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An Uncommon Topic: Disability in the Common Law

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This article discusses the sources of law in the United States and their scope, with a focus on common law matters related to medical conditions, physical disabilities, and cognitive disabilities. While most rehabilitation professionals are likely familiar with provisions of statutory law that relate to persons with disabilities, common law treatment of disability and the special and distinguishing rules in the common law concerning disabilities are less well known. Reviewing the rules stated in the seminal common law references, the *Restatements of the Law*, the article lists the rules that have been developed over the years by courts that distinguish responsibilities and protections for persons with disabilities that are different from those without disabilities in the areas of torts, contracts and property law, and wills, trusts and estates. Where applicable, specific examples from the rulings of courts are provided as examples of the application of these rules to actual cases.

An Uncommon Topic: Disability in the Common Law

Most professionals who work with persons with disabilities are familiar with provisions of federal and state statutes that deal specifically with disability. From the federal government come both the legislation that provides for the federal-state vocational rehabilitation program as well as civil rights protections from The Americans with Disabilities Act and the Americans with Disabilities Act Amendments Act. Several provisions of the law governing Social Security are also quite closely intertwined with disability. From the states, most notably, are statutes concerning workers' compensation, which deal with medical expenses and potentially lost time from work due to workplace injury, and at their furthest extent can deal with partial or total disabilities of workers that can arise from these injuries.

Most scholarly discussions of the law as it relates to persons with disabilities relate to these statutes. However, those rules relating to disability under the common law are less frequently discussed. The purpose of this article is to discuss some of the issues related to disability under the common law in order to provide rehabilitation and other professionals a fuller understanding of the special rules that might apply to those who have disabilities.

Sources of Law

Laws are the rules which govern behavior of people in regard to their interaction with other people and their government. For a law to be enforced it must be based on some legitimate source. There are four basic sources of law: Constitutional law, statutory law, administrative law, and common law.

Constitutional Law

The highest authority for law is the United States Constitution. The Constitution and its amendments indicate the duties and powers of government to make law as well as those limitations to those powers, especially in regard to the fundamental rights of citizens. No law can stand if it violates the terms of the Constitution. The Supreme Court of the United States is the ultimate authority on the Constitutionality of laws, and it has, since its ruling in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), reserved for itself the right of judicial review to determine such questions. The United States operates under federalist system of government, which reserves for the individual states those law-making powers not specifically reserved to the federal government. Each state has its own individual constitution. The rules applying to the federal government concerning the constitutionality of laws also apply to state constitutions and state laws (Dunn, 2014).

Statutory Law

Statutory law consists of those laws passed by a legislative body. The federal government assigns to the legislative branch the ability to make certain law under the enumerated powers of the Constitution, which are enumerated in Article I. Many of these enumerated powers are rather limited and mundane, yet two of these are of special mention due to their breadth. The first is the necessary and proper clause, which states that Congress has the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. Art. I, § 8 (18). This power has been broadly interpreted since *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), when Chief Justice John Marshall held, "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch* at 421.

The second is the commerce clause, which states that Congress is given the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const. Art. I § 8 (3). This power was viewed as relatively mundane until the time of the New Deal, when the Court began to shift toward a very broad interpretation of the commerce clause (Chemerinsky, 2009). A series of rulings expanded the powers of the government to regulate commerce to an extent not previously permitted. Notable among these rulings was that in *Wickard v. Filburn*, 317 U.S. 111 (1942), in which the Court recognized that activities that were local—even those which did not directly extend beyond the scope of one's own property—could indirectly influence interstate commerce. Congress used that power to not only create the modern regulatory state, but also to enter into areas which it had not previously been permitted to legislate, such as regulation of private actors and businesses in regard to discrimination and civil rights. Although there has been an inclination of the Court to restrict some of the powers under the commerce clause since the 1990s, the commerce clause, together with the necessary and proper clause, gives the federal government immense power to enact legislation in a wide array of contexts.

State governments are permitted to pass statutory laws so long as they do not interfere with the powers of the federal government. These laws have legitimacy only within the limits of state boundaries, and are likewise limited by the constitutions of individual states. Such laws are subject to judicial review, as is any law, but so long as they do not impose burdens upon groups of individuals based upon race, national origin, or other indelible characteristics, or do not interfere with fundamental rights of citizenship such as those guaranteed by the Bill of Rights, the Court will allow such laws to stand under what is called a rational basis test. Under a rational basis test, the Court will only look to see if there is a reasonable relationship to a legitimate purpose of government. Therefore, states have great power to pass statutes that relate to protection of public welfare, health, safety, and morals (Chemerinsky, 2009).

