and in a social welfare system that provides compensation for the injured, subject to adjustments in favour of the State from damages recovered in court proceedings, together with standardised orders in compensation proceedings for adjustments to be made before an insurer, or institutional defendant, pays an award of compensation into court.
- 16 In a society which is, to this extent, managed *on behalf of* a person who is incapacitated, or on the periphery of incapacitation, there is often tension between what the person in need of protection can (and ought to be allowed to) do personally and what must, for want of a practical alternative, be done

for the person by somebody else. There is also, in all such cases, a concern about the *accountability* of those who (as holders of a fiduciary office or as persons who stand in a fiduciary relationship with an incapable person) deal with an incapable person's estate. These are presently hot topics for debate.

- 17 One way of viewing the State's protective regime is to see it as an administrative system for *managing risk* associated with the management of property (assets and income) by or on behalf of a person unable, personally, without assistance, to manage his or her own affairs without undue exposure to exploitation. The general law may offer *particular* remedies to address *particular* wrongdoing (invoking equitable jurisdiction or legislation like the *Contracts Review Act 1980 NSW*), mostly *retrospectively*, but the protective jurisdiction allows for *systemic* protection with a *prospective* outlook.
- 18 The traditional focus of a common law advocate on the conduct of an adversarial trial leading to the recovery of damages cannot now be maintained to the exclusion of a broader perspective on the financial affairs of an incapable person *before and after* a judgment for damages is obtained. There is a sense in which we are all "administrative lawyers" now, bound to recognise that the old concept of a "trial" (particularly, but not only, the concept of a trial by jury) has been displaced by "case management" procedures that must recognise that the very concept of a "case" under management evolves at different stages of a litigation process.
- 19 The Supreme Court of NSW's protective jurisdiction is both "statutory" and "inherent". An exercise of the Court's statutory jurisdiction routinely involves the exercise of powers under the *NSW Trustee & Guardian Act 2009* and, to a lesser extent, the *Civil and Administrative Tribunal Act 2013 NSW*, Schedule 6, clause 14 (*P v NSW Trustee and Guardian* [2015] NSWSC 579; *C v W* [2015] NSWSC 1774; *The Husband v The Public Guardian* [2016] NSWSC 1720) and the *Powers Of Attorney Act 2003 NSW*. The "inherent" jurisdiction is sometimes spoken of as jurisdiction conferred by section 23 of the *Supreme Court Act 1970 NSW* (eg, *Re C* [2012] NSWSC 1097 at [64]-[66]; *Fountain v Alexander* (1982) 150 CLR 615 at 633) but, generally, a reference to the

“inherent jurisdiction” is a reference to the jurisdiction derived (*via* section 22 of the *Supreme Court Act 1970*) from the *New South Wales Act 1823 (Imp)*, the *Third Charter of Justice, 1823 (Imp)*, the *Australian Courts Act 1828 (Imp)* and ancillary legislation (*PB v BB* [2013] NSWSC 1223).

- 20 When the Court appoints a protected estate manager it generally does so by reference to sections 40-41 of the *NSW Trustee and Guardian Act*. Those sections are in the following terms (omitting section 41(4), which engages the *Powers of Attorney Act 2003 NSW*):

“40 Orders for management may apply to part of estate

An order may be made under this Chapter for the management of the whole or part of the estate of a person.

41 Orders by Supreme Court for management of affairs

(1) If the Supreme Court is satisfied that a person is incapable of managing his or her affairs, the Court may:

(a) declare that the person is incapable of managing his or her affairs and order that the estate of the person be subject to management under this Act, and

(b) by order appoint a suitable person as manager of the estate of the person or commit the management of the estate of the person to the NSW Trustee.

(2) The Supreme Court may make an order on its own motion or on the application of any person having a sufficient interest in the matter.

(3) For the purposes of this section:

(a) evidence of a person’s capability to manage his or her own affairs may be given to the Supreme Court in any form and in accordance with any procedures that the Court thinks fit, and

(b) the Court may personally examine a person whose capability to manage his or her affairs is in question or dispense with any such examination, and

(c) the Court may otherwise inform itself as to the person’s capability to manage his or her own affairs as it thinks fit....”

- 21 The Court is slow to make a “partial” management order, relying on section 40, because of administrative problems in oversight of part only of a person’s estate, because greater protection can be afforded to an incapable person by

a general form of order and because, generally, it is better to allow the NSW Trustee to supervise a whole estate, subject to its power (under section 71 of the *NSW Trustee and Guardian Act*) to authorise a protected person to manage part of his or her own estate (usually a pension or income from employment), or to give directions for management of the estate: *Re Application for Partial Management Orders* [2014] NSWSC 1468.

- 22 A partial management order may be appropriate, and can be made, in particular cases; but care needs to be taken in those cases to define with precision the estate under management and to consider how the incapable person's affairs are to be managed overall. An award of interim damages under section 82 of the *Civil Procedure Act 2005* NSW, and a management order in aid of appointment of the NSW Trustee as a tutor of last resort, are two examples that come to mind. Each case needs to be considered on its particular facts.

(3) MANAGEMENT OF “THE PERSON”, MANAGEMENT OF “THE ESTATE” OF A PERSON INCAPABLE OF SELF-MANAGEMENT

- 23 It is customary to speak of the Court making orders affecting “the person” or “the estate” (that is, the property) of a person in need of protection. An order for the appointment of a “committee of the person” (a guardian) and orders authorising the performance of a medical or dental procedure are in the former category. An order for the appointment of a “committee of the estate” (a protected estate manager/financial manager) is in the latter category.

- 24 The same person may be appointed to manage *the estate* and to care for *the person* of a person in need of protection. However, not uncommonly different people are appointed, on the one hand, to the office of a manager and, on the other hand, to the office of a guardian, using the modern expressions for a committee of the estate and a committee of the person respectively. This might be done to ensure that too much power is not unnecessarily reposed in one person, or as a means of conferring particular functions on particular people and encouraging cooperation within the community of the person under protection. Thus it may be that a professional manager (such as a

licensed trustee company) is appointed to manage an estate, including the protected person's residence, and a member of family is appointed guardian for limited purposes that include decisions about where the protected person may live and what medical or dental treatment the protected person is to receive.

(4) SELECTION OF A PROTECTED ESTATE MANAGER OR GUARDIAN

- 25 If there is need of a manager or guardian, and no other person is available for appointment to those offices, the NSW Trustee (constituted by the *NSW Trustee and Guardian Act 2009* NSW) and the Public Guardian (governed by the *Guardianship Act 1987* NSW) are available as appointees "of the last resort". Whereas other appointees cannot, according to convention, be appointed without their consent, the NSW Trustee and the Public Guardian (as public officers) can, in practice, be appointed without their consent.
- 26 In a contemporary setting, an endeavour is made to facilitate the appointment of private managers and guardians where that is the preference of an incapable person's family: *M v M* [2013] NSWSC 1495 at [24]-[29] and [39]-[48]; *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [30]-[32]. Those endeavours mirror encouragement given to everybody to prepare for the future by execution of an enduring power of attorney (governed by the *Powers of Attorney Act 2003* NSW) and an instrument for the appointment of an enduring guardian (governed by the *Guardianship Act 1987*).
- 27 It is not the practice of the Court to appoint a private corporation as a protected estate manager unless the corporation is a licensed trustee company (governed by the *Trustee Companies Act 1964* NSW and Chapter 5D of the *Corporations Act 2001* Cth) or, as happens less frequently, the Court has the benefit of a report from the NSW Trustee of the type contemplated by *Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245 at [290] (m).

- 28 Where a corporation has been appointed to manage a protected estate and there has been a substantial change in the ownership, management structure or mode of operation of the corporation, bearing upon the capacity of the corporation to manage the estate or the means by which the estate might be managed, a protected person and his or her family and carers can reasonably expect to be allowed an opportunity to consider for themselves whether the change is in the best interests, and for the benefit, of the protected person; a corporate manager cannot, by a restructure, force a protected person, without redress, to submit to the restructure: *Re LSC and GC* [2016] NSWSC 1896 at [41]; *SLJ v RTJ* [2017] NSWSC 137 at [26].
- 29 No protected estate manager has an *entitlement* to remain in office. There is no property or similar right to remain in that office. All managers are liable to removal and replacement whenever it may appear to be in the interests, and for the benefit, of the protected person that there be a change: *Re X* [2016] NSWSC 275 at [36]-[37].

(5) THE STATE'S ADMINISTRATIVE REGIME FOR PROTECTIVE CASES

- 30 The Court's "inherent jurisdiction", extremely broad and incapable of exhaustive definition, is generally reserved for dealing with exceptional cases (*Re Eve* [1986] 2 SCR 388 at 411; 31 DLR (4th) 1 at 17; *Re Victoria* [2002] NSWSC 647; 29 Fam LR 157 at [37] - [40]; *Re Frieda and Jeffrey* [2009] NSWSC 133; 40 Fam LR 608), and in aid of statutory courts and tribunals (*Re B (No 1)* [2011] NSWSC 1075 at [58]-[60]; *P v NSW Trustee & Guardian* [2015] NSWSC 579 at [116]; *IR v AR* [2015] NSWSC 1187 at [115]-[117]), especially where protective jurisdiction is conferred by statute on a specialist court or tribunal.
- 31 This predisposition towards restraint is generally manifested in dismissal of applications for an exercise of inherent jurisdiction calculated to circumvent a statutory appeal procedure. However, it can also be found in the Court's reluctance to appoint a protected estate manager prior to the final determination of common law personal injury proceedings in which the case

of a claimant for damages is proceeding in an orderly way, *via* a tutor acting on behalf of the claimant, under the control of the court entertaining the claim: *Re W and L (Parameters of protected estate management orders)* [2014] NSWSC 1106 at [48]; *H v H* [2015] NSWSC 837 at [6]-[18]; *MKH v JBH* [2016] NSWSC 1031 at [14]-[18].

