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CONTEXT IN LAW, A DIGRESSION: Neuroscience, Text, Context and Purpose

by

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INTRODUCTION

1 In context, this paper is addressed to an audience of lawyers concerned with the identification, and solution, of problems relating to the administration (management) of the estate of a person who is, by reason of incapacity or death, unable to manage his or her own affairs. This audience is accustomed to dealing with problems requiring an exercise of the protective, probate or family provision jurisdictions of the Supreme Court of NSW.

2 The primary object of the paper is to invite attention to recent work by neuroscientists on the workings of the human brain, and recognition by medically and neuroscience qualified members of the legal profession in NSW (as well as significant others) that a better understanding of the brain may constructively inform the process of legal reasoning and the law itself.

3 There are two recently published papers (one by Chief Justice James Allsop of the Federal Court of Australia and the other by Dr Hayley Bennett of the NSW Bar), and a selection of texts, to which readers are referred. In combination, they open a door to an engagement between neuroscience, law and legal practice.

4 Having drawn the published papers to attention, this paper invites consideration of the importance of paying due attention to the text, context and purpose of the

law in all court proceedings including, notably, those involving a person who is, by reason of incapacity or death, unable to manage his or her own affairs.

5 Neuroscience teaches that of the two hemispheres of the brain the left hemisphere tends to be linear, analytical, atomistic and mechanical. It breaks down things into their component parts and deals with them in a linear, sequential way. The right hemisphere tends to be integrative, and holistic and is strong on empathy and emotion. It reads situations, atmosphere and moods. It is the locus of our social intelligence. It understands subtlety, nuance, ambiguity, irony and metaphor. It lives with the complexities the left hemisphere tries to resolve by breaking them down into their component parts. The two hemispheres each control the opposite side of the body, so that someone who suffers a stroke in the left hemisphere will find the right side of his or her body affected. Failure in the right hemisphere will incapacitate the left.

6 A question stated for the determination of a court about the (in)capacity of a person is ultimately a legal question, not a medical or scientific question, albeit that the court may usefully be informed about how mind and body fit together and may be assisted by expert evidence.

7 As Chief Justice Allsop demonstrates in his paper, knowledge of how the brain functions may constructively inform processes of legal reasoning across all branches of law.

8 Hayley Bennett's paper focuses upon the concept of testamentary capacity.

9 Probate law offers a particular opportunity to reflect on how the brain operates because it involves reasoning that must accommodate a logical framework of formal rules and principles (a "text"), which must be applied empathetically, upon factual inquiry, in the assessment of an individual person's state of mind in light of his or her life experience ("context"), recognising the nature of the Court's jurisdiction to decide whether a testamentary instrument was a valid exercise of the person's power as a free agent and the purpose for which the Court's jurisdiction exists.

10 In order to evaluate evidence as to a testator's state of mind, a court must endeavour to place itself in the position of the testator with an understanding of his or her life experience so far as it can reasonably be ascertained. A requirement for both logical and evaluative reasoning invites consideration of how the brain's two hemispheres work in creative tension.

BANKS v GOODFELLOW: EVALUATIVE REASONING WITHIN A LOGICAL FRAMEWORK

11 Hayley Bennett has published a paper instructively entitled "M'Naghten's Trial (1843), Banks v Goodfellow (1870), and the Neurobiology of Intellectual and Moral Functions: Progenitors of the Common Law Principles for Determining Testamentary Capacity Today" (2020), 48 *Australian Bar Review* 113.

12 The primary focus for Hayley's attention is the judgment of Lord Chief Justice Alexander Cockburn in *Banks v Goodfellow* (1870) LR 5 QB 549, still the leading case relating to a determination of the testamentary capacity of a testator in a probate suit. A precursor to an understanding of that judgment is the speech made to the jury on behalf of the defendant by Sir Alexander Cockburn QC (as he then was) in *M'Naghten's Case* (1843) in which he set out his understanding of the legal principles relevant to criminal responsibility in terms anticipating *Banks v Goodfellow*.

13 The abstract of Hayley's paper summarises its nature and scope:

> "*Banks v Goodfellow* (1870) is the starting point for the identification of the common law principles to apply in order to determine the question of whether a testator retains (or retained) the requisite mental capacity to make a will. In delivering this decision on behalf of the Court, Cockburn CJ set out the legal principles to guide a court's decision-making on this issue as well as their neuro biological underpinnings. In this Cockburn CJ stated there were distinct functions of the mind, and that the pathology of mental disease may impact upon one or some of those functions, but not others. Of the various mental functions, Cockburn CJ held that possession of both intellectual and moral functions was an indispensable condition for the due exercise of will-making power, and further held that for testamentary incapacity to be found, the presence of a mental disorder must be identified, and further, a nexus must be identified between that mental disorder and the exercise of the will-making power. No source of the Court's understanding of the mind or mental function was disclosed in this decision. Notwithstanding *Banks v Goodfellow* is now 150 years old, Cockburn CJ's formulations of the mind (and brain) are broadly

> consistent with contemporary neuroscience's understanding of brain structure and function. …"

14 *M'Naghten's Case* gave rise to the *M'Naghten's Rules*, settled by the House of Lords, as authority for the proposition that in order to establish an insanity defence to a criminal charge, it must be clearly proven that at the time of the alleged criminal act, the accused was under such a defect of reason from disease of the mind that he or she did not know the nature and quality of the act he or she was committing; or if he or she did know, he or she did not know what he or she was doing was wrong. The "right or wrong" test was a departure from the reasoning of Cockburn.

15 Hayley's treatment of her topic blends studies of the jurisprudence and neuroscience of "incapacity", legal history and biography.

16 *Banks v Goodfellow* serves well as a vehicle for this because of Cockburn's insight into the workings of the human brain in a manner consistent with subsequent developments in neuroscience and an exercise of the Court's probate jurisdiction involves both logical rules and evaluative reasoning.

17 The classic "test" for an assessment of testamentary capacity is found, as highlighted, in the following passage of *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-566:

> "The law of every country has … conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion, of that which he possesses. The Roman law and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.
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> It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable

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

Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence – in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is a result; ought we, in such case, to deny to the testator the capacity to dispose of his property by will?