Administrative Law

Administrative law refers to that body of law that is written to enforce statutory provisions. Most statutes that are passed contain language that enables a state or federal agency to regulate the provisions of law. Regulations for the federal government may be found in the *Code of Federal Regulations* (U.S. Government Printing Office, 2017). Regulatory law is often quite esoteric and relevant only to a narrow scope of activity; however, it represents a significant accumulated body of law that is nonetheless significant to those who work in professions or engage in pursuits which are regulated. Vocational rehabilitation professionals are most likely to be familiar with those regulations that relate to vocational rehabilitation and education, and forensic professionals, with those related to Social Security Disability provisions.

Common Law

Constitutional law, statutory law, and administrative law govern a sweeping scope of activity of persons and organizations, and government itself, yet they are not comprehensive, and cannot cover the entire array of circumstances that can emerge between two parties. Especially in regard to civil actions—torts, contracts, wills and estates, for example—much of the governing law is based upon principles which have been determined by courts for thousands of years; in some cases, the basic principles that govern an action are fundamental and have been recognized since time immemorial. In the United States and in most English-speaking nations, the scheme that governs these circumstances is referred to as a common law system.

The common law system is based upon the principle of *stare decisis*, or "standing by that which has been settled." Under this principle, courts look to decisions made in previous cases with similar circumstances in that same jurisdiction to determine the rule of law that will be applied to adjudicate the dispute at hand. Courts tend to be very loyal to the principle of *stare decisis*, and only under unusual circumstances will they fail to hold to precedent; doing so can lead to grounds for appeal of the case to a higher court. Circumstances which might lead a court to abandon the principle include societal circumstances changing to such a degree that public policy demands a change in the rules governing conduct, or passage of statutory law in the jurisdiction which voids the common law rule and establishes a new rule. Statutory law (and constitutional law) are more powerful than common law, and a legislature can void the common law by passing legislation.

Two other situations are relevant in the common law system. Courts within a jurisdiction may be hearing a controversy for the first time. These situations are called *cases of first impression* and require a court to establish a rule that will serve as precedent within that jurisdiction. In cases of first impression courts often look to other jurisdictions to identify the rule have been applied in similar circumstances. Such law is viewed as persuasive rather than precedential, and a court may choose to apply the rule if there appears to be a consensus from other jurisdictions, choose between different interpretations of foreign courts, or determine a different rule from those established elsewhere. The other situation involves the ability of a court to *distinguish* a case from others, meaning that there are facts that lead a court to note the case as an exception to the established rule. Those exceptions become precedential in and of themselves and serve as a caveat for future cases that have facts similar to the previously distinguished case.

Common law rules are bound by state jurisdiction. While rules governing civil disputes are usually similar across jurisdictions each state has its own common law. Between the states, the rule that is most commonly followed is known as the *majority rule*, and if states follow a different rule from the consensus this is known as the *minority rule*. On occasion, disputes involving relatively large amounts of damages between individuals situated in different states may be heard by a federal court rather than a state court. In these cases, the federal court must apply the common law rules of the relevant state rather than making their own; this rule was determined by the Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). This case established that, essentially, there is no federal common law in regard to civil cases, and while adversaries may choose between state or federal forums to settle the dispute, they will not be able to choose based upon a more advantageous set of laws between federal and state courts.

Attorneys pressing either a cause of action or a defense under the common law must research the common law rules in the jurisdiction in which the suit is being heard. For those representing a plaintiff, knowledge of the common law rule in the state is perhaps most important, and for those defending knowledge of any relevant distinguishing cases are critical to persuading a court's interpretation of the law. Knowledge of distinguishing cases from other jurisdictions can also be considered as persuasive law, but the court must accept those arguments if such distinguishing factors have not been considered previously.

Even with a certain degree of congruence between the states in the common law, it covers a very wide domain of cases and rules and understanding all of the points of law on a given matter can be a daunting task. Fortunately, there is a compendium which defines the various rules of the common law which have arisen in the courts through the years. These volumes, collectively known as the *Restatements of the Law*, published by the American Law Institute. These volumes cover many common law areas and have been revised since their initial appearance about one hundred years ago.