- 32 Protected estate management orders, if made, have the effect, *prima facie*, of suspending the authority of a tutor to conduct compensation proceedings: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [38] *et seq*; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [40]-[49]; *MKH v JBH* [2016] NSWSC 1031 at [13]. The court hearing a compensation claim is generally better placed to supervise the conduct of a claimant's tutor, on terms fairer to both parties to the claim, in adversarial proceedings, than is the Court, exercising protective jurisdiction, at a distance, in what may effectively be *ex parte* proceedings.
- 33 Much of the work formerly performed by the Supreme Court in the exercise of its protective jurisdiction is now performed by NCAT's Guardianship Division. It routinely deals with the making and revocation of financial management orders and guardianship orders, the granting of medical consents and reviews of enduring powers of attorney and enduring guardianship appointments. It does not, however, have power to authorise, or permit, a financial manager to claim remuneration (*Ability One Financial Management Pty Limited and Anor v JB by his tutor AB* [2014] NSWSC 245); to supervise tutors in court proceedings (*Civil Procedure Act 2005 NSW*, section 80; *Re P* [2006] NSWSC 1082; *Bobolas v Waverley Council* [2012] NSWCA 126 at [58] and [60]); or to order that money paid into court pursuant to a judgment for the recovery of personal injury compensation be paid out (*Civil Procedure Act 2005*, sections 75-79; *Dunning v NSW Trustee & Guardian* [2015] NSWSC 2095).
- 34 The NSW Trustee & Guardian (often known by its alternative title, the NSW Trustee) manages some protected estates, and supervises all protected

estates, subject to directions of the Supreme Court: *NSW Trustee and Guardian Act 2009* NSW, chapter 4. It is the statutory successor to the Protective Commissioner, the successor in turn to the Court's Master in Lunacy. Unlike its predecessors, the NSW Trustee is not an officer of the Court. Nevertheless, the Court regularly looks to the NSW Trustee to provide assistance, including executive services, in its exercise of protective jurisdiction: *M v M* [2013] NSWSC 1495 at [10] *et seq.*

- 35 Historically, the Court's protective jurisdiction is based upon delegations by the Crown to the Lord Chancellor of jurisdiction protective of those deemed incapable of self-management: idiots or natural fools, lunatics, others of "unsound mind" and infants. These days, we think not of the *Crown's* protective functions, but the *State's*.
- 36 The efficacy of administration of the State's legal system for the protection of those in need of protection depends, in large part, on adoption by the Court of practice conventions in exercise of the jurisdiction it enjoys as a superior court. Reserving all its powers for cases in which they may be needed, the practice of the Court is to exercise purposeful restraint in deployment of its inherent jurisdiction, with the object of facilitating the work of statutory courts and tribunals, and channelling appeals from those courts and tribunals through the regulatory framework for which their governing legislation specifically provides.
- 37 The work of the Court in its administration of protective jurisdiction is, and must be, integrated with that of the statutory courts, tribunals and authorities which bear the heavy burden of the routine cases: in the finding of facts, in the making and revocation of orders, and in the day-to-day management of the "person" and "estates" of individuals in need of protection.
- 38 Currently, there are three statutory courts or tribunals, staffed with personnel with specialist expertise, supported by administrative arrangements dedicated to the performance of specialist functions, upon whose work the effectiveness

of the State's legal system for the protection of those in need of protection particularly depends:

- (a) NCAT's Guardianship Division focuses upon individuals unable, independently to manage their person or property.
- (b) The Mental Health Review Tribunal focuses on forensic patients and, more generally, the care and treatment of people with a mental illness or mental disorder.
- (c) The Children's Court of NSW focuses on individuals under the age of 18 years, variously described as "infants", "minors", "children", and "young persons" depending on context.

39 The focus of the present paper (on the management of the estate of a person incapable of managing his or her own affairs) calls for no more than passing notice to be given to the Children's Court, and little more to the MHRT. A protected estate management order can be made in respect of the estate of a minor: *JP v CP* [2013] NSWSC 273 at [2]; *AC v OC (a minor)* [2014] NSWSC 53 at [47]-[57]; *Re AAA; Report on a protected person's attainment of the age of majority* [2016] NSWSC 805. Management orders made by NCAT (under the *Guardianship Act 1987*), the MHRT (under Part 4.3 Division 1 of the *NSW Trustee and Guardian Act*) and by the Court in exercise of its jurisdiction under Part 4.2 of the *NSW Trustee and Guardian Act* have in common subjection of an estate (the protected estate) to administration under the *NSW Trustee and Guardian Act*.

40 It is engagement of that system of administration that activates the management/supervisory roles of the NSW Trustee. It is engagement of that system which most commonly affects the estates of those who seek, or obtain, personal injury compensation.

- 41 The District Court of NSW has no jurisdiction to appoint a protected estate manager under the *NSW Trustee and Guardian Act* or otherwise. If such an appointment is to be made, it must generally be made by the Supreme Court.
- 42 Where substantial damages are recovered in personal injury compensation proceedings, the practice is that, at the time of entry of the judgment for damages, the common law court (be it the Supreme Court or, just as frequently, the District Court) makes an order for money paid into court pursuant to section 77(2) of the *Civil Procedure Act* to be held in court pending the determination of an application to the Supreme Court for the appointment of a protected estate manager, coupled with an order for the funds in court to be paid out to the manager, subject to the orders and direction of the NSW Trustee. That practice should be adhered to.
- 43 In theory, an application could be made to NCAT for the appointment of a financial manager (under the *Guardianship Act*) after the entry of a judgment for damages in the District Court, followed by an application to the District Court (under the *Civil Procedure Act*, section 77(4)) for payment out of court of compensation paid into court (pursuant to section 77(2) of the *Civil Procedure Act*) in satisfaction of the judgment. However, that is likely to be a cumbersome process productive of extra costs, delay and ongoing proceedings, particularly if (as is often the case) the preferred manager is a corporation in the character of a private manager for reward. NCAT does not have power to authorise a manager to be remunerated.
- 44 In any event, the Supreme Court should continue to be directly engaged with large (and complex) estates, particularly those large enough to require, and fund, management by a licensed trustee company or other private manager for reward.
- 45 *Prima facie*, if a plaintiff in compensation proceedings requires a tutor for the conduct of those proceedings, consideration needs to be given to whether he or she also requires a protected estate management regime to manage the compensation recovered.

(6) SUPERVISORY JURISDICTION OVER “TUTORS”

- 46 No less important than the Supreme Court’s general protective jurisdiction is the ability of each court governed by the *Civil Procedure Act* 2005 NSW and the *Uniform Civil Procedure Rules* 2005 NSW to regulate, *via* tutors, proceedings before the particular court in which a party to the proceedings is under a legal incapacity: CPA section 3 (definition of “person under legal incapacity”) and Part 6 Division 4 (sections 74-80); *UCPR* Part 7 Division 4 (rules 7.13-7.18).
- 47 These powers are protective in character, if only by analogy; but the Supreme Court’s inherent jurisdiction extends, in any event, to the appointment (and removal) of a tutor for the purpose of proceedings in any court or tribunal: *Re P* [2006] NSWSC 1082 at [8]; *Bobolas v Waverley Council* [2012] NSWCA 126 at [58] and [60]. Section 80 of the *Civil Procedure Act* 2005 NSW also empowers the Supreme Court, on the application of a tutor, to give directions with respect to the tutor’s conduct of proceedings, whether the proceedings be in the Supreme Court or some other court.
- 48 In exercise of its powers, the Supreme Court endeavours to be mindful not to interfere with the conduct of proceedings in other courts: eg, *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [37]-[53] *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [40]-[49]; *MKH v JBH* [2016] NSWSC 1031.
- 49 When, upon settlement of a claim for compensation on behalf of a person under legal incapacity or otherwise incapable of managing his or her affairs, the Court is called upon to approve the settlement pursuant to section 76 of the *Civil Procedure Act*, the jurisdiction exercised by the Court is protective in nature, akin to the Court’s inherent protective jurisdiction: *Fairhurst (bht NSW Trustee and Guardian) v Fairhurst* [2012] NSWSC 388 at [30]-[40]; *Institoris by his next friend Maria Institoris v Falcolner* [2012] NSWCA 298 at [2].

(7) AN IMPORTANT LINK BETWEEN COMMON LAW AND PROTECTIVE PROCEEDINGS: PAYMENT OF COMPENSATION INTO COURT PENDING ESTABLISHMENT OF A PROTECTIVE MANAGEMENT REGIME

50 The Court's restraint in making orders that might affect pending proceedings is predicated upon an assumption that, at the conclusion of such proceedings, orders will be made (under CPA section 77) designed, by a requirement that compensation moneys recovered in those proceedings be paid into court, to facilitate a constructive engagement with the State's protected estate management regime: *MKH v JBH* [2016] NSWSC 1031 at [16] and [20].

51 The procedure for payment of money into, and out of, court is not a mere formality. Three examples illustrate the point.

52 First, it provides an orderly path for dealing constructively with the exceptional case in which a person who recovers compensation through a tutor seeks an opportunity to contend that he or she is not a person incapable of self-management: eg, *CJ v AKJ* [2015] NSWSC 498.

53 Secondly, it facilitates the Court's selection of a "suitable person" for appointment as a protected estate manager by allowing the Court, if need be, to obtain a report on the suitability of a proposed manager bearing in mind the size and composition of the estate to be managed: eg, *Ability One Financial Management Pty Limited and another v JB by his tutor AB* [2014] NSWSC 245 at [290](m); *MKH v JBH (No. 2)* [2016] NSWSC 1103.

54 Thirdly, by ensuring that an estate remains within the control of the Court during engagement of the protected estate management regime it facilitates the efficient approval by the NSW Trustee, under the direction of the Court, of a plan of management for management of an incapable person's protected estate, and a placement of funds under management on terms designed to hold a manager to an approved plan.

55 In a legal system in which an award of personal injury compensation is often satisfied by an insurer standing behind the defendant, or a self-insured

institutional defendant, established procedures (for which section 77 of the *Civil Procedure Act* provides) for the payment of a judgment sum into court, often adjusted for repayment of social welfare pay-backs, provides a mechanism for a smooth transition from litigation to estate management. It allows arrangements to be made for an orderly identification of a protected estate manager and an orderly engagement of the State's regime for protected estate management.