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

It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause – namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. …"

18 Reproduction of the italicised passage in a broader setting lends weight to recent observations that the italicised criteria are not to be applied as if merely a statutory formula: *Carr v Homersham* (2018) 97 NSWLR 328 at [6] and [133]-[134].

19 The ultimate question in a probate suit, whether the Court is satisfied that a particular instrument (in the form of a will or codicil) is the last will of a free and capable testator, is conventionally (and logically) analysed by reference to four main questions; namely:

(a) whether, at the time the will was made (or, possibly, at the time instructions were given for a will prepared by a solicitor), the testator had *testamentary capacity.*

(b) whether the will was made with the testator's *knowledge and approval* of its contents.

(c) whether the testator's execution of the will was obtained by an exercise of *undue influence* on the part of an identified individual or individuals.

(d) whether the testator's execution of the will was obtained by the *fraud* of an identified individual or individuals.

20 Conceptually, the subsidiary questions underlying the question whether a testamentary instrument was the (last) will of a free and capable testator each have a distinct field of operation:

(a) The concept of "testamentary capacity" is directed to whether the testator had the *mental capacity* to make a valid will. That generally requires consideration of a further layer of logical, subsidiary questions considered, in common experience, to bear upon the existence of testamentary capacity: whether, at the time the will was made, the testator understood the nature of a will and

its effects; whether he or she understood the extent of the property available for disposition; whether he or she was able to comprehend and weigh claims on his or her bounty; and whether his or her faculties were materially impaired by a medical condition.

(b) The concept of ”knowledge and approval” is directed (upon an assumption of testamentary capacity) to whether the testator truly *knew* the terms of a will and *intended* to give effect to them.

(c) The concept of ”undue influence” (upon an exercise of probate jurisdiction) is directed to whether the will (that is, the independent mind) of the testator was *overborne* in execution of a testamentary instrument so that he or she could not be said to have been a free agent and the instrument cannot be said to express his or her true intentions, but the intentions of another. In a probate case, ”influence” is ”undue” if it overbears the testator’s independent judgement. In probate law, ”undue influence” is often described as ”coercion”; but that word, standing alone, is inadequate to describe the essence of the concept, which is the fact that (by whatever means) the will of the testator is overborne. A testamentary instrument the execution of which is procured by another person’s undue influence (coercion) is not the instrument of the testator, but of the other.

(d) The concept of ”fraud” (upon an exercise of probate jurisdiction) is directed to whether the testator was *misled* into execution of a testamentary instrument such that the instrument cannot be said to be that of a free and capable testator.

21 The ostensibly logical precision of these concepts provides a structured approach to a determination of whether a testamentary instrument was the (last) will of a free and capable testator. However, their application is not a mechanical exercise. Any “tests” they embody are evaluative in character. An

element of practical wisdom is required in the evaluation of evidence, focusing upon the perspective and personal circumstances of the testator, whose absence from the witness box is a central fact of probate proceedings. Medical evidence may be critical but, in contested proceedings, it may not in the final analysis be determinative.

22 The following observations by Kirby P in *Re Estate of Griffith (Dec'd); Easter v Griffith* (1995) 217 ALR 284 at 295-296 bear repeating:

> "(6) In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent — more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will: see [*Banks v Goodfellow* (1870) LR 5 QB 549 at 560]. Nor will partial unsoundness of mind, which does not operate on the relevant capacities to appreciate the extent of and dispose of the estate, necessarily deprive the testator of testamentary capacity if it is shown that the will was signed during a lucid interval: see *Banks*, above, at 558. Were the rule to be otherwise, so many wills would be liable to be set aside for want of testamentary capacity that the fundamental principle of our law [freedom of testamentary disposition] would be undermined and the expectations of testators unreasonably destroyed.
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> (7) If, by reason of evidence, a doubt is raised as to the testamentary capacity of the testator, that doubt must be resolved by the civil and not the criminal onus: see *Worth v Clasohm* (1952) 86 CLR 439 at 453:
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> > 'The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is thought by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution.'
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> (8) In judging the will propounded, and the challenge to it, the court must consider all of the facts proved which are relevant to the testamentary capacity of the testator. It must not be deflected into a consideration of medical evidence, still less of jargon, as to whether particular conditions such as a 'delusion' or 'paranoia' have been established. Such evidence is only relevant as it throws light on the court's responsibility to decide whether the testator has appreciated the extent of the property to be disposed of; realised the various calls for disposition to which consideration should be given; and was able to evaluate those calls to give effect to the resulting dispositions by the provisions of the will: see

> *Banks* at 557. There is nothing excessively technical in any of these considerations. What the court is asked to do is to determine, on all of the evidence, whether for the purpose for which the law provides and protects testamentary freedom, the testator had the capacity to give effect to the legal privilege. Determining that question, courts must steadfastly resist the temptation to rewrite the wills of testators which they regard as unfair, unwise or harsh. …"

23 These observations should be read with those Gleeson CJ in the same case (at 290): "The power freely to dispose of one's assets by will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter."

24 Decisions bearing upon the validity of a will are often fact-sensitive even if all conventional formalities in the process of making a will have been observed. Although the validity of a testamentary instrument depends upon findings directed to a particular point in time (usually the time which an instrument is executed) an application of principles governing an assessment of validity may require an investigation of facts that play out over time. Context can be critical.

25 Despite criticism that they have at times been construed or applied too narrowly, the *Banks v Goodfellow* criteria provide a logical framework for an assessment of testamentary capacity.

26 In *Carr v Homersham* (2018) 97 NSWLR 328 at [5]-[6] Basten JA characterised these elements in the following terms:

> "[5] Testamentary capacity is not a statutory concept but is derived from the case-law, from which the primary judge fairly took as his starting point the decision of Cockburn CJ in *Banks v Goodfellow*. The concept is sometimes divided into component parts, with affirmative and negative elements. The primary judge accepted that there were three affirmative elements, namely:
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> (a) the capacity to understand the nature of the act of making a will and its effects;
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> (b) understanding the extent of the property the subject of the will, and
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> (c) the capacity to comprehend moral claims of potential beneficiaries.

