

# Innovations in Recognising the Will of a Person

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Five Nations Seminar Series  
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Plan: Nine Slides (not including this one!)

1. Screenshot from the History of the Present
2. Recognitive Volitional Practices
3. The Legal Doctrine of the Will
4. In the Beginning ... Augustine's Amalgam
5. The Will as Decision-Making Capacity
6. Decision-Making Capacity as 意思能力 [ishi nōryoku]
7. New Recognitive Volitional Practices in Kanagawa Prefecture
8. Evincing the Will
9. Conclusions

# 1. Screenshot from the History of the Present



20 October 2025 - Morning session



“What we are dealing with is somebody who has no mental capacity to decide about their living arrangements but can still evince willingness or unwillingness to be there.”

Dame Vivien Rose (Lady Rose)  
UK Supreme Court

## 2. 'Recognitive Volitional Practices'

A **recognitive volitional practice** is a practice in which a person is recognised as having a will in a matter.

### 3. The Legal Doctrine of the Will

The will [*voluntas*] is:

- A capacity of a legal actor ...
- to endorse (*volo*) or reject (*nolo*) an offer or plan-of-action;
- Distinct from both intellect and appetite;
- Compromised by ‘vices of the will’ [error, fraud, threat, coercion, undue influence ... ];
- A condition on imputation (“No will, no deed”);
- Exclusionary: no one without a will can exercise full legal capacity.

## 4. In the Beginning ... Augustine's Amalgam



Augustine of Hippo (354-430 AD)  
credited as 'inventor of the will'

### *De Libero Arbitrio ... Voluntatis*

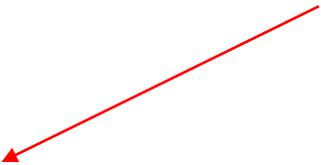
The capacity to  
arbitrate among options;  
choose, elect, select

The capacity to be oriented by  
ends that one values, and  
to be motivated to pursue them

“Because I am not required to answer your question unless you are willing [*volenti*] to know what you are asking about. Henceforth, unless you will [*velis*] to attain wisdom, I should not discuss these matters with you. Finally, you cannot be my friend unless you will [*velis*] my well-being. Then you, for your part, will see in respect of yourself whether you have no will [*voluntas*] for the happy life.” (Lib. Arb. 1.12.25.82)

## 5. The Will as Decision-Making Capacity

*De Libero Arbitrio ... Voluntatis*



The capacity to  
arbitrate among options;  
choose, elect, select



The capacity to be oriented by  
ends that one values, and  
to be motivated to pursue them

## 6. Decision-Making Capacity as 意思能力 [ishi nōryoku]

If the person making a juridical act did not have mental capacity when manifesting the relevant intention, the juridical act is void.

Art. 3-2; Civil Code of Japan  
Official English Translation  
Japanese Ministry of Justice

If the person making a juridical act did not have *volitional* capacity when manifesting the relevant *will*, the juridical act is void.

## 7. New Recognitive Volitional Practices in Kanagawa Prefecture

July 26, 2016

‘The Incident’ 事件 [Jiken]

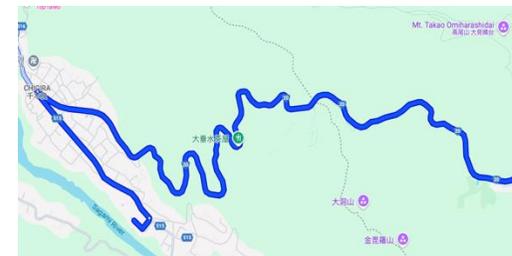
Tsuki Lily Garden Residential Care Centre

Sagamihara, Kanagawa Prefecture, Japan

19 killed; 26 injured; 131 surviving residents

Chair of the Task Force:

“I was very shocked to learn that behind this incident was the idea that people with disabilities have no will.”



## 8. Evincing the Will

- All 131 former residents are recognised as having a will.
- Having a will does not require the ability to make decisions.
- A person's will is inferred or constructed on the basis of 'clues' [*tegakari*; 手がかり] drawn from a variety of different sources: the person's individual life-history, behaviour, facial expressions, reflections on the results of 'experience-gaining' events, etc.
- Multi-disciplinary team, coordinated by a Decision-Support Officer (new professional role), identifies "the life the person wants to live."
- Identifying the appropriate placement may require cognitive load-sharing.
- Kanagawa Prefecture recognises the (reviewable) output of this procedure as the person's will as regards residential placement.

## 9. Conclusions



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- ❖ Since late antiquity, the law has operated with a widely shared concept of the will, which can be functionally characterised.
- ❖ Recognitive volitional practices are practices in which the will of a person in a matter is recognised.
- ❖ Recognitive volitional practices define the *de facto* limits of legal capacity.
- ❖ At the beginning of the western legal tradition, the will was conceived as an integrated amalgam of two functions: the capacity to s/elect among options, and the capacity to be oriented towards ends one is motivated to pursue.
- ❖ The currently dominant conception of the will in these Five Nations emphasises one element in this amalgam: decision-making capacity.
- ❖ In contemporary Japan, at the local level, efforts are underway to develop new recognitive volitional practices.
- ❖ The focus in these new practices is not so much on the ability to make a particular decision, but on “the life the person wants to lead.”
- ❖ The will of a person in a matter can be recognised in the absence of decision-making capacity.



小林さん

「障害者には意思がない」ということばに対するアンチテーゼで、僕は動いています。入所している人たちが、いろいろな人と関わっている色々な自分を出せるようになって、本人の意思や権利が守られるのが理想だと思っています。「意思がない」なんてことはもう言わせない」

*“I am working as an antithesis to the phrase, ‘disabled people have no will.’ I think the ideal situation would be for residents to be able to interact with a variety of people and express their various selves, and for their will and rights to be respected. I don’t want to let anyone say that they ‘have no will.’”*

Satoshi Kobayashi, Chief Supporter  
Decision Support Promotion Officer  
Tsukui Lily Garden