- 56 Effective operation of the administrative system for which the *NSW Trustee and Guardian Act* provides requires not only orders for the appointment of a manager, and for management of an estate subject to the Act, but, also, timely notification of the NSW Trustee that such orders have been made. A failure to engage the Act fully, in practice as well as in theory, can expose those involved in management of an estate to liability for mismanagement of it, and can complicate arrangements for a change of manager (*SLJ v RTJ* [2017] NSWSC 137) or an application for revocation of the management orders (*Re LSC and GC* [2016] NSWSC 1896).
- 57 In some quarters there is strong resistance to engagement of the administrative system for which the *NSW Trustee and Guardian Act* provides. It is usually accompanied by a strong predisposition against involvement with the NSW Trustee as a regulatory authority; an expressed desire to minimise management costs; an unexpressed desire to control the affairs of an incapable member of family; a complete disregard of concerns about conflicts of duty and interest, conflicts between interests and learning about the obligations of fiduciaries; and, sometimes, a misplaced belief in the efficacy of a "private" trust arrangement.
- 58 Not uncommonly, there is a failure to appreciate: (a) the risks and costs associated with trust arrangements (*AC v OC (a minor)* [2014] NSWSC 53; *Re X* [2016] NSWSC 275); (b) the comparative flexibility of management orders *vis-a-vis* a trust arrangement; and (c) the scope for the appointment of private managers, including members of family, in a regime governed by the *NSW Trustee and Guardian Act*.

59 An application for the appointment of a protected estate manager requires the Court to exercise an independent judgement about whether a person thought to be in need of protection is, or is not, capable of managing his or her own affairs; the need, or otherwise, for a protected estate manager; the utility, or otherwise, of a protected estate management regime; and the selection of a protected estate manager.

60 Occasionally, a person who has conducted personal injury litigation through a tutor will be found not to require a manager, or likely not to require one in the foreseeable future: eg, *CJ v AKJ* [2015] NSWSC 498; *H v H* [2015] NSWSC 837.

(8) THE SUPREME COURT’S “PROTECTIVE LIST”

61 All judges of the Supreme Court, in common with each other judge of the Court, can exercise the whole of the Court’s jurisdiction. Arrangements for particular judges to specialise in one or another type of case (in the Common Law Division or the Equity Division, as the case may be) reflect considerations of administrative convenience, not jurisdiction.

62 Within the Equity Division, all judges routinely decide Probate List cases and, less frequently, Protective List cases. The Probate and Protective List judge has no monopoly on either type of case.

63 The field of operation of the Protective List focuses squarely upon persons who are unable, by reason of incapacity, to manage their own affairs (their property or person).

64 Although the Court’s protective jurisdiction includes jurisdiction over minors (*Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258 -259), cases involving minors are not routinely dealt with in the Protective List unless the problem at hand concerns the administration of a minor’s property.

- 65 Cases concerning the appointment of a protected estate manager to manage compensation recovered on behalf of a minor in personal injury litigation are routinely dealt with in the Protective List: eg, *AC v OC (a minor)* [2014] NSWSC 53; *Re AAA: report on a protected person's attainment of the age of majority* [2016] NSWSC 805.
- 66 Senior Deputy Registrar Brown generally serves as the Court's "Probate and Protective List Registrar", with routine directions hearings each Monday. She case manages proceedings and, as appropriate, refers them to the Probate and Protective List Judge for consideration, in chambers or otherwise, as the nature of the case may require.
- 67 The Probate and Protective List judge periodically entertains probate and protective cases on a "*List Day*", currently every second Monday, in the course of which a variety of business is conducted: including applications for the revocation of protected estate management orders and appeals from the Guardianship Division of NCAT.
- 68 The Protective List judge also deals with routine business that requires a judge and can be dealt with in the absence of parties "in chambers". That work generally involves applications for protected estate management orders (under sections 40-41 of the *NSW Trustee & Guardian Act*), accompanied by an application for an order (under the *Civil Procedure Act*, section 77) for the payment out of court of compensation moneys paid into court pursuant to a judgment in personal injury litigation conducted, on an exercise of common law jurisdiction, in the Common Law Division of the Supreme Court or in the District Court of NSW.
- 69 The need for an order that funds in court be paid out drives much of the Court's protective work. That work otherwise goes to NCAT's Guardianship Division, governed by the *Guardianship Act 1987 NSW* and the *Civil and Administrative Tribunal Act 2013*.

- 70 Although NCAT’s statutory powers fall short of the powers of the Court, the legislation that governs proceedings in the Tribunal confers on the Tribunal jurisdiction of a character similar to that exercised by the Court. The decision-making process of both the Court and the Tribunal are governed by a need to consult the purposive character of the protective jurisdiction: *NSW Trustee and Guardian Act*, section 39; *Guardianship Act*, section 4; *Civil and Administrative Tribunal Act*, Schedule 6 clause 5.
- 71 Although the protective jurisdiction works best when routine procedures are followed, so as to engage all those interested in due management of an estate, the Court can, and often does, proceed with a minimum of formality. As classically stated by HS Theobald (*The Law Relating to Lunacy*, London, 1924, page 382): Whereas equity practice (and, it might be added, common law practice) is directed to litigation, protective jurisdiction practice “should be directed to administration without strife in the simplest and least expensive way”.
- 72 An illustration of this (recognised in rule 57.2(2) of the *Uniform Civil Procedure Rules* 2005 NSW) is the procedure whereby the NSW Trustee applies to the Court “on report and proposal”. The NSW Trustee submits to the Protective List Judge a written report which, following an elaboration of facts, concludes with a proposal for action recommended to the judge for adoption. If adopted, by formal acceptance of the recommendation, the proposal is implemented as an order of the Court. The procedure is used, for example, to confirm the authority of the NSW Trustee to take specific action in the interests of a protected person, or to effect a revocation of management orders affecting a small estate, in the absence of controversy about the desirability of so doing.

(9) THE MAIN CASES

- 73 The main appellate authorities that inform, and govern, an exercise of the Supreme Court’s protective jurisdiction are:

- (a) *Marion’s case* (1992) 175 CLR 218 at 258-259.

- (b) *Gibbons v Wright* (1954) 91 CLR 423 at 437-439.
- (c) *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423, read with *Clay v Clay* (2001) 202 CLR 410 at 428-430 and 432-433.
- (d) *Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542, 543 and 544-545.

74 *Marion's Case* identifies the nature, purpose and breadth of the Court's inherent jurisdiction. It does so by reference to a judgment of Lord Eldon in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243 and the historical exposition of the jurisdiction found in *Re Eve* [1986] 2 SCR 288 at 407 *et seq*; (1986) 31 DLR (4th) 1 at 13 *et seq*, a judgment of the Canadian Supreme Court. In essence, these judgments confirm that the protective jurisdiction exists to take care of those who are not able to take care of themselves. The purposive character of the jurisdiction derives from that essential observation.

75 *Gibbons v Wright* is a primary authority for the proposition that the law does not prescribe any fixed standard of sanity (or, more broadly, incapacity) as a requisite for the validity of all transactions. It requires, in relation to each piece of business transacted, that each party have such soundness of mind as to be capable of understanding the general nature of what he or she is doing by his or her participation in that business.

76 *Countess of Bective v Federal Commissioner of Taxation* and *Clay v Clay* are primary authorities for the proposition that a protective estate manager or the like is a fiduciary (although not a trustee in the strict sense) whose liability to account for the property of an incapable person under management may depend on whether or not the manager has fulfilled the purpose for which he or she was appointed to office: namely, to care for a person unable to take care of himself or herself. The mere fact that a "guardian" of the property of an incapable person has shared a benefit arising from expenditure for the benefit

of the incapable person will not, of itself, expose the guardian to a liability to account.

77 *Protective Commissioner v D* confirms that the Court's protective jurisdiction extends, independently of statute, to authorisation of voluntary allowances out of a protected estate for the maintenance or benefit of a protected person's family.

(10) THE MAIN LEGISLATION

78 The main legislation encountered upon an exercise of the Supreme Court's protective jurisdiction comprises the following:

- (a) the *NSW Trustee and Guardianship Act* 2009 NSW, especially sections 38-41, 64-65, 71 and 86.
- (b) the *Civil Procedure Act* 2005 NSW, section 3 (definition of "person under legal incapacity") and Part 6 Division 4 (sections 74-80).
- (c) the *Uniform Civil Procedure Rules* 2005 NSW, Part 7 Division 4 (rules 17.13-17.18).
- (d) the *Powers of Attorney Act* 2003 NSW.
- (e) the *Civil and Administrative Tribunal Act* 2013 NSW, especially schedule 6 clause 14.
- (f) the *Guardianship Act* 1987 NSW.
- (g) the *Succession Act* 2006 NSW, sections 18-26.

79 The *Powers Of Attorney Act* 2003, often encountered in general equity cases, is less often encountered directly upon an exercise of protective jurisdiction. That is because, while it subsists, a protected estate management order

generally suspends the operation of a power of attorney: *Powers of Attorney Act*, section 50; *NSW Trustee and Guardian Act*, section 71(1); *Scott v Scott* (2012) NSWSC 1541; (2012) 7 ASTLR 299 at 343.

80 An appeal from the Guardianship Division of NCAT is governed by Schedule 6 clause 14 of the *Civil and Administrative Tribunal Act* 2013, which provides substantial scope for appeal procedures to be adapted to accommodate the real issues in a *bona fide* appeal: *P v NSW Trustee and Guardian* [2015] NSWSC 579; *C v W* [2015] NSWSC 1774. Appeals which are mainly an attempt to re-run a factual dispute decided by NCAT are not uncommon; but, when exposed as such by an insistence that there be precisely drafted grounds of appeal, coupled with a reminder that the Supreme Court is not a cost-free jurisdiction, they can often be dealt with summarily. As NCAT's protective jurisdiction is conferred by reference to the *Guardianship Act* 1987, an appeal from NCAT requires the Court to consult that Act as a primary source.

81 The *Succession Act* 2006 is encountered upon an exercise of protective jurisdiction primarily because it empowers the Court to authorise the making of a "statutory will" for a person who lacks testamentary capacity. In NSW, the leading case is *Re Fenwick* (2009) 76 NSWLR 222, which must be read in light of the judgment of the Queensland Court of Appeal in *GAU v GAV* [2016] 1 Qd R 1; [2014] QCA 308.

