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Précis Paper

Legal Capacity

Sarah Hill and Michelle Daniels discuss the common law presumption of sanity, and the tests for determining whether somebody is capable of managing their own affairs or making a will.

Discussion Includes

- What is capacity?
- The presumption of capacity
- When does a question of capacity arise and is the test subjective or objective?
- The importance of lay evidence
- Solicitors must satisfy themselves that a client has capacity in circumstances where there is doubt

Précis Paper

Legal Capacity

1. In this edition of BenchTV, Sarah Hill (Barrister) and Michelle Daniels (Barrister) present on the topic of capacity to manage one's own affairs and to make a will.

2. As a legal term, capacity relates to the level of cognitive ability before a person can undertake certain activities or do certain things, such as enter a binding contract, make a will, or manage one's own affairs, particularly financial affairs. Capacity issues usually only arise when it is apparent there is a possible lack of capacity. At common law, there is a general presumption of sanity. The law presumes that everyone over the age of 18 is capable. Therefore, it is for the person alleging incapacity to prove it. This is based on the common law's respect for an individual's civil rights to do what they like with their own property, including the personal and commercial freedom to contract with others. In contrast, incapacity is a legal fetter on this freedom to do what you like as an individual. The underlying policy considerations are that the law intends to protect those people who are vulnerable and lack the cognitive ability to appreciate risks, thereby leaving themselves open to exploitation.

3. There is no uniform test for capacity. The test is very specific to the particular time, situation, and task, and there are different considerations that need to be taken into account depending on each of these factors. Thus, rather than a uniform test, the test is applied by the courts on an individual level.

<u>Ability to Manage One's Own Affairs</u>

4. In the case of *Erdogan v Ekici* [2012] VSC 256, the applicant, Mr Erdogan, was under a financial management order as he suffered from a brain injury arising from a car accident. In 2004, he successfully applied for and was awarded damages for his personal injury claim. However, due to his brain jury, he was deemed incapable of managing his own affairs so the funds were paid into court.

5. Mr Erdogan applied to the court to have his own funds released back to him and placed under his control. In considering the test to be applied, Dixon J first considered the party who bore the onus for establishing Mr Erdogan's capacity/incapacity. Due to the earlier personal injury proceedings establishing Mr Erdogan's brain injury, Dixon J found that the presumption of capacity had been displaced. Therefore, he held that Mr Erdogan bore the onus for demonstrating his mental capacity.

6. In relation to the test for capacity for self-management of one's own affairs, Dixon J discussed at length whether it was an objective or subjective test with reference to a range of NSW and Victorian cases. In the earlier NSW case of *PY v RJS* [1982] 2 NSWLR 700, the test formulated by Powell J was more characteristic of an objective test as the same standards for incapacity would be applied, irrespective of whether the person was a multi-millionaire with an extensive asset portfolio or a pensioner on Centrelink benefits. Despite the more objective test applied in *PY*, Dixon J in *Erdogan* applied a more subjective test since he considered Mr Erdogan's personal circumstances and assets in determining whether he was capable of managing his own affairs. This subjective test was affirmed in the more recent NSW case of *H v H* [2015] NSWSC 837 where Lindsay J expressly rejected the earlier objective test in favour of a subjective approach.

7. In assessing Mr Erdogan's specific personal circumstances, Dixon J considered his income, debt, assets, and day-to-day financial obligations. Through this assessment, Dixon J ultimately found that Mr Erdogan lived a simple life with a fairly reliable source of income and a home which he jointly owned outright with his wife. Therefore, there would be few complexities involved in managing Mr Erdogan's estate.