Scope of Common Law

All law depends upon precedent to define nuances in the law, even statutory and constitutional law. However, in common usage, civil disputes between individuals are generally regarded as the focus of the common law. Personal injuries, contractual disputes, adversaries as to the ownership of property are governed by common law rules, although the various domains of the common law can be modified by statute. The subdivisions of common law are torts, contracts, property, wills, trusts and estates.

Torts

Torts are those injuries to the person, property, or reputation of one party caused by the actions of another, called a *tortfeasor*. There are many different kinds of torts, the most serious being an *intentional* tort. An intentional tort, as the name implies, involves an intentional act toward another party. Intentional torts are malicious, and not the result of accident or mistake; they actor has shown volition in committing the act. Battery is perhaps the best example of an intentional tort, in which an individual strikes or otherwise comes into contact with another person. Those who commit intentional torts are liable not only for the damages directly relating from their actions, but also for punitive damages, intended to punish the victim for their malicious act.

Intentional torts are a relatively uncommon circumstance. Most torts arise out of simple *negligence*, or oversight or accident on the part of the tortfeasor without malicious intent to harm another individual. Negligence requires four elements: 1) the tortfeasor owed a duty of care to another party; 2) the tortfeasor breached that duty; 3) the breach of the duty caused another party to be damaged; 4) the injured party actually suffered damage as a result of the breach. Torts arising from negligence call only for compensation of the injured party so as to put them in a position that they would have been in had the negligence not occurred. These damages are often divided into pecuniary damages (damages for which a definite dollar value can be determined, such as medical bills or lost wages) and nonpecuniary damages (pain and suffering and lost enjoyment of life) for which an amount cannot be determined through economic means, but rather are established by a jury. Negligence does not call for punitive damages unless it can be shown that the defendant was reckless (acting in such a way that it was virtually certain that the other party would be damaged) or grossly negligent (failing to provide even slight diligence in a situation, where such slight diligence would have avoided the damages to the other party).

At the center of negligence is the notion of the reasonable person, and whether the alleged tortfeasor acted reasonably in the circumstances. It is not necessary for actors to protect others from any injury—such a duty would be virtually impossible for even the most prudent of people—but only those injuries that are reasonably foreseeable from breaches of duty. The question becomes both an objective and a subjective question for juries determining matters of tort. The objective question asks what a reasonable person would do in the situation, and the subjective question asks whether the actions of the alleged tortfeasor were in keeping with this behavior. The rule applies not only to tortfeasors but also to defendants. An individual claiming negligence on the party of another can act so unreasonably that their actions go beyond the scope of foreseeable harm. This is a complicated rule, with much case law and many distinguishing cases.

Disability and Distinguishing Common Law Tort Rules

For the vast majority of common law rules there is no distinction to be drawn between persons with disabilities or others, either as plaintiffs or defendants. However, in certain circumstances, a physical, mental or cognitive impairment can impact the rules that a court will follow in determining liability, proper conduct of actors, or damages that can be awarded. The following describes some of the common law rules that distinguish persons with disabilities in the common law.

The "Eggshell Skull". One of the basic rules of damages in torts (and also in criminal law), and one of the first rules that most law students learn in studying the common law, is that defendants in tort suits, as stated in one frequently cited British criminal case, "take their victims as they find them." (*R. v. Blaue*, 1 W.L.R. 1411 (England and Wales C.A. 1975). That is, any damages that are proximately caused by the tortfeasor's actions are recoverable in a suit at law. The rule is commonly known as the "eggshell skull" principle, on the notion that if a defendant damages a plaintiff with a skull no more durable than an eggshell, the lack of this knowledge to him is no defense. This rule has roots that extend far back into the history of the common law and is included in the *Restatements of the Law:*

> Restatement (2d) Torts, § 16. Character of Intent Necessary. If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm. (American Law Institute, 1979).
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> Restatement (2d) of Torts, § 461. Harm Increased in Extent by Other's Unforeseeable Physical Condition. The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct. (American Law Institute, 1979)

The implication of these rules to disability is that one who causes damages to another through intentional or negligent contact cannot claim that damages to a person with a hidden medical condition leading to a susceptibility of harm cannot claim a lack of foreseeability as a defense. The case that is most often cited in regard to this rule is *Vosburg v. Putney*, 50 N.W. 403 (Wisc. 1891). Here a schoolboy had been recovering from an infection to his leg. In the classroom another boy lightly kicked his leg across an aisle, and within a few moments the young man who was kicked was in intense pain. At trial it was claimed that the injury was unknown to the defendant and that he could not be held liable for the damages, which resulted in a permanent and significant loss of use of the injured leg. The ruling of the court upheld a significant damages claim against the defendant, holding "the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him." *Vosburg* at 404. While not intended as a special protection for those who have medical conditions that could be implicated in the facts of a case, it can have that effect. The rule demonstrates the extent to which damages might be recoverable from another's tortious act.