(11) AVAILABLE TEXTS

82 There is no up-to-date, current text available, although one of my former tipstaves (Esther Khoo) has a handbook in preparation and two former other tipstaves (Hugh Morrison and Mary-Ann de Mestre) edited the recent, special issue of the *Australian Bar Review* identified at the commencement of this paper.

83 The most comprehensive, relatively modern treatment of the topic is Nick O'Neill and Carmelle Peisah's handbook, *Capacity and the Law* [2011] SydUPLawBk 1, published by Sydney University Press on the Austlii website.

The authors are presently preparing a second edition to take into account significant developments in law and practice since 2011.

84 The late Philip Powell's Forbes lecture (*The Origins and Development of the Protective Jurisdiction of the Supreme Court of New South Wales*), published by the Forbes Society in 2004, includes a summary of the powers of the Supreme Court (pages 73-76) and an appendix listing significant judgments published by Powell J in the period 1982-2000 (pages 77-83). His Honour made a significant contribution to the law and practice relating to the protective jurisdiction.

85 Over many years, the text most often used in exposition of the Supreme Court's protective jurisdiction has been Sir Henry Studdy Theobald's classic, *The Law Relating to Lunacy* (Stevens and Sons, London, 1924), as explained in *W v H* [2014] NSWSC 1696 at [29]-[37].

86 *Theobald* is long out of print but, as an old text, it has been reproduced on the internet. It remains an insightful treatment of enduring problems that arise in administration of the protective jurisdiction, even allowing for modern developments and local legislation.

87 For completeness, reference might be made to Brian E Porter and Mark B Robinson's *Protected Persons and their Property in New South Wales* (Law Book Co, Sydney, 1987), a handy text in its time but now largely out of date.

(12) CONCEPTS VIS-À-VIS TERMINOLOGY

88 A newcomer to study of the protective jurisdiction is confronted by a bewildering array of synonyms for basic concepts, in part a reflection of different historical foundations for a jurisdiction melded from composite parts.

(12.1) The Protective Jurisdiction

89 The jurisdiction itself goes by different names. The adjective appended to the noun varies between "protective", "*parens patriae*", "inherent", "lunacy" and, in

relation to minors, “wardship”. Use of the expression “Lunacy Jurisdiction” has been discouraged in NSW since about 1958, when the expression “Protective Jurisdiction” was adopted as a substitute: *Mental Health Act 1958* NSW, sections 5-6.

- 90 In NSW we tend to reserve the expression *parens patriae* jurisdiction for cases involving minors. However, chapter 9 of Joseph Chitty’s *Treatise on the Law of the Prerogatives of the Crown* (London, 1820) confirms that the expression has long applied to cases involving “infants”, “idiots” and “lunatics” (a collection of cases we sometimes place under the rubric *parens patriae*) and, in addition, to “charities”, a topic we do not generally associate with the expression *parens patriae* (*Estate Polykarpou; re a Charity* [2016] NSWSC 409). One common denominator is that, historically, the Crown claimed jurisdiction as “the father (or parent) of the nation” (*parens patriae*). Another is that each head of jurisdiction involves a public interest aspect that transcends the interests of private parties.

(12.2) Protected Estate Managers (Committees of the Estate)

- 91 The office we presently describe as that of a “(protected estate) manager” or “financial manager” is substantially the same as that which, in historical terms, was described as a “committee of the estate”, an expression still used (to avoid misunderstandings) when the Court exercises its inherent jurisdiction to appoint a “manager”: *IR v AR* [2015] NSWSC 1187 at [113].
- 92 The office of a “manager” (however described) is fiduciary in character, sometimes likened to that of a bailiff or agent, and distinguished from that of a trustee in the strict sense: *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [166]-[175]; *Clay v Clay* (2001) 202 CLR 410 at 428-431. The office is a gratuitous one unless a special arrangement to the contrary is authorised by legislation (as it is in relation to the NSW Trustee and licensed trustee companies) or an order of the Court.

- 93 The Court's jurisdiction to appoint a committee of the person is generally invoked to deal with exceptional cases: eg, *IR v AR* [2015] NSWSC 1187 (extra territorial operation of orders); *G v G* [2016] NSWSC 511 (urgent orders to guard against exploitation by a suitor).
- 94 On an exercise of protective jurisdiction, the Court sometimes appoints a "receiver and manager", rather than a manager, in order to underscore the interlocutory character of the appointment. If, in such a case, the NSW Trustee is the receiver, the Court's practice is to define the receiver's powers as those exercisable by the NSW Trustee if management of the estate were to be committed to the NSW Trustee: *JMK v RDC and PTO v WDO* [2013] NSWSC 1362; *L v L* [2014] NSWSC 1686 at [60]-[69].
- 95 The Court's jurisdiction to appoint a receiver and manager is both statutory and inherent. Receivers have long been appointed in exercise, or in aid of an exercise, of the Court's protective jurisdiction: *GNM v ER* [1983] 1 NSWLR 144 at 148C-149D; Theobald, *The Law Relating to Lunacy* (1924), pages 54, 401-403 and 511-513. In *Ex parte Warren* (1805) 10 Ves Jun 622; 32 ER 985 at 986 Lord Eldon regarded as immaterial whether a person appointed to manage the estate of a lunatic was called "committee" or "receiver". As any form of protected estate management order is liable, with a change in circumstances, to be revoked or varied there is a sense in which *all* such orders are "interlocutory", not "final".

(12.3) Guardianship Orders (Committees of the Person)

- 96 In the *Guardianship Act* 1987 NSW the expression "guardianship order" accords with that which historically, and upon an exercise of the Court's inherent jurisdiction, is known as an order for the appointment of a "committee of the person": *NSW Trustee and Guardian v Ralph Stern* [2015] NSWSC 2087 at [7]-[9], citing *RH v CAH* (1984) 1 NSWLR 694 and *MN v AN* (1989) 16 NSWLR 525.
- 97 On closer examination, the expression "guardian" depends very much on the context in which it is used: *IR v AR* [2015] NSWSC 1187 at [105]-[114].

- 98 In modern usage, it is commonly associated with the guardianship of minors and protection of the person as distinct from the protection of property. However, in earlier times the Court's "guardianship jurisdiction" was regarded as synonymous with its *parens patriae* jurisdiction, including jurisdiction over the appointment and removal of committees of the estate as well as committees of the person: *Tomlins' Law Dictionary* (London, 1810), "Guardian", paragraph [7].
- 99 In broad terms, according to the practice of the English Lord Chancellor at the time NSW inherited English law and procedure in the 1820s, a committee of the person was perceived to be the equivalent of a "tutor", and a committee of the estate was acquainted with that of "curator", under Roman law: Blackstone, *Commentaries on the Laws of England* (1st edition, 1765-1769; 9th edition, 1783), volume 1, pages 305 and 460.
- 100 An appointment by the Court of a "committee of the person" is comparatively rare, given the ease with which people can themselves appoint an "enduring guardian" and the ready access that can be had to the Guardianship Division of NCAT for the review of such instruments and/or the appointment of a guardian. The Court's jurisdiction to appoint a committee of the person is generally invoked to deal with exceptional cases: eg, *IR v AR* [2015] NSWSC 1187 (orders required for extra-territorial operation); *G v G* [2016] NSWSC 511 (urgent orders required to prevent exploitation by overseas suitors).

(12.4) Tutors

- 101 Today, we confine use of the word "tutor" more narrowly. Section 3 (1) of the *Civil Procedure Act* 2005 NSW defines the word as follows:

"Tutor, in relation to a person under legal incapacity, means a tutor appointed to represent the person (whether by the Court or otherwise) in accordance with the *Uniform Rules*".

- 102 Equivalent expressions, sometimes sanctified by legislation and sometimes simply used colloquially, are "next friend" and "guardian *ad litem*".

103 The word “*tutor*” is Latin in origin, associated with the idea of a person protecting, defending, making safe another person. In modern legal language, this essential idea remains central.

(13) THE PURPOSIVE CHARACTER OF THE JURISDICTION

(13.1) The purposive character identified

104 The governing purpose of the Supreme Court’s protective jurisdiction is *protection of the welfare and interests of the particular protected person in need of protection*. The welfare and interests of the person in need of protection are paramount. This principle is sometimes referred to elliptically as “the paramountcy principle” or “the welfare principle”. Any decision made affecting the welfare or interests of a protected person must be made in a manner, and for a purpose, calculated to be in the best interests, and for the benefit, of the protected person: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238 and 241-242.

105 Care needs to be taken, in all decision making affecting a person in need of protection to focus on the facts of the particular case, preferably with due consultation with the particular person, his or her family and carers who may be well placed to inform the Court of his or her particular circumstances: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 238C-239B, 240D, 241B-F and 243E-F; *Re L* [2000] NSWSC 721 at [10].

106 There is currently a debate in some circles about whether legislation governing decision-makers such as the Guardianship Division of NCAT should be based upon a “substituted decision making model” or an “assisted decision-making model”.

107 That debate is fuelled, in part, by proponents of human rights jurisprudence who perceive that persons incapable of self-management have been deprived of rights which, with greater assistance, they would, and should, have been able personally to assert. They perceive that too many decisions have been made on behalf of such persons by others who have simply substituted their

own decisions for those which, with greater consultation, individual incapable persons might themselves have been able to make.