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

27 The qualitative character of the *Banks v Goodfellow* criteria is implicit in their requirement that a testator be able to "understand", "comprehend" and "appreciate" certain things, in use of the word "ought" in identification of claims on a testator's bounty, and in the need for there to be consideration of whether there is a causal connection between any medical condition suffered by a testator and his or her will.

28 That qualitative character has led some to recast the criteria in terms of a formulaic guideline that a testator must be able "to remember, to reflect and to reason" about his or her testamentary arrangements: MS Willmott and CP Birtles, "Testamentary Dispositions – Wills and Codicils" (2016) 43 *Australian Bar Review* 62 at 82-83.

29 Helpful though these approaches are in encouraging a beneficial view to be taken of the *Banks v Goodfellow* criteria (demonstrating the availability of different formulations of the concept of "testamentary capacity"), they do not displace the abstract logic of the criteria. One must still consider elements relating to the nature and effect of a will; available property; identification and weighing of claims; and medical impediments. These are foundational to a finding that an instrument constituted the duly expressed testamentary intentions of a free and capable testator.

DR IAIN McGILCHRIST

30 The second paper recommended for reading is that of James Allsop (soon to retire as Chief Justice of the Federal Court of Australia) entitled "Thinking About Law: The Importance of How We Attend and of Context" (2023) 15 *The Judicial Review* 61. In that paper he acknowledges the contribution to his thinking made

by another medically qualified member of the NSW Bar, Kevin Connor SC, who introduced him to the work of Dr Iain McGilchrist.

31 The abstract to the Chief Justice's paper summarises its nature and scope:

> "In his exploration of neuroscience and its relevance to legal thinking, the Hon James Allsop AO [now AC] discusses the book *The Master and His Emissary: The Divided Brain and the Making of the Western World* by Iain McGilchrist. McGilchrist's work provides valuable insight for the manner of setting rules and principles and the manner of thinking about them. His Honour considers the two different ways of 'attending' identified by McGilchrist which are rooted in the bi-hemispheric physical structure of the brain: the right hemisphere seeing things as a whole; and the left seeing things abstracted from context. Both are important for how those in the legal profession approach legal problems. His Honour proposes that, for law and lawyers, this relationship between experiential reality and abstracted conceptualisation derived from distance is at the heart of our way of thinking. The appreciation of the potential for co-operation and conflict between the two hemispheres of the brain in how we think about the law helps us recognise and give weight to aspects of law's content and demands and how to think of and about it."

32 In his paper the Chief Justice addresses the first part of Dr McGilchrist's work dealing with features of the brain and their implications for an individual. His Honour does not address the second part of Dr McGilchrist's work dealing with the history of Western culture using insights drawn from the first part. Nor does his Honour deal with the spiritual dimension of Dr McGilchrist's work. His concern is the jurisprudential implications of an understanding of neuroscience as explained by Dr McGilchrist.

33 *The Master and His Emissary* (Yale University Press, 1st Edition, 2009, New Expanded Edition, 2019) is a learned but readable and readily available text. A much shorter introduction to the author's thinking can nevertheless be found in a pamphlet entitled *Ways of Attending: How Our Divided Brain Constructs the World* (Routledge, 2019).

34 Use of McGilchrist's core expression "attending" or "attention" requires explanation for those of us unfamiliar with the language of neuroscience. It refers to how we see the world and how we relate to the world we see. That is, how we "attend" to the world in perception and action.

35 McGilchrist's thesis is summarised in the blurb to *Ways of Attending:*

> "Attention is not just receptive, but actively creative of the world we inhabit. How we attend makes all the difference to the world we experience. And nowadays, in the West we generally attend in a rather unusual way: governed by the narrowly focused, target-driven left hemisphere of the brain.
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> …
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> It is not what each hemisphere does - they are both involved in everything - but how it does it, that matters. And the prime difference between the brain hemispheres is the manner in which they attend. For reasons of survival we need one hemisphere (in humans and many animals, the left) to pay narrow attention to detail, to grab hold of things we need, while the other, the right, keeps an eye out for everything else. The result is that one hemisphere is good at utilising the world, the other better at understanding it.
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> Absent, present, detached, engaged, alienated, emphatic, broad or narrow, sustained or piecemeal, attention has the power to alter whatever it meets. The play of attention can both create and destroy, but it never leaves its object unchanged. How you attend to something - or don't attend to it - matters a very great deal. This book helps you to see what it is you may have been trained by our very unusual culture not to see."

36 Dr McGilchrist has elaborated his views in two magisterial volumes more recently published as *The Matter With Things: Our Brains, Our Delusions, and the Un-Making of the World* (Perspectiva Press, London, 2021). Volume 1 is subtitled "The Ways to Truth". Volume 2 is subtitled "What Then is True?"

37 If read cover to cover these volumes demand time and, it must be said, attention. In a provocative style, their blurb summarises the nature and scope of their message:

> "Is the world essentially inert and mechanical - nothing but a collection of things for us to use? Are we ourselves nothing but the playthings of chance, embroiled in a war of all against all? Why, indeed, are we engaged in destroying everything that is valuable to us? Whitehead observed that philosophy is of urgent importance because 'as we think, we live'. This book argues that if we are wreaking havoc on ourselves and the world, and if our best intentions lead to paradoxical outcomes, it is because we have become mesmerised by a mechanistic, reductionist way of thinking, the product of a brain system which evolved not to help us understand, but merely to manipulate the world: that is the left hemisphere. We have become blind to what the subtler, more intelligent and more perspective right hemisphere sees. Consequently we no longer seem to have the faintest idea who we are, what the world is, or how we relate to it. Indeed there is a sense in which we no longer *live in a world* at all, but *exist* in a simulacrum of our own making.

> This book offers a vitally necessary and radically new vision, one that is rigorously based on the science of the brain, deeply grounded in philosophy and sustained by the most up-to-date findings of physics: a vision that inverts common assumptions about what matters; sees the whole, not just the parts; and helps us break out of the hall of mirrors. In doing so it must attempt the hardest, because the most fundamental, questions of all: what can we say of time, space, motion, matter, consciousness, purpose, value and the existence or otherwise of a God?
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> The resulting world-picture is not just consistent across different disciplines, but happens to be in line with the deepest traditions of human wisdom. It is to this 'unconcealing' of a world that is rich, complex and beautiful that the reader is invited. If we are to survive - and for our survival, even to *matter* - we need to become aware of what is, at a fundamental level, the matter with things."