Disability and the "Reasonable Person." As discussed above, the rule of the reasonable person applies to both tortfeasors and defendants. Many tort cases involve a failure to secure property or circumstances from foreseeably hazardous conditions to others. This usually involves correcting the situation as soon as possible, and while the hazardous condition is present restricting access to others and placing warnings (signs, cones, barriers, etc.) to warn others of the danger. If these safeguards are put into place, a person who ignores the signals may be deemed to be acting in an unreasonable manner, and does so at their own peril. This rule also has implications for persons with disabilities, especially those with sensory disabilities who may not be able to recognize warnings. The *Restatements* speak to this situation:

> Restatement (2d) of Torts, § 283C. Physical Disability. If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability. (American Law Institute, 1979).

This rule is one of the many examples of exceptions to the principle of the reasonable person. Reasonable conduct has been described for individuals with many types of physical disabilities and medical conditions, including blindness, deafness, monocular vision, "lameness," short stature, bone conditions, clubbed feet, and illness in general. It is noteworthy that voluntary intoxication is not protected by this rule and those in such a state are held to the standard of reasonable behavior of a sober individual. (American Law Institute, 1979).

Blindness has been one of the most common disabilities in which this rule has been applied. For example, in *Fletcher v. City of Aberdeen*, 338 P.2d 743 (Wash. 1959), the city dug a large trench to repair utility lines. Barricades had been placed around the trench to prevent access and warn passers-by of the danger. One worker had moved some of the barricades out of necessity and then left the area to perform work elsewhere without replacing the barricades. A man who was blind using a long cane was walking through the area and because the barriers had been moved failed to recognize the danger and fell into the trench, injuring himself. The city argued that the plaintiff's blindness did not impose a need to take special precautions. The court, in rejecting this argument, held

> The city is charged with knowledge that its streets will be used by those who are physically infirm as well as those in perfect physical condition...The person under a physical disability is obliged to use the care which a reasonable person under the same or similar disability would exercise under the circumstances. The city, on the other hand, is obliged to afford that degree of protection which would bring to the notice of the person so afflicted the danger to be encountered. *Fletcher* at 745.

The rule of the reasonable person with a disability has been recognized in the common law for at least one hundred years. Protection of persons with disabilities from the failure of others to provide safeguards have been recognized long before statutory demands for accessibility of public facilities or the advent of universal design. As attitudes toward persons with disabilities continue to change and the greater integration of persons with disabilities more fully into the community continues, this area of the common law will likely continue to develop.

Sudden Incapacity. Foreseeability of harm is often at the key of determining liability in negligence cases. The prudent, reasonable person would not endanger others by engaging in activities that are unreasonably dangerous for them but would not be so for other persons. Some medical conditions contain the potential for blackouts, seizures, or other sudden moments of incapacitation, in which an individual might not be able to retain control of a potentially dangerous device, such as an automobile. These situations have been reviewed by courts and the common law rule has been established.

> Restatement (2d) of Torts: § 11(b). Disability. The conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor (American Law Institute, 1979).

The issue then becomes one of foreseeability. Medical diagnosis and professional advice to avoid certain activities can be pivotal in determining the level of negligence. An individual who is told to absolutely avoid an activity and nonetheless engages in it, and harms another as a result, could be deemed to have crossed the line to reckless rather than merely negligent behavior. The courts have addressed this circumstance many times, and there appears to be a tendency for them to grant significant leeway in interpreting this rule in such a way as to expunge liability. The ultimate question, though, of liability is a matter for the jury to decide, with the burden of proof on the defendant, not the plaintiff. See, for example, *Lutzkovitz v. Murray*, 339 A.2d 64 (Del. 1975).

