NSW BAR ASSOCIATION

The Succession and Protective Law Committee

SEMINAR

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IN CONVERSATION:
Neuroscience, Text, Context and Purpose

by

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IN CONVERSATION WITH

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INTRODUCTION

1 With the added commentary of Kevin Connor SC and Dr Hayley Bennett (members of the NSW Bar with professional qualifications in medicine and neuroscience respectively), this paper is a re-presentation of a paper delivered at a UNSW EDGE Seminar on 21 March 2023: *Context In Law, A Digression: Neuroscience, Text, Context and Purpose.* The original paper has been posted on the website of the Supreme Court of NSW.

2 The primary object of these papers 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 (and 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, recently retired from the Federal Court of Australia, and the other by Hayley Bennett), and a selection of texts, to which reference is made in the current papers. In combination, they open a door to an engagement between neuroscience, law and legal practice.

4 The legal profession and the wider community are invited to give consideration to the importance of paying due attention to the text, context and purpose of the law in all court proceedings including, notably, but not only, those involving a person who is, by reason of incapacity or death, unable to manage his or her own affairs.

5 The first of the two papers drawn to attention is Hayley Bennett's paper 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.

6 The primary focus of Hayley's paper is the judgment of Lord Chief Justice Alexander Cockburn in *Banks v Goodfellow* (1870) LR 5 QB 549, the leading case relating to a determination of the testamentary capacity of a testator in a probate suit.

7 The second paper drawn to attention is that of James Allsop AC entitled "Thinking About Law: The Importance of How We Attend and of Context" (2023) 15 *The Judicial Review* 61.

8 An abstract of each of the two papers drawn to attention can be found in the original "Context in Law" paper.

DR IAIN McGILCHRIST

9 James Allsop's paper gives particular attention to the work of Dr Iain McGilchrist, popularised in a book entitled *The M*aster *and His Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, first edition, 2009; new expanded edition, 2019).

10 That book is widely available in local bookshops in a paperback format and reasonably priced.

11 In the first of its two parts, the book deals with features of the brain and their implications for an individual. The second part deals with the history of Western culture using insights drawn from the first part.

12 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.

13 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.

14 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.

15 In balance, the two hemispheres operate in creative tension. The right hemisphere notices surroundings, the left hemisphere analyses them, each provides feedback to the other. To the extent that the left hemisphere is dominant, patterns of thought tend to be narrowly focused

on "the particular". To the extent that the right hemisphere is dominant, patterns of thought tend to be focused on "the general" and lacking analytical direction. An imbalance on one side or the other is less than optimal.

16 A core expression of Dr McGilchrist reflected in the title of James Allsop's paper, is that of "attending". As used by Dr McGilchrist, 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.

17 It is not necessary in this paper to explore Dr McGilchrist's broader thesis about the history of Western culture and its current course. Suffice to say, that in *The Master and His Emissary,* and other writings, he has a real concern about the welfare of modern society because of an increasing predominance of "left hemisphere thinking" in the modern managed society to which others have drawn attention (including in the Introduction to *Australian Jurists and Christianity,* Federation Press, Sydney, 2021, edited by Professor Wayne Hudson and myself). There is a concern that there is too much linear, analytical, atomistic and mechanical thinking that operates to the detriment of a person's ability, with empathy and emotional engagement, to understand subtlety, nuance, ambiguity, irony and metaphor in a way that exhibits social intelligence.

SPECULATION ABOUT ANGLO-AUSTRALIAN LEGAL HISTORY

18 If I were to indulge myself with any historical review in light of Dr McGilchrist's work, I would be inclined to trace the course of development of the equity jurisdiction in Anglo-Australian jurisprudence.

19 Some significance may attach to this because, Australian courts having been decoupled from English courts by the *Australia Acts* 1986 (Cth) and (Imp), it may be necessary, in adapting Australian law to Australian conditions, to re-imagine the nature and scope of the equity jurisdiction of Australian courts independently of English legal history or the customary binary comparison

between the equity and common law jurisdictions symptomatic of Anglo-Australian jurisprudence.

20 We cannot escape history but, in reimagining a system for the administration of justice, it may be of assistance to interrogate the manner in which our approach to law and legal reasoning has developed. An engagement with neuroscience offers the possibility of viewing legal history, law, legal process and legal reasoning through a different prism.

21 A thesis which I have earlier advanced (in a paper entitled "Equity's Challenge: Maintenance of Standards in Deployment of Enduring Powers of Attorney and Enduring Guardianship Appointments" published on the Supreme Court's website on 16 November 2022) is that: (a) each type of jurisdiction exercised by the Court is governed by the purpose for which it exists; (b) its purposive character defines the functions it performs; (c) functionality is an important concern of the Court in the application of rules or principles applied to particular facts as found by the Court; (d) "rules" or "principles" generally reflect analytical structures for dealing with common patterns of behaviour encountered by the Court; (e) any extension of, or departure from, established rules or principles is likely to be called into being, and governed, by the purposive character of the jurisdiction to be exercised; and (f) an appreciation of the purpose served by an exercise of jurisdiction provides protection against a misapplication of rules and principles that guide decision-making.