38 In the first volume of *The Matter With Things* (at pages 27-30) McGilchrist summarises the learning that can be taken from *The Master and His Emissary:*

> "Let me sum up, so far. There is nothing controversial in the view, undisputed by neuropsychologists and neurologists, that the hemispheres pay different types of attention to the world, in humans, as in animals. It is similarly undisputed by neuropsychologists and philosophers that the type, and extent, of attention we pay changes the nature of the world that we experience. And since each hemisphere on its own is perfectly capable of yielding a coherent experiential world, the conclusion is therefore logically inescapable: that this situation should give rise to two different experiential worlds, with different qualities. It couldn't be otherwise. So there should be evidence that this is indeed the case. Is there?
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> Evidence from a wealth of sources, including brain insults (trauma, stroke, tumour, etc), neuropsychological experiments in normal and post-commissurotomy ('split-brain'), and brain imaging in a range of modalities, suggests, precisely, that this is the case. This is a fact about human life, the implications of which are only now being uncovered. The evidence was available, however, from the turn of the nineteenth/twentieth century, and ignored or dismissed. …
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> Before we move on, let me clear up one misconception out of the way at this stage. I am aware that a hemisphere on its own cannot properly be said to do what only a person can do: 'believe', 'intend', 'decide', 'like' and so on. These and similar formulations should be understood as avoiding the repetition of such cumbersome locutions as 'a person relying on the faculties of the left (or right) hemisphere believes ('intends', 'decides', 'likes'), etc. You are *not*, your brain, you are a living human being, as philosopher of neuroscience *Alva Noe* emphasises: 'the idea that a person is a functioning assembly of brain cells and associated molecules is not something neuroscience has discovered. It is, rather, something it takes for granted.' And shouldn't.
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> Some of the headline differences, very much in shorthand form and for present purposes only, are listed below. . . . :

(1) The Left Hemisphere is principally concerned with manipulation of the World; the Right Hemisphere with understanding the World as a whole and how to relate to it.

(2) The LH deals preferentially with detail, the local, what is central and in the foreground, and easily grasped; the RH with the whole picture, including the periphery or background, and all that is not immediately graspable. The importance of the global (RH)/Local (LH) distinction cannot be overstated. It is also extremely robust.3 'Perhaps the most compelling distinction between local and global visual processing is the differential lateralisation in the brain';4 'evidence to support this hypothesis comes from a wealth of data'.

(3) The RH is on the lookout for, better at detecting and dealing with, whatever is new, the LH with what is familiar. V.S. Ramachandran calls the RH the 'devil's advocate since it acts as an 'anomaly detector on the lookout for what might be erroneously assumed by the LH to be familiar.

(4) The LH aims to narrow things down to a certainty, while the RH opens them up into possibility. The RH is able to sustain ambiguity and the holding together of information that appears to have contrary implications, without having to make an 'either/ or' decision, and to collapse it, as the LH tends to do, in favour of one of them.

(5) In line with this, the style of the RH is altogether more circumspect than that of the LH, which tends to be less self-critical.

(6) The LH tends to see things as isolated, discrete, fragmentary, where the RH tends to see the whole. The LH tends to see things as put together mechanically from pieces, and sees the parts, rather than the complex union that the RH sees.

(7) The LH's world tends towards fixity and stasis, that of the RH towards change and flow.

(8) The LH tends to see things as explicit and decontextualised, whereas the RH tends to see them as implicit and embedded in a context. As a result, the LH largely fails to understand metaphor, myth, irony, tone of voice, jokes, humour more generally, and poetry, and tends to take things literally.

(9) There is a tendency for the LH to prefer the inanimate, the RH the animate. Machines and tools are alone coded in the LH, too, while the animate is coded by both hemispheres, though preferentially by the RH.

(10) The RH understands narrative. The LH, if offered a story whose episodes are taken out of order, tends to regroup them so as to classify similar episodes together, rather than reconstruct them in the order that has human meaning.

(11) Both hemispheres need to categorise, but do so according to different strategies. The LH tends to categorise using the presence or absence of a particular feature; the RH tends to do so by reference to unique exemplars, using what Wittgenstein called a 'family resemblance' approach - it sees the *Gestalt*.

(12) More general categories are dealt with preferentially by the LH, more fine-grained ones, as one approaches more closely uniqueness, by the RH. Damage to the RH can lead to a loss of the sense of uniqueness or the capacity to recognise individuals altogether.

(13) The RH contains the 'body image' (this is a slightly misleading neuropsychological term which refers not just to a visual image, but to a multimodal schema of the body as a whole). The LH tends to focus on parts - arms, legs and so on - out of which the body must then be constructed. The RH tends to process in a more embodied, less abstract fashion than the LH. The RH is also superior at reading body language and emotion expressed in the face or voice.

(14) The LH is superior for fine analytic sequencing and has a larger linguistic vocabulary and more complex syntax than the RH. Pragmatics, the ability to understand the overall import of an utterance in context, is, however, a RH function. Understanding prosody, the musical aspect of language, its tone, inflection, etc, depends to a very large extent on the RH.

(15) For most of us, music is very largely the province of the RH, the LH dealing only with simple rhythms.

(16) The RH is essential for 'theory of mind': that is to say that it is better able to understand another's point of view.

(17) The RH is essential for empathy.

(18) In very general terms, both emotional receptivity and expressivity are greater in the RH.

(19) The RH is better at seeing things as they are pre-conceptually - fresh, unique, embodied, and as they 'presence' to us, or first come into being for us. The LH, then, sees things as they are 're-presented literally 'present again' after the fact, as already familiar abstractions or signs. One could say that the LH is the hemisphere of theory, the RH that of experience; the LH that of the map, the RH that of the terrain.

(20) The LH is unreasonably optimistic, and it lacks insight into its limitations. The RH is more realistic, but tends towards the pessimistic.

