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Articles

M’Naghten’s Trial (1843), *Banks v Goodfellow* (1870),
and the neurobiology of intellectual and moral functions:
Progenitors of the common law principles for
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— Hayley Bennett

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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.

Statutory interpretation: The time dimension
— Chloe Burnett

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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.

The Commonwealth *Model Litigant Rules*:
Meaningful or meaningless?

— *RJ Desiatnik*

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Twenty years ago the first iteration of what has become known as the Model Litigant Rules, was promulgated. Now in its third version, these Rules set out standards of behaviour as litigants that were expected of the Commonwealth and its agencies, they being the most prolific participants in disputes before courts and tribunals in Australia. So the Rules are of significance, but are they effective and, in any event, should they continue to exist? The aim of this article is to answer these questions.

Artificial conception and the legal definition of a ‘parent’

— *Patrick Parkinson*

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In *Masson v Parsons* (2019), the High Court upended conventional understandings of the relationship between providers of sperm and children born as a consequence of artificial conception procedures. Provisions in the Status of Children Act 1996 (NSW) were declared invalid to the extent of inconsistency with the Family Law Act 1975 (Cth). There is, nonetheless, controversy about how to interpret the High Court’s decision. In particular, the question now arises whether sperm donors, in cases where the child is born to a woman who was not married or in a de facto relationship at the time of conception, are in all cases de jure parents. In interpreting the High Court’s decision, a clear distinction needs to be made between rules of addition and rules of subtraction in relation to parentage. The High Court’s decision is best understood as deciding, for the purposes of the Family Law Act, that a biological progenitor is a parent unless there is a rule of subtraction to say otherwise. The Court left open whether an anonymous gamete donor falls within the ordinary meaning of the term ‘parent’ for the purposes of the Act. This decision has significant social consequences, particularly in the case of men who donate sperm pursuant to an agreement or understanding with the birth mother that they will be involved in the life of their biological children.

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