22 "Rules" and "principles" provide a "text" against which to measure the facts of a case in the "context" in which the facts are to be determined. Both "text" and "context" interact with the purpose of the Court's jurisdiction in the administration of justice.

23 Can neuroscience throw any light on the course of development of the equity jurisdiction in Anglo-Australian jurisprudence? In my assessment this is, at least, a question worth asking.

24 We are accustomed to seeing the rise of the English Chancellor's equitable jurisdiction, with conscience as its touchstone, in increasingly technical constraints productive of injustice in administration of the writs of Courts of Common Law. Did the common law become rigid as a result of overly dominant left hemisphere thinking? Did the Chancellor redress the imbalance through right hemisphere thinking?

25 We are accustomed to thinking that the development of equity jurisprudence as a system of law occurred during the time of Lord Eldon as Lord Chancellor, when a course of discretionary decisions matured into "principles" of equity not unlike "rules" of common law. In the wake of Lord Eldon's tenure as Lord Chancellor procedural reforms culminating in the *Judicature Acts* of 1873 and 1875 (UK) were implemented to overcome rigidity in the application of equitable principles. Some local legacies of those reforms remain relevant to current day practice: the *Uniform Civil Procedure Rules* 2005 NSW, rule 54.3 (partial administration orders); the *Trustee Act* 1925 NSW, section 63 (judicial advice); the *Supreme Court Act* 1970 NSW, section 68 (*Lord Cairns' Act damages*). Were 19th century developments in the administration of equity jurisprudence (in terms of both substantive and adjectival law) affected by tensions between left and right hemisphere thinking?

26 Closer to home, did Australian equity jurisprudence become too narrowly focused after the retirement of Sir Owen Dixon as Chief Justice of the High Court of Australia, during the tenures of Sir Garfield Barwick and Sir Harry Gibbs as Chief Justice, only to expand under the tenures of Sir Anthony Mason and Sir Gerard Brennan, followed by a tightening of principles during the tenure of Chief Justice Murray Gleeson? Can these developments find any explanation in neuroscience?

27 Since the mid-1970s, Australian Parliaments have enacted legislation designed to confer broad discretions on courts of all descriptions. The concept of "misleading and deceptive conduct" introduced by the *Trade Practices Act* 1974 Cth has been joined in amending legislation by a statutory concept of "unconscionability". The *Contracts Review Act* 1980 NSW also comes to mind.

Is such legislation a product of concern about too much left hemisphere thinking by judges in the formulation and application of equitable principles?

28 Some equity practitioners have a tendency to analyse problems in narrow, technical terms, drawing fine analytical distinctions without any apparent consciousness of the central informing idea of "unconscionability". Was that tendency of mind a motivating factor in the procedural reforms of the 19th century in Anglo-Australian jurisprudence or post 1974 legislative reforms in Australia? Might it also have been a factor in the introduction of the case management system of court administration (adopted progressively in New South Wales almost immediately following adoption of a *Judicature Act* system of court administration in 1972) and the virtual abolition of technical rules of evidence in civil proceedings by enactment of the *Evidence Act* 1995 NSW?

29 Have debates about the nature of principles of estoppel reflected different types of thinking? Is the idea that there is a general, unified concept of estoppel informed by right hemisphere thinking, and is the idea that estoppel must be analysed by reference to particular concepts informed by left hemisphere thinking?

30 In drawing these questions to attention I do no more than point to the hours of enjoyment in speculation about legal history, law, legal process and legal reasoning made possible by insights available from even a passing familiarity with recent developments in neuroscience.

TEXT, CONTEXT AND PURPOSE IN LEGAL REASONING

31 Legal reasoning lends itself to engagement with neuroscience because the natural tendency of lawyers is to identify and analyse problems, and available solutions, by reference to reductionist propositions of fact and law, often embodied in "rules" (a text), which may aid or detract from a broader understanding of human behaviour (context) in pursuit of a particular object (a purpose).

32 Unless a conscious effort is made to appreciate context and recognise the purpose of legal thinking a natural tendency of all lawyers is to be linear, analytical, atomistic and mechanical with the consequence that a legal outcome of decision making may be technically correct but of little utility in solving real life problems.

33 Text, context and purpose are interactive. The tendency of lawyers to reduce problems and potential solutions to a reductionist text, and to confine consideration of context, can be constructively moderated by an appreciation of the purpose of an exercise of jurisdiction. Care needs to be taken to be "purpose-driven" rather than "rule-bound" in problem solving.

34 A focus on the purpose of an exercise of jurisdiction invites interrogation of the law, legal process and legal reasoning with fundamental questions: What is to be done? Why? How? Can we do better? In short, why are we doing this?

