

“JUDGING COMMUNITY STANDARDS AND MORES”

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ROSEVILLE ROTARY CLUB**

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Thank you for the invitation to speak to you this evening. I would like to take the opportunity to raise with you a pervasive aspect of my work as a judge which troubles me from time to time in varying degrees, but is always present in the background. It is the question as to how we assess and apply community values in a range of situations.

The question is sometimes identified in terms of high constitutional principle. At that level, we say that it is the function of the Government, acting through Parliament (or perhaps more correctly, the Parliament acting on the initiative of the Government) to identify relevant moral, social and ethical issues and resolve them through legislation. On that view, it is not the job of judges to address such issues at all. Our role is to apply the law, as it is sometimes found in earlier lines of judicial authority, that is by an application of existing precedent, or, as is more usual in these days, by applying the words of the statute enacted by Parliament.

The most common support for this constrained view of the judicial role is found amongst opponents of a Bill of Rights. If constitutionally entrenched, a Bill of Rights imposes limits on what Parliament can enact; and whether or not constitutionally entrenched, it allows judges to decide cases by reference to broad and imprecisely defined, value-laden concepts such as freedom of expression, freedom of religion and equal protection under the law.

Although what I want to talk about may have ramifications for that debate, that is not the focus of my thoughts tonight. My concern is how judges should deal with cases in well-established areas of the law, applied on a daily basis, but where the concepts are value-laden. Let me give you some examples.

First, there are the relatively easy cases. Take motor vehicle accidents. The vast majority of such cases are covered by insurance and disputes never reach the courts. However, if but a small percentage of all claims come to the courts, because of the large total numbers, the court cases are not uncommon. Nevertheless, the issues are reasonably straightforward. Was the driver who hit a pedestrian on a pedestrian crossing keeping a proper lookout? Was it reasonable to travel at 50kph through busy streets where there were known to be cyclists? Were the RTA signs indicating road works and changed conditions sufficiently clear or were they confusing? If they were confusing, did they cause the accident?

There are of course other types of negligence cases, all of which are governed by the same principles as the motor accident cases, namely did the defendant owe the plaintiff a duty to take reasonable care for his or her safety and, if so, did the

defendant breach that duty so as to cause harm to the plaintiff? When the defendant is a medical practitioner and the plaintiff is her patient, the reasonableness of the practitioner's conduct must be judged by standards with which we judges are not familiar, but about which we can be told by professionals working in the same field as the defendant. These cases could all be put to one side, but for one consideration. It is that the defendants are usually covered by insurance. If you read the judgments of the courts in such matters where plaintiffs have recovered damages for negligence, you can test the relevance of insurance by asking yourself whether you agree that the plaintiff was entitled to recover damages. Would you reach the same conclusion if you thought that the defendant had to pay the damages personally? Arguably the decision is correct only if you answer both questions "Yes". However, there will probably be many cases in which you would answer the second question "No", meaning that the plaintiff should only recover if the defendant had insurance which covered the loss. If that is what happens in practice, are judges applying the test of reasonable care correctly?

Let me turn to two other examples which arise in private law, that is between citizen and citizen. The first involves succession, or what used to be called testators family maintenance claims. Our court decided a case last year involving a will left by a mother (the father had predeceased her). The testator was survived by five offspring, being one son and four daughters, all themselves middle-aged. The estate was worth approximately \$800,000. The son received about half of the estate, with the balance being divided between three sisters (c \$130,000 each), the fourth sister receiving a legacy of only \$10,000. Those facts alone might cause you to raise an eye-brow.

There is no legal obligation for a testator to treat all members of his or her family equally, nor indeed preventing a testator leaving much or all of an estate outside the family, such as to charity. Nevertheless, when an estate is distributed amongst adult children, most of us look for a reason for departing from equal treatment. In that case there were two reasons, one relating to the son and the other to the disinherited daughter. With respect to the son, he received 40% of the value of the home, which was the principal asset in the estate, because of work he had done on the house without compensation, which improved its value. Otherwise, he and the three daughters shared the residue equally, apart from the legacy to the fourth daughter. The reason for treating the fourth daughter less favourably was the almost total absence of contact between her and her mother for a period of 35 years. It was the fourth daughter who made a claim for a greater share of the estate.

Such claims can be made by a statutorily defined list of individuals, who are largely close relatives. Where a claim is made, the *Succession Act* provides that the court “may ... make a family provision order ... if the court is satisfied that” the testator has not made “adequate provision” for the applicant. The underlying idea is that the testator has moral duties towards members of his or her family. Such duties may require that account be taken of the respective needs of family members.