8. In evaluating capacity, Dixon J also considered the cognitive abilities needed to manage one's own affairs. He identified three elements at [74] which Mr Erdogan needed to satisfy him of:

    a. An ability to identify and comprehend the existence of an event, transaction or issue which requires management - a decision or a choice.
    b. Once the matter is identified, insight into, and understanding of, the matter is needed. The person must be able to understand or appreciate and recall the relevant facts, the alternatives available, whether by action or inaction, including seeking advice or assistance where appropriate, with sufficient clarity to permit rational choice or decision.
    c. The person must have the capacity to reason, to make a rational decision or choice about the steps to be taken, or avoided, to achieve an appropriate outcome or otherwise give effect to or implement a transaction.

9. Through these three elements, Dixon J held that what ultimately needed to be demonstrated is the capacity to understand, absorb, and retain information.

10. To assess his capacity, Mr Erdogan also undertook standardised neuropsychological tests. However, there were complications involved in administering these standardised tests since Mr Erdogan, originally from Turkey, spoke virtually no English and had migrated to Australia shortly before the car accident, and was therefore not very familiar with Australian culture

and society. Additionally, Mr Erdogan had minimal schooling of only three years but the tests are designed for persons with a high level of education. One of the medical experts in the case, Associate Professor Yucel, emphasised that the results of the standardised testing need to be interpreted in line with the person's "real life functioning", that is, Mr Erdogan's day-to-day commercial activities, such as his banking and financial transactions.

11. However, there was a difference in opinion between Associate Professor Yucel and a Dr Anson, the other main medical expert in the case, regarding Mr Erdogan's capacity for complex financial decision-making. Specifically, Dr Anson believed that Mr Erdogan's improved functionality in day-to-day money management skills was not a sufficient guide to his capacity to manage his lump sum personal injury damages and his real estate.

12. Apart from the medical evidence and opinions, Dixon J also considered the oral evidence provided by Mr Erdogan via an interpreter in the case. It appeared that Dixon J drew some comfort from Mr Erdogan's performance on the witness stand and the manner in which he gave evidence, again highlighting the subjective nature of the test for capacity.

13. Additionally, Dixon J also favourably considered the ongoing support of Mr Erdogan's wife, her joint ownership of the property with Mr Erdogan, and the likelihood of this supportive role continuing in future. It is interesting that Mrs Erdogan's role was given such substantial weight even though there was no guarantee that the couple would stay together or that Mrs Erdogan would not exploit Mr Erdogan's brain injury.

14. Furthermore, Dixon J also took into account the likely future improvement in Mr Erdogan's mental condition given the significant improvement which had already occurred since the time of his first assessment following the brain injury. Therefore, after taking into account all the aforementioned issues, Dixon J proposed a delayed return of control to Mr Erdogan over his financial affairs.

15. In the recent case of *H v H* [2015] NSWSC 837, Lindsay J gave similar weight to medical opinions compared to the person's oral testimony and functioning in court. At [37], Lindsay J held that:

> 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.... 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.

16. Thus, this judgement demonstrates that whilst medical opinions are important, so are eye-witness accounts of those closely associated with the person as well as the conduct of the person in court. Furthermore, like all matters that turn upon expert evidence, the medical opinion must be formed and explained with reference to the primary facts because the court's assessment of capacity is ultimately a legal issue, not a medical one.

Ability to Make a Will (Testamentary Capacity)

17. The test for testamentary capacity is a common law test originally stated in *Banks v Goodfellow* [1870] LR5 QB 549. It requires that the will maker be of sound mind, memory, and understanding. Like the presumption of sanity, the maker of a will is presumed to be of sound mind unless there is evidence to raise doubt regarding the person's capacity. Once the evidentiary burden has been satisfied, the burden of proof shifts to the will maker to establish testamentary capacity. Under the test in *Banks,* there are four limbs which must be satisfied to establish testamentary capacity:

    a. Person must understand the nature and effect of a will.
    b. Person must understand the nature and extent of their property which they will give away under the terms of their will.
    c. Person must comprehend and appreciate the claims to which they ought to give effect, that is, the potential beneficiaries of their will.
    d. Person must not be suffering from a mental disorder which would result in an unwanted disposition.