- 108 The debate might also be a function, in part, of the increasingly broad range of people whose estates have come under management in a society in which “mental illness” is no longer a necessary element in characterisation of a person as “incapable of managing his or her own affairs”: *David by her tutor the Protective Commissioner v David* (1993) 30 NSWLR 417 at 436E-437C, placed in historical context in *P v NSW Trustee and Guardian* [2015] NSWSC 579 at [235]-[258]. These days, the protective jurisdiction is focussed, not on a person’s “status” as somebody said to be “mentally ill”, but upon the functional question whether he or she is capable of managing his or her own affairs: *PB v BB* [2013] NSWSC 1223 [50].
- 109 At one end of a broad spectrum are cases of individuals physically incapable of making any decision about their welfare and interests. At the other end, there are cases of individuals who, if supported by their community, are probably able to get by without particular supervision or substituted decision-making.
- 110 Across the spectrum, it is not uncommon for people whose estates are under protective management to resent any form of restraint, however beneficial it may be to their interests, whoever may be the decision-maker affecting them, and whatever may be their insight into their own capacity.
- 111 In concept, the purposive character of the protective jurisdiction is such that a person whose estate or person is under management *should* be consulted and allowed as much freedom (including a freedom to make mistakes) as circumstances may reasonably allow.
- 112 Whether or not particular considerations are appropriately ranked to meet all cases, this is apparent in the statement of “general principles” set out in section 39 of the *NSW Trustee and Guardian Act 2009*:

“39 General principles applicable to Chapter

It is the duty of everyone exercising functions under this Chapter with respect to protected persons or patients to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation.”

113 This statement of principles represents an adaptation of a similar statement found in section 4 of the *Guardianship Act* 1987.

114 That the purposive character of the protective jurisdiction may require adaptation in different circumstances may be illustrated by reference to the need to accommodate public safety in the formulation of legislation governing the Mental Health Review Tribunal’s work with forensic patients: *A (by his tutor Brett Collins) v Mental Health Review Tribunal (No 4)* [2014] NSWSC 31 at [116]-[211].

(13.2) Consequences of the Jurisdiction’s Purposive Character

115 The purposive character of the protective jurisdiction carries procedural consequences which mark out an exercise of protective jurisdiction as different from what is routinely experienced in ordinary, adversarial proceedings on a claim of right at common law.

116 Without pretending to be exhaustive, several illustrations are noted.

- 117 First, the protective jurisdiction is not a “consent jurisdiction”. Orders cannot be made simply “by consent” of parties. For example, an order for the appointment, removal or replacement of a particular manager is not to be made merely because a party, or some other person, seeks it, consents to it or acquiesces in it: *JJK v APK* (1986) *Australian Torts Reports* 80-042 at 67, 881 (first guideline). The Court is bound to exercise an independent judgement because of the public interest element in the decision to be made and the possibility, if not the fact, that the person in need of protection lacks the mental capacity requisite to informed decision-making.
- 118 Secondly, by its nature the protective jurisdiction has a strong administrative flavour. Historically, the origins of the jurisdiction are found in delegations from the Crown to the Lord Chancellor, and much of the Lord Chancellor’s work was necessarily performed by his delegates or administrative staff: HS Theobald, *The Law Relating to Lunacy* (1924), page 61; Leonard Shelford, *A Practical Treatise on The Law Concerning Lunatics, Idiots and Persons Of Unsound Mind* (London, 1833), pages 25-27. The work of the Supreme Court, as the local repository of jurisdiction historically exercised by the Lord Chancellor in England, cannot, functionally, be entirely separated from executive government in one form or another. In a practical sense, an exercise of protective jurisdiction often requires that the Court be afforded assistance by the NSW Trustee as well as the Court’s Registry. The Court’s powers under the *NSW Trustee and Guardian Act* include (in sections 61 and 64) powers to give directions to the NSW Trustee: for example, to provide to the Court a report on particular questions.
- 119 Thirdly, whereas standing to sue on a common law claim depends upon the claimant’s possession of a cause of action, even a stranger may apply for the appointment or revocation of protected estate management orders. In protective proceedings, the question of standing ultimately returns to the rationale for the protective jurisdiction itself (the need for an accessible remedy for the protection of a person who, unable to manage his or her own affairs, is in need of protection): *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [92].

- 120 Fourthly, because a protected person may lack the mental capacity requisite to informed decision-making and, in that sense, may be “absent” from any deliberations of the Court, and because of the public interest element in the process of decision-making of the Court, protective proceedings may be more inquisitorial than adversarial in character.
- 121 The protective jurisdiction is classically said to be “parental and protective”, “for the benefit of [the person in need of protection]” and “directed to administration [of the affairs of such a person] without strife in the simplest and least expensive way” rather than “to litigation”: Theobald, *The Law relating to Lunacy* (1924) pages 380 and 383.
- 122 The focus is on problem solving, from the perspective of the person in need of protection, rather than on adjudication of competing claims made by adversaries. This is graphically illustrated, in many cases, by a tendency on the part of the family of an incapable person to be passionate about the affairs of the incapable family member until such time as they are put on notice that they may have an exposure to personal costs orders or, contrary to their wishes, an independent manager or guardian might be appointed. Sometimes reasonable solutions emerge only when self-interest and altruism are forced to make choices.
- 123 Because the Court’s focus is on “problem solving” governed by its purposive jurisdiction, it may be required to be more attentive to outcomes than it is required to be in ordinary civil proceedings between fully competent adversaries. There is a purpose-driven concern about outcomes, and a special need to have regard to the utility, or otherwise, of proposed orders.
- 124 Fifthly, in exercising its protective jurisdiction the Court is not necessarily bound by strict rules of evidence, but has a discretion to act on material which is rationally probative, even though excluded by such rules; the Court is able to proceed upon consideration of what is rationally probative of material facts, with due regard to considerations of fairness *vis-a-vis* affected parties: Theobald, *The Law Relating to Lunacy* (1924), pages 59-60; *Roberts v*

Balancio (1987) 8 NSWLR 436; *CAC v Secretary, Department of Family and Community Services* [2014] NSWSC 1855 at [7]. The operation of the Court's protective jurisdiction might usefully be informed by the rules of evidence as a counsel of good practice, or procedural fairness, but the paramountcy principle, fundamental to the operation of the protective jurisdiction, prevails, where it must, over technical rules of evidence.

- 125 Sixthly, if an unqualified application of the principles of natural justice would frustrate the purpose for which the protective jurisdiction exists, an application of those principles may be qualified to that extent: *J v Lieschke* (1987) 162 CLR 447 at 457.
- 126 Seventhly, upon an exercise of protective jurisdiction, the mere fact that a person is incapable of managing his or her own affairs is insufficient to compel the Court to make an order for protected estate management, or to sustain the continuation of such an order, absent a need for, or utility in, the existence of such a manager: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286 at [42]. Questions of utility loom large in the determination of protective proceedings.

(14) THE CONCEPT OF “INCAPACITY”

- 127 If a single judgment informs the meaning of the expression “incapable of managing his/her own affairs” and equivalent expressions, it is *Gibbons v Wright* (1954) 91 CLR 423 at 737-739. That judgment counsels that capacity for self-management is generally to be assessed by reference to what it is that has to be managed in the particular case. It ties the concept of capacity to particular facts, looking forward to what is required for due management of the affairs of a person perceived to be in need of protection.

(14.1) Management of a Protective Estate *via* a Manager

128 In exposition of the concept of incapacity for self-management, in the context of protected estate management orders, I repeat here observations made by me in *CJ v AKJ* [2015] NSWSC 498 at [14]-[43]:

“14. **Capacity for Self-Management.** The expression “a person ... incapable of managing his or her affairs”, central to the operation of section 41(1) of the *Trustee and Guardian Act* and associated provisions, is undefined by the Act.

15. An illustration of one of the provisions associated with section 41(1) is its procedural converse, section 86 of the Act. It provides a procedure for revocation of an order made under section 41. The Court’s inherent jurisdiction extends to revocation of a management order independently of section 86: *Re W and L (Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106 at [87]-[89].

16. Section 86(1), with emphasis added, provides as follows:

‘86 Revocation of orders by Supreme Court

(1) The Supreme Court, on application by a protected person and *if the Court is satisfied that the protected person is capable of managing his or her affairs*, may:

(a) *revoke any declaration made that the person is incapable of managing his or her affairs*, and

(b) *revoke the order that the estate of the person be subject to management under this Act*, and

(c) *make any orders that appear to it to be necessary to give effect to the revocation of the order, including the release of the estate of the person from the control of the Court or the manager and the discharge of any manager.*”

17. The proper construction, and operation, of chapter 4 of the *NSW Trustee and Guardian Act* (in which both section 41 and section 86 are located) is informed by:

(a) the nature and purpose of the Court’s inherent, *parens patriae* (protective) jurisdiction (explained in *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* (1992) 175 CLR 218 at 258-259), upon which chapter 4 is modelled; and

(b) the “general principles” enunciated in section 39 of the *NSW Trustee and Guardian Act*.

18. Chapter 4 (sections 38-100) is entitled “Management functions relating to persons incapable of managing their affairs”.

19. Section 38 defines the expression “protected person” as including, *inter alia*, a person in respect of whom an order is in force under section 41(1) that the whole or any part of the person’s estate be subject to management under the Act. Section 38 also defines the concept of an “estate” of a person as meaning, so far as presently material, “the property and affairs of a person”.

20. So far as material, section 39 of the Act is in the following terms:

‘39 General principles applicable to Chapter

It is the duty of everyone exercising functions under this Chapter with respect to protected persons ... to observe the following principles:

(a) the welfare and interests of such persons should be given paramount consideration,

(b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,

(c) such persons should be encouraged, as far as possible, to live a normal life in the community,

(d) the views of such persons in relation to the exercise of those functions should be taken into consideration,

(e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,

(f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,

(g) such persons should be protected from neglect, abuse and exploitation.’

21. This section is in substantially the same terms as section 4 of the *Guardianship Act 1987* NSW, which informs the performance by the Guardianship Division of the Civil and Administrative Tribunal of NSW (“NCAT”), under Part 3A (particularly sections 25E-25H) of the *Guardianship Act 1987* NSW, of functions similar to those conferred on the Supreme Court by reference to section 41(1) of the *NSW Trustee and Guardian Act. W v H* [2014] NSWSC 1696 at [54]-[60].

22. The practice of the Court, over many years, has been to view the expression “a person ... incapable of managing his or her affairs” through the prism of observations made by Powell J in *PY v RJS* [1982] 2 NSWLR 700 at 702B-E.

23. However, as explained by White J in *Re D* [2012] NSWSC 1006 at [46]-[67] and *Re R* [2014] NSWSC 1810 at [84]-[94], Powell J’s formulation of his test (sometimes described as an “objective” test) of capacity for self-

management by reference to “the ordinary affairs of man” has been the subject of criticism as: (a) a gloss on the legislation; and (b) not in unison with a perceived need, according to the terms of the legislation, to take subjective considerations into account on a determination of a particular person’s capacity for self-management.