Given relevant evidence, financial needs can readily be assessed; but in this case the mother may not have known of the financial circumstances of her fourth daughter, with whom she had had virtually no contact for 35 years. Indeed, is such lack of contact itself a sufficient reason for disinheriting an offspring? And how is

one to address that question – by reference to attitudes which the judge derives from his or her experience of how society operates? By reference to the beliefs and attitudes of the social group to which the family belonged? Or by some other set of standards? Historically, one can readily identify groups who would have thought it more than appropriate, perhaps necessary, to disinherit a family member who was actively homosexual, married to a person of a different race, or who rejected the religion of his or her parents. Even within our dominant culture, is it acceptable to disinherit an offspring with a long criminal record? Where there has been no contact for a lengthy period, is that by itself sufficient to warrant an offspring being left out of the will; or does one, in some reprise of the old fault-based approach to divorce, assess where responsibility lay for the breakdown of the family relationship?

Another area of private law in which such questions can readily arise is defamation. A statement which in some segments of society might be considered mere vulgar abuse or even a compliment, may be treated as a scurrilous reflection on one's reputation in other circles. That is not to say that the principles to be applied cannot recognise diversity. To call someone a pork-eater may be offensive to the adherents of some religions, but not to others. Rejection of religious intolerance is a general principle, even though its application will vary, depending on the circumstances.

Let me turn to areas of public law. The most obvious is the sentencing of offenders in criminal cases. Hardly a day goes by without criticism of the sentence imposed in a particular case, usually because it is seen to be unduly lenient. It is a topic on which everyone can readily form an opinion, the strength of which is usually inversely proportionate to knowledge of the facts. Nor is that remark intended to be

facetious: social science research has demonstrated over and over again that jurors who have heard all the evidence at trial and have convicted an offender who stay to hear the further evidence and submissions on sentence are far more likely to accept the justice of the sentence and even consider it overly harsh, compared with those who know little beyond the detail of the offending and the sentence imposed, who will be inclined to consider it unduly lenient.

Despite all that, the difficulty in assessing the relative moral culpability of different offences and different offenders is immense. Parliament identifies only the broadest parameters, by specifying maximum penalties and, with respect to a handful of offences, what are described as standard non-parole periods, that is standard periods of custody during which the offender is not eligible for conditional release.

Nor should it be thought that courts treat public criticism of their decisions as simply water off a duck's back or, to use a different metaphor, an occupational hazard. That is because in ways which are hard to measure, social stability and the rule of law, which we treat as an essential attribute of a liberal democracy, depend on public acceptance of the fairness and efficiency of the administration of justice. Indeed, the courts are required to take account of such matters in particular circumstances where they are seen to be at risk. One example is to be found in the principles governing contempt of court. Thus, the courts will punish those whose actions tend to bring the administration of justice into disrepute; although that itself is a fraught concept. It is often said that baseless and scurrilous abuse is a form of contempt. However, scurrilous abuse which is seen to be baseless is unlikely to affect public opinion significantly; rather it is serious criticism which has a sufficient and perceived

basis which is likely to be most effective, but which requires attention to the underlying problem, rather than punishment for contempt. In the result, contempt proceedings are usually restricted to cases where individuals have flouted a court order or where prejudicial publications may tend to undermine the fairness of a forthcoming jury trial.

The other example where the courts seek to protect the reputation of fair administration of justice is in respect of perceived or actual bias on the part of judges and other decision-makers. However, like contempt, complaints of bias have their own inbuilt tensions. There are many circumstances in which one might apprehend that a judge could be influenced by conscious or unconscious prejudice of various kinds. Having a financial interest in the outcome (perhaps through an investment in a company involved in litigation), having heard a case involving one of the parties in the past, knowing one of the parties or a witness or indeed having dealt with some earlier stage in the proceedings in a manner adverse to one of the parties are all examples. Strong personal beliefs may be problematic in some circumstances.

In clear cases of bias and in circumstances where the reasonable informed observer might think that the judge might not bring an open mind to the determination of the dispute, the judge is required to stand aside and if he or she fails to do so, that failure may constitute a ground for appellate interference.

The internal tension is this: while failure to insist on a tribunal free of bias is a recipe for disenchantment with the fairness of justice, too ready an acceptance of a complaint of bias may encourage doubts as to the ability of judges to put to one side

prejudicial information or views, as they have to do on a daily basis. There is a balance to be drawn. However, it must be said that the balance is, in practice, drawn without any ready basis for assessing public attitudes, despite the fact that public confidence in the fair administration of justice is the rationale.

In Australia we do not elect judges, we appoint them. Generally, we appoint people with long experience in the practice of law, as well as legal training. In America they elect their judges in many state jurisdictions, though not in federal courts. In the civil tradition in Continental Europe and in many parts of the world which derive their legal systems from the civil law countries, judges are largely, though not always, professionals whose primary experience is in the courts, starting in a junior role and progressing to higher office. No doubt the method by which we train and choose our judges affects the standards they bring to bear in deciding cases. The laws which Parliament gives them to enforce almost invariably have large areas for evaluative judgment and in some cases, such as the examples I have given, require the application of social, cultural or moral standards. The work judges do must be, not beyond criticism, but broadly accepted in institutional terms. That will not happen if the standards applied are not broadly accepted; on the other hand, it will fall short in another way if minority groups become alienated from the judicial system. We all need, so far as possible, to maintain a consistent moral compass whilst recognising social diversity.