18. This test from *Banks* has withstood the passage of time, despite 1870 being a significantly different era given the recent advancements in medicine and a growing recognition of various psychiatric conditions. This test was applied in the recent UK case of *Key v Key* [2010] EWHC 408 (Ch). In this case, George Key, an 89 year old man, was suffering from a mild cognitive impairment which was potentially an early sign of dementia. In 2006, George's wife, Sybil, to whom he had been married for 65 years and had a strong relationship of dependency on, had suddenly passed away. George had four children: two sons, Richard and John, and two daughters, Mary and Jane.

19. George's estate was comprised of a range of farming properties, cash at the bank, modest personal chattels, and a car. In 2001, George's will provided for a life interest for Sybil, with the remainder of his estate to be divided equally between his two sons. However, one week after Sybil's death in 2006, George was prompted to execute a new will by his daughter Mary who had the opportunity to read George's 2001 will. The new 2006 will provided for the bulk of George's estate to be divided between his daughters, Mary and Jane. Subsequently,

George's sons, Richard and John, challenged this will by arguing that George lacked testamentary capacity.

20. In arguing a lack of testamentary capacity, the sons relied upon expert evidence from Dr William Hughes, a psychiatrist, who had assessed George, albeit 5 months after he executed the 2006 will. In contrast, the daughters relied upon a Professor Jacoby. Although Professor Jacoby had never assessed George, he was a little better qualified both by experience and specialisation than Dr Hughes in giving expert evidence as to Mr Key's testamentary capacity, according to the presenters.

21. Neither Dr Hughes nor Professor Jacoby considered George's mild cognitive impairment to be sufficient on its own to deprive him of testamentary capacity. However, in Dr Hughes' opinion, the mild cognitive impairment combined with an effective disorder arising from his sudden bereavement amounted to a lack of testamentary capacity. The court found Dr Hughes' opinion very compelling and held that the testator did in fact lack testamentary capacity. As a result, probate of the earlier will was granted.

22. The *Key* case is also noteworthy because the solicitor in that case, Mr Cadge, did not act in the way one would normally expect. In the UK, the 'golden rule' requires solicitors to take steps to satisfy themselves that the testator has testamentary capacity where the solicitor has reason to doubt the existence of this capacity, for example due to old age. The steps taken usually involve taking the testator to a medical practitioner for assessment and/or making detailed contemporaneous notes of the testator's capacity. In the *Key* case, Mr Cadge did neither of these things. In fact, his file notes were a few scribbled notes on the back of an envelope which were not even relevant to the evidence he gave regarding George's testamentary capacity. Therefore, the court had real difficulty in accepting how George's instructions were given to Mr Cadge for the 2006 will.

23. Given the doubt raised about the validity of the will, the burden of proof shifted to the defendants to establish testamentary capacity. Due to the lack of evidence from Mr Cadge and the inconsistency within the evidence provided, the defendants were unable to prove George's testamentary capacity.

24. In the recent NSW case of *D'Apice v Gutkovich – Estate of Abraham* (No. 2) [2010] NSWSC 1333, the solicitor (Mr William) took instructions from Mrs Abraham (the testator). At the time the codicil in question was executed, Mrs Abraham was 94-years-old and suffered from a moderate form of dementia. A codicil is a testamentary document which amends a will compared to making a completely new will. In contrast to *Key,* in this case the solicitor recognised the particular difficulties surrounding Mrs Abraham's testamentary capacity given her mental condition and old age. Therefore, the solicitor kept detailed

contemporaneous file notes of the multiple questions he asked Mrs Abraham to gauge her capacity and her motivation for making the new will. Additionally, the solicitor also took Mrs Abraham to a psycho-geriatrician to assess her capacity. This doctor similarly kept detailed contemporaneous and coherent records of the meeting, including Mrs Abraham's reason for wanting to change the will.