35 A decision maker such as a judge is bound to be conscious of the nature and scope of any jurisdiction he or she is called upon to exercise. For that reason alone advocates need themselves to be aware of the nature and scope of that jurisdiction.

36 Particularly in a system of the administration of justice that privileges "case management", it is important for advocates (in pursuit of a client's adversarial interests) to appreciate the purposive nature of the jurisdiction exercised by a court or tribunal.

37 It is not necessary, here, to explore what lies behind particular types of jurisdiction. Suffice to say that **a conferral of jurisdiction is generally informed by values of the society which entrusts decision-making to a court or tribunal.**

38 Upon an exercise of "welfare jurisdiction" (such as is regularly encountered in dealing with protective, probate, family provision and general equity proceedings) values inherent to all decision-making are informed by an assumption that an exercise of jurisdiction concerns an individual living and dying in community, affording the individual respect for his or her autonomy and protecting the vulnerable from exploitation.

GCL
18 April 2023
Revised
21 April 2023

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ADDENDUM

39 As chairman of the Succession and Protective Law Committee of the NSW Bar Association, Lindsay Ellison SC chaired the Seminar presented by Lindsay J "in conversation with" Kevin Connor SC and Dr Hayley Bennett.

40 In opening remarks, Dr Bennett made observations to the following effect about the paper "Context in Law, A Digression: Neuroscience, Text, Context and Purpose" delivered by Lindsay J on 21 March 2023:

> "The paper is in two parts. The first part is where the papers of Chief Justice Allsop and myself are discussed, including a consideration of the neurobiological underpinnings of cognition and behaviour. With this deeper neuroscience context and understanding of how brains work, Lindsay J then explores the connection between brains and the law.
>
> This exploration is important as it will have implications, for example, as to how we understand the minds of people who are, by reason of incapacity or death, unable to manage their own affairs. It will also have implications for how we understand the brains and decision-making of judges, juries, witnesses, and legal representatives, as well as providing insights into how the legal world operates more generally.
>
> In the second part of his paper, Lindsay J applies the neuroscience understanding to the coalface practice of the profession, and the legal framework surrounding it. This includes the need for legal practitioners to understand the purposive character of the jurisdiction within which they work, which will include the role of the process of case management and the need to look beyond adversarial interests.

> More specifically, and in relation to protective, probate and family provision proceedings, Lindsay J also explores context, which will include, for example, contextual information in relation to a person who may be central to protective proceedings, as it is through that person that the world must be viewed.
>
> For me, Lindsay J's paper highlights the tendency of legal practitioners to be rule-bound and to be searching for certainty through text, which he explains, is a result of over-reliance on just one part of the brain (the left hemisphere).
>
> Furthermore, on my reading of the paper, Lindsay J extends an invitation to legal practitioners to use the whole of their brains in the practice of the profession; to not be unduly weighed down and limited by rule-bound and text-focused thinking, but rather, to additionally consider the broad context, and to engage and flow with the higher-level purpose of the jurisdiction within which they work (right hemisphere).
>
> In taking up this invitation, legal practitioners will operate at a number of levels at once, from the concrete and text bound, to the more abstract, contextual and process driven, and thus use both sides and all parts of the brain in wondrous synchronicity.
>
> These are not Lindsay J's own words, by the way. It is my extrapolation of his ideas, as stimulated by reading his paper."

41 In commentary that followed Lindsay J's presentation Connor SC presented a series of slides that elaborated the work of Dr McGilchrist and, more generally, referred to current and historical scholarship in the field of neuroscience.

42 Reflecting the work of Dr McGilchrist, he emphasised that the two hemispheres of the brain attend to the World in different ways. Our left hemisphere creates abstract representations of the World. Our right hemisphere is experiential and connects with the real World.

43 The left hemisphere is characterised by a narrow, sharply focused attention to detail.

44 The right hemisphere is characterised by a sustained, broad, open and vigilant alertness. People who lose their right hemispheres have a pathological narrowing of the window of attention. So extreme can this phenomenon be that a person who suffers damage to the right hemisphere may fail to acknowledge the existence of the left side of his or her body.

45 In his reflection on the tendencies of lawyers, Connor SC observed that lawyers tend to (1) exult the cognitive, ignoring the affective ('feeling' states, including the subconscious and the subcortical 'emotional' circuits); (2) focus on the explicit, failing to appreciate the nature and extent of the implicit; (3) label and taxonomize, seeking to reduce the law to a set of 'rules' whenever and where ever we can; and (4) create constructs and abstractions (that are necessarily text based, where the utility of text to speak of and to the 'whole' is limited).

46 Recognizing these tendencies, Connor SC suggested that, as lawyers, we might regularly test our constructs, our abstractions, against reality and what comes to be known about 'reality'. And as we gain new and better understandings of 'reality', we might adjust our constructs, our abstractions, our ways of thinking about the law.

GCL
23 April 2023