These could be understood (LH–fashion) as 20 separate distinctions. Indeed, that is how they have been seen, and still are seen, by most brain researchers. But they are (as RH would see them) just an arbitrary number of attempts to give different sidelights on two distinct, entirely coherent versions of the world."

39 Dr McGilchrist's concern for the welfare of individuals and society if left hemisphere modes of thought dominate those of the right hemisphere finds expression in the title of *The Master and His Emissary*.

40 A convenient elaboration of that concern can be found in the Introduction to *Ways of Attending*:

> "There's a story somewhere in Nietzsche that goes something like this. There was once a wise spiritual master, who was the ruler of a small but prosperous domain, and who was known for his selfless devotion to his people. As his people flourished and grew in number, the bounds of this small domain spread, and with it the need to trust implicitly the emissaries he sent to ensure the safety of its ever more distant parts. It was not just that it was impossible for him to order all that needed to be dealt with personally: as he wisely saw, he *needed* to keep his distance from, and even to remain ignorant of, such concerns. And so he nurtured and trained his emissaries carefully, in order that they could be trusted. Eventually, however, his cleverest and most ambitious vizier, the one he most trusted to do his work, began to see himself as the master and used his position to advance his own wealth and influence. He saw his master's temperance and forbearance as weakness, not wisdom, and on his missions on the master's behalf adopted his mantle as his own: the emissary became contemptuous of his master. And so it came about that the master was usurped, the people were duped, the domain became a tyranny, and eventually it collapsed in ruins.
>
> This story is as old as humanity, and I think it tells us something important about what is going on inside ourselves, in our very brains. It is being played out in the world around us right now, and, since the consequences are great indeed, we need to understand what it is."

41 In McGilchrist's reckoning, the right hemisphere is "the Master", the left hemisphere is "the Emissary". An unbridled, dominant left hemisphere mode of thinking tends to undermine the quality of life which is otherwise served by a right hemisphere way of thought.

FURTHER READING

42 At my invitation Hayley Bennett has introduced me to two further, accessible texts: Antonio Damasio *Descartes*' *Error: Emotion, Reason and the Human Brain* (Vintage Books, London, 2006; first published, 1994); and Robert Sapolsky, *Behave*: *The Biology of Humans at Our Best and Worst* (Vintage Books, London, 2018; first published, 2017). Kevin Connor has drawn attention

to Damasio's later books, particularly *Self Comes to Mind: Constructing the Conscious Brain* (Vintage Books, London, 2012).

43 The blurb of *Descartes*' *Error* summarises its message:

> "In the centuries since Descartes famously proclaimed, 'I think, therefore I am', science has often overlooked emotions as a source of a person's true being. Even modern neuroscience has tended until recently to concentrate on the cognitive aspects of brain function, disregarding emotions. This attitude began to change with the publication of *Descartes*' *Error*. Antonio Damasio challenged traditional ideas about the connection between emotions and rationality. In this wonderfully engaging book, Damasio takes the reader on a journey of scientific discovery through a series of case studies, demonstrating what many of us have long suspected: emotions are not a luxury, they are essential to rational thinking and to normal social behaviour."

44 The blurb of *Behave* is in the following terms:

> "Why do human beings behave as they do?
>
> We are capable of savage acts of violence but also spectacular feats of kindness: is one side of our nature destined to win out over the other?
>
> Every act of human behaviour has multiple layers of causation, spiralling back, seconds, minutes, hours, days, months, years, even centuries, right back to the dawn of time and the origins of our species. In the epic sweep of history, how does our biology effect the arc of war and peace, justice and persecution? How have our brains evolved alongside our cultures?
>
> This is the exhilarating story of human morality and the science underpinning the biggest question of all: what makes us human?"

45 Kevin Connor has also drawn to my attention Chapter 2 of Jonathan Sack's book, *The Great Partnership: God, Science and the Search for Meaning* (Hodder & Stoughton, London, 2011), from which I have adapted the introductory summary in paragraph 5 of this paper, which develops ideas found in *The Master and His Emissary.*

46 For those whose interest in modern neuroscience has been whetted by these modern texts, recommended reading extends to the works of William James (1842-1910), an American philosopher and psychologist (the brother of the author Henry James), a leader of the philosophical movement of pragmatism and a founder of the psychological movement of functionalism. His works

include *The Principles of Psychology* (1890), *The Will to Believe*, and *Other Essays in Popular Philosophy* (1897), *The Varieties of Religious Experience* (1902), and *Pragmatism: A New Name for Old Ways of Thinking* (1907). These essays are available in two volumes published by Library of America. The first is entitled *William James: Writings 1878-1899*, the second is entitled *William James: Writings 1902-1910*.

COMMENTARY

47 A common message that emerges from recommended reading is that an understanding of how the brain works, in the common ownership of two hemispheres operating in tension with one another, offers insights into how the legal world operates in the identification and solution of problems, the perception and evaluation of facts, and the formulation and application of "rules" and "principles".

48 Neuroscience shares with Australian law a concern for the welfare of the individual, living (and dying) in community, as a point of commencement for the identification, and solution, of problems affecting the individual. It counsels against narrow "rule bound" reasoning (associated with the left hemisphere of the brain) and encourages an engagement with context (associated with the right hemisphere) in decision-making. It provides scientific insights for the practice of law with a broader vision than what might be found in a text or reductionist "rules" and "principles" read without context.

49 The language used by neuroscientists to describe the different characteristics of the left and right hemispheres of the brain is broadly consistent but variable and inclined to speak of tendencies rather than exhaustive absolutes. The discipline of neuroscience is essentially evidence-based and liable to revision as understanding develops, whatever conclusions may be drawn from time to time from observations of mind and body.

50 There appears to be agreement that the left hemisphere is in nature mechanical; focused on noticing and assimilating to itself a vision of things in parts rather than as a whole; especially related to the use of language (spoken

or written) and symbols as a means of reducing the world to a manageable system of “rationality” familiar to it. In contrast to the right hemisphere, it lacks a capacity to see the world as a whole or to experience emotional engagement with others or empathy.