24. In light of White J’s analysis (with which, in general, I agree), the Court should be mindful of a need to give effect to the text of the legislation without any elaborative gloss.

25. Insight into the meaning of the expression “a person ... incapable of managing his or her affairs”, as used in chapter 4 of the *NSW Trustee and Guardian Act*, can be had by study of broadly comparable provisions in Part 3A of the *Guardianship Act*.

26. However, although the expression is undefined in both statutes, the character of NCAT as a statutory tribunal carries with it a greater legislative prescription of the Tribunal’s procedures leading to the making of a Financial Management Order (under sections 25E-25H of the *Guardianship Act*) than can be found in conferral on the Supreme Court of jurisdiction (under section 41 of the *NSW Trustee and Guardian Act*) to make an equivalent form of management order. This is entirely consistent with the character of the Court as a superior court and preservation of its inherent, *parens patriae* jurisdiction.

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).”

129 Further elaboration of the concept of incapacity for self-management can be found in *P v NSW Trustee and Guardian* [2015] NSWSC 579 and *H v H* [2015] NSWSC 837.

130 Minds may differ about the utility of medical evidence in aid of a determination of whether a person is, or is not, capable of self-management. Occasionally, some doctors seem willing, like the general population, to accommodate their opinions to the prevailing wind and a desired outcome. Occasionally, a medical opinion seems contrary to the facts when the subject person appears

in the flesh. I repeat the following observations from *H v H* [2015] NSWSC 837 at [37]:

“Experience of the protective jurisdiction makes a judge wary of medical opinions, *unaccompanied by an articulation of primary facts based on empirical observation*, but forensically convenient to the application of the moment. It is for that reason, for example, that medical opinions expressed in support of an application for revocation of management orders (under section 86 of the NSW Trustee and Guardian Act) are routinely measured against earlier opinions expressed in support of an application for section 41 orders. The Court may take comfort from an *opinion*, but it must look primarily to facts, especially in close-run cases in which opinions may fairly differ. If in doubt, there is no substitute for a direct, personal engagement with the person whose capacity for self-management is under consideration, and those closely associated with him or her in daily living.”

(14.2) Management of Court Proceedings *via* a Tutor

- 131 The key expression “(in)capable of managing his or her affairs” is found, not only in the pivotal legislative provisions of the *Guardianship Act* (section 25G) and the *NSW Trustee and Guardian Act* (sections 41 and 86), but also in rule 7.13 of the *Uniform Civil Procedure Rules 2005 NSW*.
- 132 UCPR rule 7.13, found in rules of court governing the appointment or removal of a tutor, expands the definition of “person under legal incapacity” found in section 3(1) of the *Civil Procedure Act 2005 NSW* to include (in addition to a “protected person” within the meaning of the *NSW Trustee and Guardian Act*, section 38) “a person who is incapable of managing his or her affairs”.
- 133 In exposition of the concept of incapacity for self-management in the context of the appointment or removal of a tutor, I here repeat observations I made in *A v A* [2015] NSWSC 1778 at [70]-[78] and [80]-[82]. The orders made in that case were set aside, on the other grounds, by the Court of Appeal (*IA v TA* [2016] NSWCA 179), which expressly (at [55]) did not address the following observations (which incorporate minor editorial adaptations):

“70. In *Murphy v Doman* (2003) 58 NSWLR 51 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.

71. Drawing heavily 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.’

72. 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] and *Bowering v Knox* [2014] NSWSC 1107 at [14] and [38]), 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]’.

73. 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. ...

74. On a broader reading of the Court of Appeal’s judgment, it contains observations about legal incapacity that are consistent with *Gibbons v Wright*, and inconsistent with *PY v RJS*: [2003] 1 WLR 1511 at [18]-[20], [22]-[27], [29], [54], [58]-[60] and [62].

75. 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.

76. Further illustrations of the necessity for an appreciation 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*.

77. The primary meaning of the expression “person under legal incapacity”, within the CPA section 3(1) definition, is “any person who is under a legal incapacity in relation to the conduct of legal proceedings”, with a qualification not presently material. 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” is compelling.

78. 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....

80. Given the purposive and context-sensitive character of the concept of (in)capacity for self-management, a decision about such capacity upon consideration of whether to make a protected estate management order may need to be approached differently from a decision about capacity on consideration of whether to require a tutor, even if only because the nature and scope of inquiry about “the affairs” of the particular person that require management are different.

81. Nevertheless, it must be remembered that when a protected estate management order is made under section 41 of the *NSW Trustee and Guardian Act*:

(a) the power of the protected person to deal with his or her estate is suspended by operation of section 71 of the *NSW Trustee and Guardian Act*, and

(b) by virtue of the management order, the protected person falls within the definition of “person under legal incapacity” in CPA section 3(1), without a need for independent consideration of his or her capacity for self-management by reference to UCPR rule 7.13.

82. In each case, a decision-maker needs to be alive to nuances arising from a shift in perspective, and the need both: (a) to consult the welfare and interests of the particular person in need of protection as the paramount consideration (eg, the *NSW Trustee and Guardian Act*, section 4); 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.”

134 As Sackar J remarked in *Bowering v Knox* [2014] NSWSC 906 at [58]-[62], whatever be the correct test for determination of whether a person needs a tutor, the Court should be very carefully concerned to ensure that the person’s interests are protected. That concern is grounded in the role of the Court as a protector of a person who, through illness, is clearly vulnerable.

135 His Honour elaborated the Court’s role by adopting the following observations in *Masterman-Lister* at [78]:

“The courts have ample powers to protect those who are vulnerable to exploitation from being exploited; it is unnecessary to deny them the opportunity to take their own decisions if they are not being exploited. It is not the task of the courts to prevent those who have the mental capacity to make rational decisions from making decisions which others may regard as rash or irresponsible.”

136 In a helpful article entitled “Acting for the incapable - a delicate balance” (2012) 35 *Aust Bar Rev* 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.

137 In *Smith v NRMA Insurance Limited* [2016] NSWCA 250 Gleeson JA reviewed authorities relating to protective costs orders where a tutor cannot be found prepared to bear the risk of a personal costs order in the conduct of proceedings on behalf of an incapable person.

(15) STANDARD APPLICATIONS AND ORDERS

(15.1) Introduction

- 138 Most of the routine work of the Supreme Court's Protective List involves applications made to the Court under the *NSW Trustee and Guardian Act*.
- 139 Part 57 of the *Uniform Civil Procedure Rules* governs the procedure on those applications.
- 140 It includes a summary of the evidence ordinarily required on an application for management orders under section 41 of the NSW Trustee and Guardian Act (UCPR rule 57.5) and a summary of the evidence ordinarily required on an application under section 86 of the Act for revocation of such orders (UCPR rule 57.8).
- 141 UCPR rule 57.7 sets out a form of "usual orders" made on a section 41 application. In days past, judges adopted a summary form of announcement that "the usual orders" be made. That might still be done; but, more often, the Court's orders are these days set out in detail in short minutes of orders, signed and sealed by the Protective List Judge, which can be immediately "entered" in the records of the Court and provided to interested persons.
- 142 The current practice is to set out in short minutes of orders, not only the orders of the Court, but also a series of introductory notations that record: (a) a brief procedural summary of past orders affecting the person the subject of the proceedings; (b) the date of filing of the summons or notice of motion by which the current application was made to the Court, together with a short description of the relief sought; (c) a list of the affidavits or other evidence adduced in support of, or response to, the application; (d) a reference to any formal report on the application provided by the NSW Trustee; and (e) a short summary of the principal features of the case including, for example, the date of birth of the protected person.

- 143 The object of short minutes of orders so styled is to facilitate the work of the NSW Trustee, and others interested in due management of a protected estate, by identification of primary materials that may need to be consulted, and placement of current orders in their historical context.
- 144 A file of the Court relating to Protective List proceedings is never really “closed” even if, for administrative purposes, so described. On any application for directions, a change of manager or revocation orders the Court may, and generally does, access earlier records relating to the particular protected estate. It matters not that the Court’s internal system for numbering proceedings may have changed. There is a sense in which the record is a continuing one.
- 145 Although the rule is often honoured in the breach, UCPR rule 57.2(1) provides that “[once] proceedings (‘the original proceedings’) have been commenced under the *NSW Trustee and Guardian Act 2009* or the *Guardianship Act 1987* in relation to any person, any further proceedings under that Act in relation to the same person (whether or not they form part of, or relate to, the original proceedings), are to be commenced by a notice of motion filed in the original proceedings.” Notwithstanding that rule, it is not uncommon for applications for revocation orders to be made by way of a summons.

(15.2) An Application for a section 41 order

- 146 On an application for orders under section 41 of the *NSW Trustee and Guardian Act*, common, formal deficiencies in an application (which the Registrar generally requires to be rectified before proceedings can be dealt with by the Protective List Judge in chambers) are the absence of:
- (a) affidavits of at least two medical practitioners or other persons qualified to give an expert opinion on the condition of the person perceived to be in need of protection: UCPR rule 57.5(1)(b).

- (b) an affidavit setting out the names of the person's nearest relatives, so far as they are known, and the attitude of each of those persons to the application: UCPR rule 57.5(1)(a)(iii).

147 The requirement in UCPR rule 57.5(1)(b) that the affidavit of a medical practitioner (or other person qualified to give an expert opinion on the condition of a person perceived to be in need of protection) set out the deponent's diagnosis, and opinion, in the deponent's "own words and handwriting" is an important protection for those persons whose affairs are under consideration. It provides an assurance to the Court that a deponent has given specific, personal consideration to the particular problem at hand.

148 The importance of an affidavit, required by UCPR rule 57.5(1)(a)(iii), setting out the names and attitudes of the nearest relatives of a person perceived to be in need of protection, is an important safeguard, the significance of which can only be appreciated when one experiences applications made for the appointment of a protected estate manager designed to keep from the Court's view competing perspectives of family members who have, or may have, a personal or pecuniary interest in the outcome of the application. In a society in which fractured families are not uncommon, it is important to ensure that the interests of a person perceived to be in need of protection are not subordinated to fractious family disputes.

