Australian Bar Review (ABR)

Volume 48 Part 2

(articles and book reviews included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

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 neurobiological 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. This article will review the decision of *Banks v Goodfellow*, in the context of the history of modern neuroscience, and will identify relevant milestones in the life and career of Cockburn CJ which may well have been the source of his understanding of the mind and brain in 1870. Contemporary neuroscience understanding of the brain and mental disorders will also be discussed, as will the implications of this for courts today in making testamentary capacity determinations, as well as for legal practitioners who instruct medical experts to provide expert opinion in such cases.

Parliament generally intends its statutes to have a long life. It is in the nature of statutes that the meaning of their terms may change over time, even without any amendment being made to them. This article, in Part I, explores the ways in which such 'passive amendment' of statutes can take place over time. In Part II, this article considers actual amendments to statutes and the temporal issues to which they give rise.

Book Reviews