51 There appears also to be agreement that the right hemisphere is in nature better able to empathise with others, to experience emotional engagement with them and to see the world as a whole, including things of beauty (such as music and song), with a facility for evaluation of things beyond itself. In contrast to the left hemisphere, although it attends to a wider view of the world, it is less able, on its own, to analyse the parts of the whole in a disciplined fashion designed to turn them to particular advantage.

52 In short, perhaps, the left hemisphere is “inner directed” (self-absorbed) and the right hemisphere is “other directed”, conscious of “the other”.

53 A common theme of our neuroscientist friends is that we as a community (including, but not only, lawyers) need to resist being captured by the mechanistic tendencies of the left hemisphere of the brain and to remain open to the broader perspective of the right hemisphere, nevertheless appreciating that the two hemispheres operate in tandem in the make up of a whole person.

54 A lawyer might, here, be reminded of the historical role of the equity jurisdiction (applying principles informed by considerations of good conscience) in tempering the tendency of common law rules to focus on a narrow perspective of binary rights and obligations.

55 Care needs to be taken, however, not to be trapped in the analysis of legal problems by a mere contrast between “law” and “equity”. The jurisdiction exercised by a court such as the Supreme Court of NSW requires a broader understanding.

56 This is particularly true in dealing with those branches of the Court's jurisdiction commonly experienced by practitioners dealing with protective, probate and family provision cases.

57 In each case, importance attaches to identification of the jurisdiction sought to be engaged and the purpose for which that jurisdiction exists. We live in a world in which rule-based reasoning is common place, reinforced by formidable administrative regimes (public and private) capable of overwhelming an individual. Purpose-driven reasoning can be an antidote to rule bound thinking.

58 In essence, purposive reasoning invites consideration of "why" it is, as well as "how" it is, that the affairs of an individual are to be managed. We cannot believe (or disbelieve) what we cannot see. That is the importance of context. Neuroscience reminds us of that.

THE PRIMACY OF PURPOSE

59 Much law, whether substantive or adjectival (procedural), is governed by the purpose it serves. At a high level of abstraction the law, as a social phenomenon, is designed to facilitate peace, order and prosperity in a community of individuals whose freedom and dignity is privileged.

60 Each order made by a court (whether characterised as a "judgment" or an "order") serves a purpose within the administrative framework within which its operation falls to be considered. How that purpose is defined will govern the order's field of operation. Despite superficial similarities in name and function, particular types of order may differ from place to place, and over time, depending upon needs (real or perceived) of the administration of law within which they operate as part of the larger whole.

61 At the current time, and in the Australian legal system, looking for a moment beyond the protective, probate and family provision jurisdictions, for example:

(a) an award of damages at common law against a wrongdoer, for a breach of contract or commission of a tort, is *designed* to place

the victim of wrongdoing (so far as money can do it) in substantially the same position (subject to questions of remoteness of damage) as the victim would have been in had the wrong not occurred: *Robinson v Harman* (1848) 154 ER 363 at 365; *Wenham v Ella* (1972) 127 CLR 454 at 460.

(b) a judgment on a cause of action in debt (or an alternative form of cause of action, *indebitatus assumpsit*, derived from trespass on the case, now fashionably part of "the law of restitution"), upon an exercise of common law jurisdiction, is *designed* to "restore" to a plaintiff a liquidated sum of money which the defendant is held to have wrongfully detained after having received the benefit of work done, services supplied or property transferred by the plaintiff at the request of the defendant or a promise fully performed by the plaintiff in a bargain made between the parties: *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 at 567; *Pavey & Matthews* Pty Ltd v Paul (1987) 162 CLR 221 at 264-267;

(c) an order for specific performance of a contract, made upon an exercise of equity's "auxiliary" jurisdiction in aid of a common law right, is *designed* to compel a party to perform a contractual obligation where an award of damages for a failure to perform it would be inadequate to serve the ends of justice (because, for example, property the subject of a sale under the contract comprises land or a chattel of special value to the buyer): *Dougan v Ley* (1946) 71 CLR 142 at 150-151 and 153-154;

(d) an injunction granted in exercise of equitable jurisdiction is *designed* to mandate or restrain conduct (by means of orders respectively described as mandatory and prohibitory injunctions) in a case in which, absent intervention of the court, the person to whom the injunction is directed would be likely to engage in conduct (eg, breach of contract, commission of a tort, or a breach of trust or some other fiduciary obligation) that is against "good

conscience" (ie, unconscientious) and an award of damages against the person would not be an adequate remedy; and

(e) statutory remedies are *designed*, according to the terms of the legislation that governs them, to address particular problems identified by Parliament (as a representative of community) as in need of solution, and they must be judged, for their purpose and effect, by reference to their particular terms, construed by reference to text and context.

62 The purposive character of an exercise of equity jurisdiction as we know it can be seen in Australia's rejection of the view of the American jurist Oliver Wendell Holmes Junior that a contractual obligation is essentially a promise to perform or to pay compensation at the election of the defendant. That view does not hold sway in Australia to the extent that it makes no allowance for the intervention of equity to compel performance of a contractual obligation: *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 574-575 [128]; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 285-286 [13].

63 Prospective litigants are generally, like the law itself, "purpose-driven" in their own way. By their resort to "the law" they are generally, if not necessarily, focused upon achievement of a particular outcome. Left to their own devices, advocates are trained to prepare a case "backwards" (from orders sought) in order to present it "forwards" in the hope of persuading a decision-maker that an examination of "facts" and "law" leads reasonably to a desired outcome.

64 The task of a lawyer is to endeavour, within the limits of the law and with due regard for the responsibilities of an officer of the Court, to accommodate (so far as reasonably possible) the particular purposes of a client to those for which the law provides.

65 In the context of Court proceedings, this function involves both a positive and a negative aspect:

(a) in positive terms, a lawyer needs to identify a problem within the cognisance of the law, a workable solution or range of solutions to each problem, and a practical means of moving his or her client towards a just outcome;

(b) in negative terms, a lawyer needs to ensure, or at least to endeavour to ensure, that the processes of the law are not abused (to use the example of *Williams v Spautz* (1992) 174 CLR 509) by the commencement or maintenance of court proceedings as a means of obtaining some advantage for which such proceedings are not designed or some collateral advantage beyond what the law allows.