149 In an appropriate case, the Court may dispense with requirements of UCPR rule 57.5; but that does not routinely occur, and the parties can generally minimise costs and delay by a timely compliance with the rule.

150 The standard form of orders made on a section 41 application (in a case in which a private manager is appointed) is as follows:

- (1) DECLARE, pursuant to section 41(1)(a) of the *NSW Trustee and Guardian Act*, that the defendant is incapable of managing his/her affairs.

- (2) ORDER, pursuant to section 41(1)(a) of the *NSW Trustee and Guardian Act*, that the estate of the defendant be subject to management under the Act.
- (3) ORDER, pursuant to section 41(1)(b) of the *NSW Trustee and Guardian Act*, that XYZ be appointed manager of the estate of the defendant subject to the orders and direction of the NSW Trustee.
- (4) ORDER that XYZ may not do anything in reliance on its appointment as manager of the estate of the defendant until the NSW Trustee has authorised it to assume management of the defendant's estate.
- (5) ORDER, pursuant to section 68 of the *NSW Trustee and Guardian Act*, that XYZ give such, if any, security in respect of its management of the defendant's estate as the NSW Trustee may determine to be appropriate.
- (6) [Where XYZ is a licensed trustee company] ORDER that, subject to any further order of the Court or any order or direction of the NSW Trustee, all funds paid into court on the account of the defendant in the [personal injury compensation proceedings] be paid to XYZ as manager of the estate of the defendant.
- (7) [Where XYZ is a private manager other than a licensed trustee company] ORDER that, subject to any further order of the Court or any order or direction of the NSW Trustee, funds paid into court on the account of the defendant [in the personal injury compensation proceedings] be paid out to the NSW Trustee pending consideration and approval by the NSW Trustee of a plan of management for the defendant's estate.
- (8) ORDER that the costs of the plaintiff and the defendant be paid out of the estate of the defendant on the indemnity basis.

- (9) ORDER that the solicitor for the plaintiff (identified by name) provide a copy of these orders to:
- (a) XYZ;
 - (b) nominated members, or carers, of the defendant; and
 - (c) the NSW Trustee.
- (10) ORDER that, at the time of providing a copy of these orders to the NSW Trustee, the solicitor for the plaintiff also provide to the NSW Trustee a copy of the summons and evidence in support of the summons.
- (11) ORDER that all parties be at liberty to apply as they may be advised.

151 Where a judgment sum has been paid into court following the determination of personal injury compensation proceedings determined in the District Court, the Supreme Court sometimes orders, not that the funds in court be paid out directly to a manager, but that the manager, when authorised by the NSW Trustee to do so, be at liberty to apply to the District Court for an order that the funds be paid out to it in its capacity as manager. The jurisdiction of the Supreme Court extends nevertheless to an order that the funds be paid out without an independent application being made to the District Court: *Dunning v NSW Trustee & Guardian* [2015] NSWSC 2095 at [21]-[24] and [26].

152 The customary order that precludes a manager from acting upon an appointment until authorised by the NSW Trustee to do so (one of “the usual orders”) is logistically necessary to enable the NSW Trustee to come to grips with the particular case and, having done so, to issue to the manager a formal “order and direction” that establishes administrative parameters within which the manager must generally act.

153 Where two or more persons are appointed to be managers of a protected estate, they are ordinarily appointed *jointly* and (in conformity with the “usual

orders”) an order is made that, on the death or discharge of any of them, custody of the defendant’s estate continues to the remainder of them.

154 Sometimes, in order to emphasise the fiduciary character of the office of a protected estate manager, the following additional orders are expressly made:

- (1) ORDER, subject to further order, that the only reward to XYZ as manager of the estate of the defendant be by way of remuneration disclosed to the Court.
- (2) ORDER, subject to further order, that any payment or other reward that might be paid to or at the direction of XYZ as manager of the estate of the defendant, or a financial adviser retained by XYZ as manager, as a result of the investment of the defendant’s estate in a financial product be accounted for to the estate of the defendant.

155 These orders have their genesis in judgments of White J, in *GDR v EKR* [2012] NSWSC 1543 at [5], [32]-[34] and [37]-[42] and *CC v RAM* [2012] NSWSC 1555 at [4]-[6], which culminated in *Ability One Financial Management Pty Limited and Ano v JB by his Tutor AB* [2014] NSWSC 245. See also in *Re Application of Fowler* [2015] NSWSC 466 at [13]. The orders are not routinely made because, in conformity with White J’s judgments, licensed trustee companies and other private managers for reward generally include (as they should) equivalent undertakings to the Court in affidavits recording their consent to appointment as a manager.

156 Where the defendant is a minor the Court generally includes in its standard orders to the following effect:

- (1) ORDER that the plaintiff and the manager of the estate of the defendant advise the defendant in writing, after he/she has reached the age of 17 years, but before he/she attains the age of 18 years, of his/her right to apply to the Court to seek a revocation of the

declaration and orders subjecting his/her estate to administration as a protected estate.

- (2) ORDER that, after the defendant attains the age of 17 years and prior to his/her 18th birthday, the manager of his/her estate provide a report to the Court (including a medical assessment as to the defendant's then capacity) in relation to whether or not the defendant has sufficient capacity to manage his/her own affairs and whether or not these management orders should or should not be revoked or varied.

157 These orders have their genesis in White J's judgments in *AG v AP-G* [2013] NSWSC 272 at [9] and *JP v CP* [2013] NSWSC 373 at [4].

158 The nature and purpose of a report on attainment of majority was explained in *Re AAA; Report on a protected person's attainment of the age of majority* [2016] NSWSC 805.

159 Where the NSW Trustee is "appointed" manager of a protected estate pursuant to section 41(1)(b), the standard form of orders speaks not of "appointment" of a manager but (in conformity with the legislation) the management of the estate being "committed" to the NSW Trustee.

160 Where a "private manager for reward" (other than a licensed trustee company) is appointed to manage a protected estate then (in conformity with *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 and *Re Managed Estates Remuneration Orders* [2014] NSWSC 383) orders and a notation to the following effect are generally included in the Court's orders:

- (1) ORDER, subject to further order of the Court or any order or direction of the NSW Trustee, that XYZ submit to the NSW Trustee annual accounts in a form prescribed or approved by the NSW Trustee.

- (2) ORDER, subject to further order, that XYZ, as manager of the estate of the defendant, provide to the NSW Trustee, or as the NSW Trustee may in writing direct, an accounting for its management of the estate of the defendant as and when directed by the NSW Trustee so to do.
- (3) NOTE the orders and notations made in the judgments reported as *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 and *Re Managed Estates Remuneration Orders* [2014] NSWSC 383.
- (4) ORDER, subject to:
 - (a) further order;
 - (b) due performance by it of its obligations as a manager of a protected estate; and
 - (c) its ongoing liability to account for estate property,

that XYZ be allowed out of the estate of the defendant such, if any, remuneration for its provision of services as manager of the estate of the defendant (including any fees of a financial adviser approved by the NSW Trustee from time to time) as may be just and reasonable, not exceeding the amount or amounts disclosed to the Court upon its appointment as manager or such other amounts or rates as may, from time to time, be fixed by the NSW Trustee.

- 161 Where, in common law proceedings for the recovery of damages, the Court makes an order under Part 6 Division 5 (sections 81-84) of the *Civil Procedure Act 2005* NSW for the payment of “interim damages”, care needs to be taken to ensure that there is a workable integration of orders made in those proceedings, and in Protective List proceedings, to ensure that the beneficial purpose of the interim award can be achieved in a way designed to ensure that funds are properly managed, and accounted for, without

interference with the ongoing conduct of the common law proceedings. Procedural questions that need to be considered, and sample orders, are canvassed in *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286.

(15.3) An Application for a change of manager

162 The standard form of orders made on a successful application for a change of protected estate manager are set out in *M v M* [2013] NSWSC 1495 at [55].

163 In genuflection to *Holt v Protective Commissioner* (1993) NSWLR 227 at 237G, those orders refer, not only to section 41 of the *NSW Trustee and Guardian Act*, but also to section 47 of the *Interpretation Act* 1987 NSW. To those references should be added a reference to UCPR rule 57.11, which provides, *inter alia*, that the Court may set aside or vary any order for the appointment of a manager.

(15.4) An Application for revocation orders

164 Most applications for an order that protected estate management orders be revoked are made under section 86 of the *NSW Trustee and Guardian Act*. That section is predicated upon: (a) an application by a protected person; and (b) satisfaction by the Court that the protected person is capable of managing his or her affairs.

165 The Court's *inherent* jurisdiction extends to the making of a revocation order notwithstanding that a protected person remains incapable of self-management: *Re W and L (parameters of protected estate management orders)* [2014] NSWSC 1106 at [55]-[101]. That jurisdiction is most commonly invoked on an application by the NSW Trustee to release a small estate from protective management, or to facilitate management of the estate of a protected person who moves interstate and is protected by a management regime put in place in the jurisdiction of his/her new residence.

166 UCPR rule 57.11 supports the existence of that jurisdiction.

- 167 In clear cases, a revocation order might be made in chambers based upon affidavit evidence (including evidence of the current protected estate manager's attitude to the application) and a report, or affidavit, from the NSW Trustee.
- 168 However, the current practice is generally to require the protected person to attend Court (on a Protective List day or another occasion), with his or her family, for the purpose of having the application dealt with "in court". The general practice, in the context of a closed court, is to invite (but not compel) the protected person to explain, in his or her own words, why a revocation order should be made, and to invite (but not to compel) family members to make any observations they care to make.
- 169 Contested applications for a revocation order are rare. See, for example, *Re R* [2014] NSWSC 1810.
- 170 Not uncommonly, an application for a revocation order is made after: a protected person's medical condition has improved; he or she has come to terms with any ongoing disability and demonstrated an ability to deal responsibly with financial decision-making; compensation moneys have been invested in a comparatively secure asset, such as a residence; and the protected person is in a stable family relationship.
- 171 As noted in *Re X* [2016] NSWSC 275 at [36], there was a time when, once protected estate management orders were made, a protected person who sought revocation of those orders bore a heavy onus on an application for their revocation. That is not now the case. In all cases, the Court is obliged to apply an independent mind to the question of capacity or incapacity, without resort to presumptions that tie a person to a regulatory regime, conscious that there is a strong public interest element in protective proceedings and that they are not adversarial in character. See *A v A* [2015] NSWSC 1778 at [35]-[39].