Several examples can be used as illustrations of this point. In *Goodrich v. Blair*, 646 P.2d 890 (Ariz. 1982), an elderly driver who had recently suffered a stroke and a heart attack reapplied for a driver's license. During the written examination he became weak and required assistance. He was told that he must complete a driving skills test behind the wheel of a car. While doing so, he suffered a heart attack, crossed traffic, and injured the occupants of another vehicle and the license examiner. The court found that the heart attack was not a foreseeable event and the driver was absolved of liability. In *Hammontree v. Jenner*, 20 Cal. App. 3d 528 (1971) a man with a fifteen year history of epilepsy, but under medical management and with no seizure activity in fourteen years, was absolved of liability for an automobile accident caused by his seizure.

Mental Illness. The reasoning for sudden incapacity might lead one to believe that actions committed by an individual with a mental illness, including those that would be considered intentional torts, are a defense to liability. In criminal law, this can be true. Serious crimes require two basic elements: *mens rea* (acting under a malicious state of mind) and an *actus reus* (the criminal act itself). The rule in *R. v. M'Naughten*, 8 Eng. Rep. 718 (1843) established that those who are unable to recognize the wrongness of their actions due to a mental condition cannot be held liable for those acts; the *mens rea* element is legally absent. The rule has been accepted by most American courts. However, the rule is different in regard to civil liability for torts committed under such a state of mind.

> Restatement (2d) of Torts: § 895J. Deficient Mental Capacity. One who has deficient mental capacity is not immune from tort liability solely for that reason. (American Law Institute, 1979).

The reasons for this distinction between criminal and civil liability relate to both principles of justice and public policy. In criminal cases a citizen's liberty is at stake; to be found guilty usually means incarceration or some other, less restrictive sanction on freedom of movement and self-determination. Thus, a defense of insanity is considered appropriate (although compelled treatment, sometimes in an institutional setting, may have much the same result). In civil suits at law the risk to the individual is monetary. While such losses can cause drastic changes in an individual's lifestyle they are deemed appropriate due to the degree of harm that person caused to another, and do not carry the loss of personal liberty involved in a criminal conviction.

In *McGuire v. Almy*, 8 N.E. 2d 760 (Mass. 1937) the defendant was a woman with a mental illness which caused her to have periods of irrational hostility toward others. Her live-in caregiver, a registered nurse, was seriously injured by the defendant during one such spell. The court found the defendant liable despite her condition, and stated the public policy rationale for the rule:

> These decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged. Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field. *McGuire* at 762.

These rules governing special circumstances with persons with disabilities or medical conditions under tort law are rational on their face, especially when courts explain the reasoning behind the rules. The law of torts is established to compensate innocent parties for the wrongful or negligent actions of others and to place the burden for that compensation on the liable parties. Rules such as this seek to place the burden of damages on the party most culpable, should that party have the resources to reimburse the defendant.

Contracts and Property

Contract law concerns agreements between parties to exchange goods or services or to perform actions for the benefit of others. Contracts have three essential elements: an *offer* to pay some price or provide some service on specified terms, an *acceptance* of that offer on the part of the other party, and *consideration*, or something of value, being given by one party to another and vice versa. While the basics elements of a contract are relatively simple to understand, contract law has many nuances regarding structure and interpretation of contracts, the obligations of parties, and the fulfillment of these obligations. Most contracts between individuals are governed by common law principles. Commercial contracts, especially between merchants, are generally governed by the Uniform Commercial Code, which has been adopted in whole or in part as statutory law by the various states.

Property law is another closely related area, concerning the transfer of both real property and moveable property (chattels) between parties. Property law is a common law topic, but has been heavily modified by statute in most jurisdictions. Much of the law of property concerns the property itself, the means of conveyance, and the use and rights of the land of the property owner. Because property law is related to agreements, it has a close relationship with contract law.

<u>Formation and Competency</u>. One of the first issues that a court faced with an issue of contract law may have to determine is whether a contract was actually formed. While the basic issues of offer, acceptance and consideration are a part of this, it is also critical that the individuals making the contract are competent to do so. Absent some form of incapacity, adults are considered competent to form contracts, and once those contracts are formed, they must abide by and satisfy the terms. Minors (in most circumstances) and intoxicated persons, for example, are deemed incompetent to contract, and contracts to which these persons are a party may be either *void* (in which case a contract is deemed to have never formed) or *voidable* (in which case the party lacking competence can choose to nullify the contract). The rationale for these rules is that to make an agreement an individual must be able to understand the circumstances under which they are making the contract, their obligations, and the compensation that will be received. The American Law Institute has published *Restatements of the Law* concerning contracts and their interpretation in the common law. The essential rule governing competency is stated as follows:

> <u>Restatement (2d) of Contracts: § 12. Capacity to Contract.</u> (1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances. (2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated. (American Law Institute, 1981).