THE TENDENCY OF CASE MANAGEMENT PROCEDURES TOWARDS PURPOSIVE REASONING

66 Within the general community of lawyers there is a tendency to confine discussion of "rights and remedies" by reference to a binary comparison of the common law and equitable jurisdictions of a court. That made more sense when trial by jury was the ordinary mode of determination of competing claims of right. The practical reasoning of a jury was commonly hidden from view by a simple verdict grounding the Court's judgment: verdict for the plaintiff, verdict for the defendant; guilty, not guilty. Within the limits of its jurisdiction, equity could intervene to prevent, or modify, enforcement of strict "legal" rights determined by the common law procedure.

67 With the abolition of trial by jury in civil proceedings, and the courts' embrace of case management procedures in the determination of civil disputes, it is timely to ask whether there is a need to rethink the way lawyers reason about the resolution of disputes through court proceedings.

68 There is often a tension between two different perspectives of the legal process. On one view, court proceedings are designed to determine competing claims of right. On the other view, court proceedings are designed to identify, and solve, problems in management of the affairs of persons affected by court

proceedings. Historically, the former perspective sits most comfortably with an exercise of common law jurisdiction, and the latter view reflects an exercise of equity jurisdiction.

69 The abolition of trial by jury in civil proceedings, and the consequential adoption of a case management philosophy in which a judge sitting alone routinely determines the course and outcome of proceedings, means that a court's decision-making process might proceed by a series of "directions hearings" rather than an all or nothing "trial" or final hearing, and orders for the compulsory mediation of disputes are common. There are reasonable grounds for thinking that our system of administration of justice has shifted its focus away from a "trial of competing claims of right" towards "the management of disputes".

70 Characterisation of a process of decision-making by reference to a concept of "management" lends itself more overtly to purposive decision-making because it may privilege the management role of a judicial officer over that of adversarial parties in so far as it qualifies any "right" parties may have to identify, and have determined, issues of their own choice.

71 The managerial character of current day court proceedings is particularly on display in proceedings in which a party to the proceedings is a person who is, by reason of incapacity or death, unable to manage his or her own affairs.

72 In ordinary civil litigation, where there is a contest between autonomous parties, a court generally proceeds upon an assumption that the parties are able to protect their own interests. In proceedings which affect the interests of a person (a central personality) who is, by reason of incapacity or death, vulnerable that assumption cannot be maintained. Much the same is true of proceedings where interests beyond those of the parties immediately before the Court are affected. In each such case consideration needs to be given to the making of some form of "representative" order so that all interests can be dealt with justly.

73 From the perspective of a judge these types of case highlight a need, in case management, to cast a critical eye beyond parameters identified by adversarial

interests. That does not mean that the questions for determination will not, in due course, reflect the assessment of particular parties, but that the court needs to look beyond the "obvious" in charting a course to decision.

PARTIES AND NOTICE OF PROCEEDINGS

74 A predisposition on the part of a judge to ensure that all affected interests are consulted in the court's decision-making process informs not only rules of court and court practice concerning parties, but also the court's attitude to the possibility that somebody other than the parties before the court should be given notice of proceedings and a reasonable opportunity to participate in the proceedings.

75 A requirement that notice of proceedings be served on interested non-parties is most commonly encountered upon an exercise of probate or family provision jurisdiction. That is because at the heart of a probate or family provision case is generally a question about title to property.

76 In the context of probate proceedings the seminal judgment, upon a consideration of the concept of notice of proceedings, is the judgment of the High Court of Australia in *Osborne v Smith* (1960) 105 CLR 153 at 158-159. There Kitto J wrote the following:

> "It was both proper and necessary in the second suit (concerning a deceased estate) to treat as binding upon the appellant the findings as to knowledge and approval which had been made in the first suit. She, it is true, was not a party to the first suit; but there is a well-established principle of probate practice, which grew up in the ecclesiastical courts, that any person having an interest may have himself made a party by intervening, and that if he, knowing what was passing, does not intervene, but is 'content to stand by and let his battle be fought by somebody else in the same interest', he is bound by the result, and is not to be allowed to re-open the case: *Wytcherley v Andrews* (1871) LR2 P & D 327; *Nani Afori Atta II v Nana Abu Bonsra III* [1958] AC 95. The principle applies in the Supreme Court of NSW in its probate jurisdiction…."

77 This principle is central to a judicial determination that a grant of probate be issued "in solemn form": *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249] et seq. A grant in solemn form is binding on the parties to the probate proceedings in which it is granted, on anyone who has been duly

served with formal notice of the proceedings and on anyone of full capacity who has an interest in the proceedings, and notice of the proceedings, but chooses not to intervene.

78 Because a grant of probate in solemn form is, in practice if not in theory, harder to have revoked than a grant in common form, it is much preferred as a means of securing the title to estate property of beneficiaries named in a will.

79 A failure to give due notice of proceedings to all eligible persons in family provision proceedings can cause injustice no less than in probate proceedings. In *Re Estate Di Meglio; Di Meglio v Carle* [2018] NSWSC 1690 can be found an example of procedural problems that can arise where an eligible person is a protected person (within the meaning of section 38 of the *NSW Trustee and Guardian Act* 2009) and insufficient attention has been given to the identity of a person, or persons, authorised to manage the protected estate.

FIRST STEPS IN EXPLORATION OF CONTEXT

80 In protective, probate and family provision proceedings (including, but not limited to, one involving questions of incapacity) an initial, key step in any decision-making, problem-solving process involving property is generally to identify the following contextual matters:

(a) the central personality (the deceased or a person at risk because of incapacity for self-management) through whose lens the world must be viewed.

(b) the nature and value of the “estate” (property) to which that key personality is, or may be, entitled.

(c) the existence or otherwise of any and all legal instruments that may govern, or affect, the disposition or management of such property: eg, a Will, the statutory rules governing an intestacy, an enduring power of attorney or an enduring guardianship

appointment, a financial management order or a guardianship order.