25. The defendant, Mrs Gutkovich, was Mrs Abraham's carer for ten years until Mrs Abraham's guardians fired her as they were concerned about how much money Mrs Gutkovich had been paid by Mrs Abraham and, more importantly, they were also concerned about a car which Mrs Abraham purchased with her own money but which was registered in Mrs Gutkovich's name. Mrs Abraham claimed that Mrs Gutkovich stole the car from her when she left her carer role and this was the reason why Mrs Abraham wished to remove her from the will.

26. In this case, White J held at [96]:

> These principles [from the case of Banks] elucidate what is required for a testator or testatrix to be capable of making a will disposing of his or her estate to a particular beneficiary or amongst beneficiaries. As a matter of principle, it does not appear to me that the same capacity would necessarily be required for a testator or testatrix who wished only to revoke a particular gift. A testatrix, when perfectly capable, may have disposed by her will of an elaborate and valuable estate carefully between numerous potential claimants, having weighed their respective claims to a nicety. If one of the beneficiaries should so misbehave towards the testatrix that she resolved that that person should receive nothing, I see no reason in principle why it should be necessary in order for a revocation of such a particular gift to be effective that the testatrix should still have the capacity to appreciate the general nature and extent of her estate and be able to weigh the claims of all persons who might then be potential objects of her testamentary bounty. In principle, it should be enough that the testatrix is capable of making a judgment as to whether the person deserves to be excluded from the will.

27. Therefore, by finding that there is a lower capacity threshold for making a codicil compared to a completely new will, the judgment again demonstrates that the test for capacity is specific to each situation. In contrast to the aforementioned case of *Key*, White J held that the testatrix, Mrs Abraham, did have capacity. The difference in outcome between the two cases is primarily attributable to the role of the solicitors. Unlike in *Key*, the solicitor in the *Abraham* case took active steps to satisfy himself of Mrs Abraham's capacity, including taking Mrs Abraham to a psycho-geriatrician for a psychological assessment. As a result of these steps, White J was able to overcome concerns surrounding Mrs Abraham's understanding of the extent of her estate and the Guardianship Tribunal order made approximately 12

months prior to the codicil which appointed a guardian for Mrs Abraham due to her diminished decision-making ability.

28. The case of *Read v Carmody* [1998] NSWCA 182 also highlights that the test for capacity depends on the special circumstances of each testator. In particular, the judgment finds that each limb of the capacity test from *Banks* must be considered in light of today's context where the nature and extent of assets within an estate have changed. As a result, several testators may not have a detailed or accurate understanding of their assets and the value of those assets. For instance, elderly testators that have a large share portfolio may not necessarily be aware of all the shares they own and the value of each of those shares, especially since the share price fluctuates daily.

Conclusion

29. Although this edition of BTV only looks at the issue of capacity in terms of managing one's own affairs and making a will, the question of capacity can arise in many different circumstances and the test for capacity is specific to each situation. From the cases of *H v H* and *Erdogan*, the significance of both lay and medical evidence concerning a person's capacity is noteworthy. Importantly, the issue of capacity is not to be delegated to medical experts, however eminent and well-regarded, as it is ultimately a decision for the court based on all the facts and evidence. This was recently affirmed by Hallen J in the case of *The Estate of Budniak; NSW Trustee & Guardian v Budniak* [2015] NSWSC 934.

BIOGRAPHY

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Sarah Hill was admitted as a Lawyer in 2003 before being called to the NSW Bar in 2004. She graduated from Sydney University with Honours. She practises in a variety of areas including administrative law, equity, commercial law, building & construction, wills & probate, trusts, estates, banking and bankruptcy.

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Michelle Daniels was admitted and called immediately to the NSW Bar in 2007. She graduated from the University of Wollongong in 2006, shortly before sitting her bar exams. Her practice is primarily in criminal law, equity, commercial law, building & construction, trusts and bankruptcy.

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