<u>Good Faith and Fair Dealing</u>. Mental illness or defect are examples of circumstances where a contract may be deemed void or voidable. The burden of proof is on the party claiming the incapacity to demonstrate to the court the grounds for the incapacity, and contracts are considered valid unless this is shown. There is also a question of good faith and fair dealing in such matters, requiring that the party without infirmity seeking to enforce the contract, are not aware of the infirmity and are not seeking to take advantage or the impaired position of the other party when the contract is formed. The *Restatements* further address this rule when it is applied to persons with mental illness or defect:

> <u>Restatement (2d) of Contracts: § 15. Mental Illness or Defect</u>. (1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition. (2) Where the contract is made on fair terms

> and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires (American Law Institute, 1981).

Contracts to which this rule is applicable are voidable, or can be cancelled at the discretion of the person with the disability. If that individual, for whatever reason, wishes to continue the contractual relationship until its completion, they may choose to do so. However, even if the contract is voided, provided the contract was made in good faith, the party voiding the contract is obligated to provide reciprocal consideration (payment) for that part of the contract that has been completed and cannot be cancelled or otherwise rectified. To do otherwise would unjustly enrich the impaired party, and justice and fairness require that the other party, provided they acted ethically and with prudence, not bear the burden of such a loss.

Such is not the case in matters where a party knew of the infirmity of the other party to the contract and attempted to gain an unfair advantage from it. In such cases, the burden of the cost is shifted to the party acting in bad faith. In *Hauer v. Union State Bank of Wauwatoma,* 532 N.W.2d 456 (Wis. App. 1995), the plaintiff was an individual who had sustained a traumatic brain injury as a result of a motorcycle accident some years prior to signing a loan agreement with the defendant bank, secured by the plaintiff's mutual fund account. The plaintiff defaulted on the loan and the bank seized the collateral. The plaintiff, who presented medical testimony that at the time she was unable to make reasoned decisions, sought to void the contract. The jury ruled that the bank did not act in good faith. As a result, the contract was voided, the bank was ordered to return the collateral, and the plaintiff's obligation to repay the loan was removed.

Contract law seeks to enforce contracts when possible, putting the parties to the contract in the position they would have been in had the contract been fulfilled. The law looks to equity and fairness, and absent matters such as bad faith on the part of the party will not apply a decision that seems punitive or inequitable. Rules such as those concerning competency to contract for persons with cognitive disabilities extend from these general principles.

Wills, Trusts and Estates

These areas of the law have a strong relationship to the common law, with provisions that are in some ways reminiscent of both the law of property and the law of contract, but the common law has been modified by statute in many states. As commonly known, wills are instruments that settle accounts with creditors, transfer remaining property, and make provisions for other arrangements after a person's death. The person making a will is called a *testator* or *testatrix*. An individual who dies with a written will is said to die *testate*; those who die without a will are said to die *intestate*. There is no legal requirement that persons have a written will, as a default procedure exists for the disposal of property under state intestacy statutes. The benefit of a will is that it permits an individual, during their lifetime, to control the disposition of their estate at their death, according to their wishes, rather than according to a statutory scheme.

Trusts are another means for disposing of property that can become effective on death, and included in a will, but may also be established and effective during the individual's lifetime. To create a trust, the *settlor* (the person creating the trust) chooses a *trustee* to manage the trust according to a set of rules the settlor establishes for the advantage of a *beneficiary*. A certain amount of property is placed in the trust, and this property is known as the trust *corpus*.

The final way that an individual may dispose of their property is to simply distribute it prior to their death to other persons or entities. This type of gift is referred to as an *inter vivos* (in the course of life) transfer. To be valid, the transfer must actually change place and the property change possession. Until the property actually changes hands it is merely a promise that is not legally binding, and upon death if a will indicates other plans for distributing the property, the language of the properly executed will controls the distribution.