(d) the full range of persons whose “interests” may be affected by any decisions to be made:

(i) probate litigation is “interest litigation” in the sense that, to commence or to be a party to proceedings relating to a particular estate, a person must be able to show that his or her rights will, or may, be affected by the outcome of the proceedings: *Nobaroni v Mariconte* [2018] HCA 36 at [16] and [49]; *Gertsch v Roberts* (1993) 35 NSWLR 631 at 634B-C; *The Public Trustee v Mullane* (Powell J, unreported, 12 June 1992) BC 9201821 at 4-5; *Bull v Fulton* (1942) 66 CLR 295 at 337, citing *Bascombe v Harrison* (1849) 2 Rob Ecc 118 at 121-122; 163 ER 1262 at 1263-1264; *Estate Kouvakas* [2014] NSWSC 786 at [212].

(ii) protective litigation requires identification of “family” and “carers” who, in the interests of the person in need of protection, need to be consulted: *Holt v Protective Commissioner* (1993) 31 NSWLR 227 at 239G-241C, 242B-C and 242E-243E; *Ex parte Whitbread in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99; 35 ER 878, extracted in *W v H* [2014] NSWSC 1696 at [39]-[40].

(e) whether any (and, if so, what) steps need to be taken to preserve the estate under consideration.

(f) whether any (and, if so, what) steps need to be taken to ensure that all “interested persons” are notified of the proceedings or to confirm, or dispense with, service of notice of the proceedings on any person.

81 A sound working rule of practice generally is that (in management of any protective, probate or family provision case) prudence dictates that, as soon as may be practicable, all property potentially affected, and all "interested persons", should be given notice of the proceedings and an opportunity to intervene. The practical wisdom underlying *Osborne v Smith* (1960) 105 CLR 153 at 158-159 is not limited to probate litigation.

82 All "legitimate" interests should be consulted in prudential decision-making, difficult though it sometimes can be to judge what interests may be "legitimate". The concept of "legitimacy" upon an exercise of protective, probate or family provision jurisdiction is generally informed, if not governed, by the purpose served by an exercise of the particular jurisdiction. Ideally, a process of consultation not only aids prudential decision-making, but also binds in all persons affected by the decision to be made.

PURPOSES FOR WHICH JURISDICTION EXISTS

83 The *protective jurisdiction* of the Supreme Court has its origins in the obligation of the Crown, as *parens patriae*, to take care of those who are unable to take care of themselves: *Marion's Case* (1992) 175 CLR 218 at 258-259. The protective jurisdiction is governed by the paramountcy (or welfare) principle, according to which the welfare and interests of an incapable person are the paramount concern of the Court.

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

85 The *family provision jurisdiction* (presently governed by Chapter 3 of the *Succession Act 2006* NSW) acknowledges an individual's "testamentary

freedom" but qualifies it by empowering the Court to make an order for provision out of a deceased estate for those members of his or her "community" for whom he or she "ought" to have made provision. The family provision jurisdiction aims to strike a balance between the testamentary freedom of an individual and moral claims of a member of the community within which the individual lived and died.

86 In *Bassett v Bassett* [2021] NSWCA 320 at [171] the Court of Appeal described the following statement as a "useful summary" of the approach to be taken to an exercise of the Court's evaluative jurisdiction in dealing with an application for a family provision order:

> "In the exercise of its statutory powers in the determination of an application for a family provision order (in particular, sections 59(1)(c) and 59(2) of the Succession Act), the Court must generally endeavour to place itself in the position of the deceased, and to consider what he or she ought to have done in all the circumstances of the case, in light of facts now known, treating him or her as wise and just rather than fond and foolish (*In re Allen* [1922] NZLR 218 at 220-221; *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463 at 478-479; *Scales Case* (1962) 1[0]7 CLR 9 at 19-20), making due allowance for current social conditions and standards (*Goodman v Windeyer* (1980) 144 CLR 490 at 502; *Andrew v Andrew* (2012) 81 NSWLR 656) and, generally consulting specific statutory criteria referred to in section 60(2) of the Act so far as they may be material."

87 The purposive character of one head of jurisdiction merges with that of the next in management of people, property and relationships as a person experiences life and death stage by stage.

88 The equity jurisdiction is never far away from an exercise of protective, probate or family provision jurisdiction because all three of those jurisdictions commonly require that an incapable person's property be accounted for and (by reference to principles designed to uphold standards of behaviour in opposition to conduct that is against good conscience) a court exercising equity jurisdiction can make orders that misconduct be restrained, that duties be performed, that a misappropriated property be returned, or that compensation for a misappropriation be paid. An equity court is characteristically able to mould its

orders to meet the justice of the case. A predisposition of equity is to protect the weak against the strong.

ROUTINE COSTS ORDERS ARE A FUNCTION OF PURPOSE

89 In approaching forensic decisions in the context of an exercise of protective, probate or family provision jurisdiction parties are sometimes reminded of the special, purposive character of those jurisdictions as expressed in the types of costs orders routinely made.

90 Although, as in general civil proceedings, the starting point is that "costs follow the event", different considerations may apply in proceedings dealing with the affairs of a "central personality" who is, by reason of incapacity or death, unable to manage his or her own affairs.

91 In probate proceedings, the court commonly justifies a departure from the rule that "costs follow the event", by reference to whether or not there has been a need to investigate the validity of a will or by attribution of "fault" to a testator. In protective proceedings the general approach is to ask "what, in all the circumstances, is the proper order for costs?". In family provision proceedings a plaintiff is commonly allowed costs out of the estate of the deceased on the ordinary basis and the personal legal representative of the deceased is allowed costs out of the estate on the indemnity basis.

92 Each departure from a rule that "costs follow the event" depends, perhaps more than parties fully comprehend, not upon blind conformity to custom but upon an assessment that, all things considered, parties before the court have acted in a manner consistent with the purposive character of the jurisdiction exercised by the court.

CONCLUSION

93 Expressed in terms with which lawyers are familiar, without subordinating the discipline of law to the disciplines of medicine or science, neuroscience offers fresh insights into the importance of "text" and "context" in the identification, and

solution, of legal problems. A way that that insight can be turned to advantage in legal proceedings is to recognise the importance of identifying the jurisdiction of the court invoked in each case and the purpose for which the jurisdiction exists.

GCL
20 March 2023

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