172 The standard form of orders generally made on a section 86 application is as follows:

- (1) DECLARE, pursuant to section 86(1) of the *NSW Trustee and Guardian Act*, that the applicant is capable of managing his/her affairs.
- (2) ORDER, pursuant to section 86(1)(a) of the *NSW Trustee and Guardian Act*, that the declaration made that the applicant is a person who is incapable of managing his/her affairs be revoked.
- (3) ORDER, pursuant to section 86(1)(b) of the *NSW Trustee and Guardian Act*, that the orders made for the estate of the applicant to be subject to protected estate management be revoked.
- (4) ORDER, pursuant to section 86(1)(c) of the *NSW Trustee and Guardian Act*, that the estate of the applicant be released from control of XYZ as manager and that XYZ be discharged as manager of the estate.
- (5) ORDER, pursuant to section 86(1)(c) of the *NSW Trustee and Guardian Act*, that XYZ take such steps as may be necessary or expedient to transfer management of the estate of the applicant from himself/herself/itself to the applicant.
- (6) ORDER, pursuant to section 86(1)(c) of the *NSW Trustee and Guardian Act*, that XYZ, within 28 days of these orders taking effect or such other time as may be appointed by the NSW Trustee, lodge with the NSW Trustee such accounts as the NSW Trustee may in writing require from him/her/it in relation to his/her/its management of the estate of the applicant.
- (7) ORDER, pursuant to rule 36.4 of the *Uniform Civil Procedure Rules* and sections [61 or 64] and 86(1)(c) of the *NSW Trustee and Guardian Act*,

that these orders are to take effect on [a specified date, usually about a fortnight hence].

- (8) ORDER that the costs of the proceedings be paid by the applicant or out of his/her estate.
- (9) ORDER that the solicitor for the applicant (identified by name) on or before [a specified date] serve on each of the NSW Trustee and XYZ a copy of these orders.
- (10) ORDER that, at the time of serving a copy of these orders on the NSW Trustee, the solicitor for the applicant also serve on the NSW Trustee a copy of the application, and the evidence adduced in support of the application, insofar as those documents have not previously been served on the NSW Trustee.

173 The effective operation of revocation orders is routinely deferred for a short time so as to accommodate practical arrangements that need to be made for the transfer of control of an estate from the manager to the protected person.

(16) THE DYNAMIC OF DIFFERENT JURISDICTIONAL PARADIGMS

174 Lawyers engaged in common law personal injury compensation proceedings (in which an *adversarial* mindset has not yet been extinguished by encroachments of legislative-driven administrative law strictures) need to adjust their perspective to that of the *inquisitorial* traditions of the protective jurisdiction as they guide an incapacitated plaintiff from the process of *obtaining* an award of compensation to the process of *managing* it. Failure to make the shift may produce unnecessary costs, delay and grief.

(17) SAMPLE PROBLEMS

175 In the course of this paper I have, in passing, identified some of the problems commonly encountered in dealing with protective estate management in the context of personal injury compensation proceedings, including the following:

- (a) Procedures for the making and revocation of protected estate management orders.
- (b) Assessment of the competing merits of a protected estate management regime and trust arrangements: *AC v OC (a minor)* [2014] NSWSC 53; *Re X* [2016] NSWSC 275.
- (c) Selection of a protected estate manager and applications for a change of manager; public (NSW trustee) or private (a licensed trustee company, private manager for reward or family): *M v M* [2013] NSWSC 1495; *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245; *Re LSC and GC* [2016] NSWSC 1896; *SLJ v RTJ* [2017] NSWSC 137.
- (d) Co-ordination of payment of a compensation award into, and out of, court in association with the preparation, and approval, of a plan of management: *MKH v JBH* [2016] NSWSC 1031; *MKH v JBH (No. 2)* [2016] NSWSC 1103.
- (e) Applications for authority for a private manager (other than a licensed trustee company, authorised by statute) to charge remuneration: *Ability One Financial Management Pty Limited and Anor v JB by his Tutor AB* [2014] NSWSC 245 at [290]; *Re Managed Estates Remuneration Orders* [2014] NSWSC 383.
- (f) Co-ordination of protected estate management orders and interim awards of damages; *Re K, an incapable person in receipt of interim damages awards* [2014] NSWSC 1286.
- (g) Co-ordination of the roles of a tutor and a protected estate manager in the context of ongoing personal injury compensation proceedings: *Re W and L (Parameters of protected estate*

management orders) [2014] NSWSC 1106; *H v H* [2015] NSWSC 837; *MKH v JBH* [2016] NSWSC 1031.

- (h) A reluctance on the part of the Court to make protected estate management orders which might unnecessarily interfere with conduct of unresolved personal injury compensation proceedings: *H v H* [2015] NSWSC 837 at [6]-[18]; *MKH v JBH* [2016] NSWSC 1031 at [14].
- (i) The need for medical opinions to expose their factual foundations in all but clear cases: *H v H* [2015] NSWSC 837 at [37].

176 Other topics to which attention should be drawn include the following:

- (a) In the conduct of personal injury compensation proceedings, a plaintiff's lawyers need to be alive to the possibility that a long-term burden of an opportunistic claim of incapacity (designed, in the short term, to maximise an award of compensation) might be indefinite subjection to a management regime which, however benign, might be deeply resented as an ongoing constraint: *H v H* [2015] NSWSC 837 at [19]-[21].
- (b) A claimant for compensation, and his or her family and carers, need to be given a realistic assessment of the likelihood, or otherwise, of protected estate management orders being made and, in time, revoked. Premature applications for revocation of management orders should not be encouraged because, apart from anything else, the costs of revocation proceedings are generally borne by the protected person's estate.
- (c) A settlement of a personal injury compensation claim generally should not take the form of a settlement "inclusive of costs". It should generally be expressed as a settlement "plus costs" in

order to minimise conflicts of duty and interest between the protected person and his/her lawyers, and to avoid the Court (upon an exercise of protective jurisdiction) having to consider whether to make orders designed to ensure that costs and disbursements deducted from settlement moneys are fair and reasonable: *AEW v BW* [2016] NSWSC 905.

- (d) Although the protective jurisdiction extends to authorisation of voluntary allowances out of a protected estate for the maintenance or benefit of a protected person's family (*Protective Commissioner v D* (2004) 60 NSWLR 513 at 540-542, 543 and 544-555; *NSW Trustee and Guardian Act*, sections 65, 73 and 76), the fact that an assessment of common law damages includes an allowance for past care does not mean that, in the course of management of a protected estate, or afterwards, a carer has an enforceable claim to a share of compensation: *JPT v DST* [2014] NSWSC 1735.
- (e) Protection of the interests of a protected person might require an application to the Court (under sections 18-26 of the *Succession Act* 2006 NSW) for authorisation of a "statutory will", a form of application usually only made by the NSW Trustee (where management of a protected estate is committed to the NSW Trustee) or with its express approval of funding for such an application (where the estate is under the control of a private manager).
- (f) The availability or otherwise of protected estate management orders as a means of securing the appointment of the NSW Trustee as a tutor "of last resort", in dealing with a dysfunctional litigant in person engaged in personal injury litigation, remains the subject of consideration in more than one case following the judgment of the Court of Appeal in *IA v TA* [2016] NSWCA 179.

- (g) Where a protected estate manager has, or may have, acted in breach of fiduciary obligations the Court (on an exercise of protective jurisdiction) may make an order that the manager be relieved of personal liability arising from the breach: *C v W (No 2)* [2016] NSWSC 945 at [22]-[47]; *Re LSC and GC* [2016] NSWSC 1896 at [59]-[60] and [64](11); and *SLJ v RTJ* [2017] NSWSC 137 at [32].

- (h) Where damages are recovered on behalf of an incapable person who resides outside NSW, the Court may endeavour to protect the person's estate, whilst at the same time rendering it more accessible to him or her, by making protected estate management orders and supplementing them with a grant of authority to the NSW Trustee to make inquiries about the availability of a protective management regime in the jurisdiction of residence, to which, with suitable protective orders, the estate can be transferred (after which the NSW orders might be revoked): *PB v BB* [2013] NSWSC 1223.

- (i) Although modern methods of communication, and the sophistication of the global economy, may well permit a protected estate to be effectively managed from outside the jurisdiction in which a protected person is domiciled (relevantly, NSW): (i) personal, geographic proximity of a protected estate manager to a person whose estate is under management, coupled with ready access to the protected person as and when necessary, generally remains desirable; and (ii) the domicile, or at least regular presence, of a manager within the same jurisdiction as both the person and property of a protected person (from our local perspective, NSW) generally remains a prudent, if not necessary, measure in aid of due management of a protected estate: *HS v AS* [2014] NSWSC 1498 at [4].

177 In *AEW v BW* [2016] NSWSC 905 consideration was given to interaction between the protective jurisdiction and proceedings under the *Motor Accidents Compensation Act 1999 NSW*.

178 Whether, when and how the NSW Trustee's recent insistence that private managers provide a security bond will impact on common law proceedings is open to speculation. It might, however, result in the revocation of management orders affecting small estates, or a refusal to appoint managers to small estates, on grounds of utility, weighing costs, benefits and risks. *KDP* [2016] NSWCATGD 24 points in that direction.

(18) CONCLUSION

179 The Court looks to the common law bar for ongoing, constructive engagement in principled, practical protection of the interests of persons incapable of managing their own affairs.

GCL

EDITORIAL NOTE (15 March 2017): This paper is a revised version of a paper (dated 10 March 2017) presented on 11 March 2017 to the Personal Injury and Common Law Conference of the NSW Bar Association. I acknowledge valuable comments on the original paper, and suggestions, made by Louise Brown, Mary-Ann de Mestre, Adam Johnson, Esther Khoo, Hugh Morrison, Catherine Phang and Mandy Tibbey.