Competency to Make a Will or Trust. It is common for wills to include language indicating the testator/testatrix is "of sound mind." Competency to make a will, trust, or even to make a gift is similar to the competency to make a contract, but the elements are somewhat more detailed. The *Restatements* indicate the general rule as follows:

> Restatement (Third) of Property (Wills and other Donative Transfers: § 8.1 Requirement of Mental Capacity. (a) A person must have mental capacity in order to make or revoke a donative transfer. (b) If the donative transfer is in the form of a will, a revocable will substitute, or a revocable gift, the testator or donor must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property. (c) If the donative transfer is in the form of an irrevocable gift, the donor must have the mental capacity necessary to make or revoke a will and must also be capable of understanding the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor. (American Law Institute, 1997).

The language under part (b) seems rather cryptic, but it is actually more liberal in interpretation than it may at first appear. First, the person making arrangements for a transfer must have a general idea of the property that they own. This does not mean knowledge to the last penny of bank accounts or the precise value of real estate or other holdings, but rather a knowledge of what they possess that is within their power to transfer. Secondly, the "natural objects of...bounty" refers to knowledge of the persons or entities to whom the donor intends to transfer the property to. The third element involves relating the property and the potential recipients in a scheme to make the distribution. The other provision of the rule indicates that the donor must be able to understand the consequences to their financial well-being of an *inter vivos* transfer. Inability to do these things is the definition of incapacity for the purpose of this rule. It should be noted that courts generally accept that an individual who has moments of lucidity interspersed with moments of incoherence can legally make a transfer or a will so long as this is done during those moments of lucidity. Challenging a will on the basis of a lack of capacity usually requires that the challenger prove to the court that the testator was not competent to make the will.

Insane Delusion. Another provision under the law of wills, trusts and estates is that concerning what is called an insane delusion. This term is somewhat misleading, as it does not necessarily imply that an individual is insane or incompetent. Actually, it is a decision to transfer or fail to transfer property based on some conclusion the donor has drawn (usually about the conduct or motives of another person) that has no basis in reality, and is so contrary to incontrovertible facts and evidence that it is completely irrational. A belief that a relative stole property from the donor or that someone was plotting physical harm to the donor could be examples of such a belief. The presence of an insane delusion does not automatically deem a donor universally incompetent, nor does it necessarily make the entire will void, but can be used to strike or correct that part of the will based upon the delusion.

Powers of Attorney and Advanced Directives. A *power of attorney* is a legal document that appoints an individual to act as the *agent* of the person (the *principal*) making the appointment in regard to the scope of matters detailed in the document. The agent here is called an *attorney-in-fact*, but need not be an attorney. *Ordinary* or *revocable* powers of attorney are relatively common devices that are used in many property transfers and business relationships. They are referred to as revocable because, under the law of agency, the individual appointing the agent has the ability to end the relationship.

In matters related to such issues as dealing with medical decisions or other affairs upon an individual's medical incapacity or loss of competence to make these decisions for themselves, a revocable power of attorney is ineffective, however. The laws of agency void a revocable power of attorney upon the principal's loss of capacity to revoke the agreement. In response to these concerns, a special power of attorney, called a *durable power of attorney*, must be created. This directive, available under state statutes, can function as an ordinary power of attorney until a period of incompetency commences, but then continues to be effective upon the incompetency of the principle and lasts while the incompetency continues, or until the principle's death.

Two other documents are of importance in estate planning. One is the *medical proxy*, which assigns the right to make medical decisions to a specified individual on behalf of an individual in times of incompetency. The other is the *living will*, which indicates an individual's wishes in regard to end-of-life care. These directives have become more commonplace in recent years as the capacity of medical science to preserve life without hope of meaningful recovery of quality of life have increased. Many persons choose to have these directives in place to indicate their wishes rather than place the emotional burden on others.

Discussion

The common law is based upon principles of equity and justice that have been developed through the holdings of courts over many years. In regard to disability and the specific rules and exceptions concerning both physical and cognitive disabilities in the common law, these principles are no less visible, and attempt to protect those in vulnerable positions while at the same time holding them to standards of behavior that are likewise based upon common sense. In a sense these rules in spirit foreshadow the provisions of statutory protections that are better known to those in the disability community in that they provide reasonable protections and demand reasonable behavior for people with disabilities and those with whom they interact. As the common law continues to develop, and persons with all types of disabilities further integrate into the community at large, additional distinguishing features and new rules pertaining to persons with disabilities based upon the same standards of equity and justice.

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