Rules that ought not to be applied – the ultimate iconoclasm

The 2010 Sir Maurice Byers Address was delivered by David Bennett AC QC

Sir Maurice Byers was one of the most brilliant lawyers and advocates that Australia has seen. I put it that way to emphasise that he was both a brilliant lawyer and a brilliant advocate for these two qualities do not always co-exist. His advocacy was such that Justice Bruce Macfarlan once referred to the fact that he always had to be on his guard against Sir Maurice's plausibility. His legal brilliance was demonstrated by his lateral thinking in being able to develop and promote new legal ideas which achieved acceptance in the High Court. The two greatest examples of this skill occurred during his final period at the private bar after his term as solicitor-general of Australia. They are *Australian Capital Television PL v The Commonwealth* (1992) 177 CLR 106 and *Kable v DPP* (1995-6) 189 CLR 51. In both cases, orthodox legal doctrine would have told a lawyer that the client's cause was hopeless. Who would have thought of implied constitutional principles giving rise to freedom of political communication or a prohibition on a state legislature empowering its own courts to make decisions concerning the continued detention of prisoners who might constitute a risk to society. In each case, Sir Maurice created and developed in argument a new legal doctrine and in each case he was successful. The ability to develop such arguments could be described as iconoclastic.

It is therefore appropriate that I devote this Sir Maurice Byers lecture to the ultimate iconoclasm – a questioning of the basic syllogism which underlies every case and motion in every court throughout Australia every day.

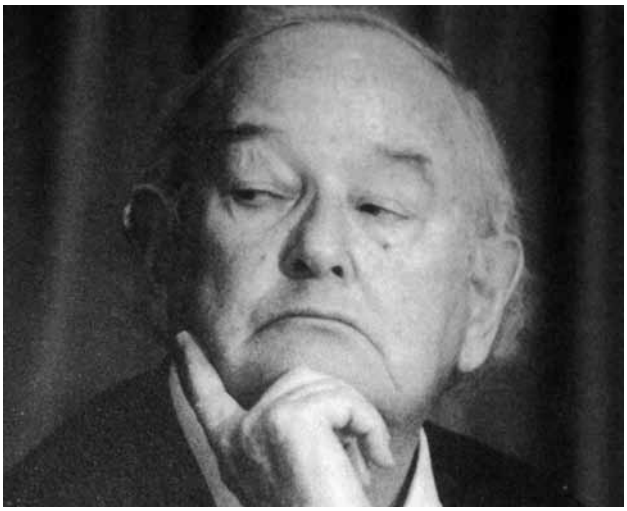
I would love to have discussed this address with Sir Maurice. I can only console myself by saying that, had he been alive, there would probably not have been a Sir Maurice Byers lecture to give.

Before I go further, I interpolate that I discussed this oration with a Federal Court judge who shall be nameless. She advised me that I should explain the words 'iconoclastic' and 'syllogism'. I do not consider this to be necessary but I will do so. Iconoclasm, literally the breaking of idols, is challenging established beliefs. A syllogism is a logical process such as 'all dogs have four legs' (the major premise); 'Fido is a dog' (the minor premise); therefore Fido has four legs. The syllogism with which I am concerned is as follows:

Major premise: If fact A (or a specific combination of facts) is shown to the relevant standard, the court shall do X (or may do Y).

Minor premise: Fact A (or the specific combination of facts) is shown to the relevant standard.

Conclusion: Therefore the court must do X (or may do Y).



The problem with this syllogism and the theme of this oration may be expressed in a number of ways. Three ways of expressing it are as follows:

1. Every generalisation of law has exceptions. The syllogism fails to recognise the possibility of an exception to the major premise where the principle is clearly inappropriate.
2. Every generalisation of law has an ultimate purpose. The syllogism fails to recognise that the application of the generalisation may be anomalous where a particular instance (or the presence of a particular additional factor) gives rise to a situation where application of the rule would be antithetical to (or at least neutral in relation to) that purpose or undesirable for some other reason; or, more briefly,
3. A law which is generally just may have specific unjust applications.

The principal problem I address in this oration is how to deal with the just law which has an unjust application.

Law students are frequently directed to the famous example developed by Professor HLA Hart – the case of the truck in the park. A hypothetical park by-law provides that no-one shall bring a truck into the park. The RSL wishes to erect in the park a memorial to military truck drivers killed in wartime. It proposes that this memorial take the form of an old military truck on a pedestal with an appropriate inscription. Does the by-law preclude this proposal?

A simpler example is that of a person who parks at a bus stop during a bus strike.

In each case the purpose of the law is not advanced by applying it to the specific case. The purpose of keeping the park quiet,

safe and emission-free is not advanced by prohibiting the proposed memorial. The purpose of enabling buses to pick up and drop passengers without holding up traffic is not advanced by prohibiting parking at bus stops on a day when no buses are operating.

An example of the presence of an additional factor which may outweigh the law's purpose is that of a person who exceeds the speed limit on an empty but straight and wide road while driving a critically ill person (or a woman about to give birth) to a hospital.

Analogous problems can arise outside the law where subordinates are required to comply with norms without the benefit of exceptions or discretion. Last year a lost bushwalker telephoned an emergency service on a mobile phone but was told that he could not be helped because he was unable to provide a street address for his whereabouts, this being a requirement with which the telephonist had been instructed to comply. Tragically he died, a victim of normative rigidity. In the United States a woman passing through airport security with a young daughter was asked by her child why they had to remove their shoes. She replied that it was in case they had hidden bombs in them. Because she used the word 'bomb' within hearing of a security guard, she was arrested, refused boarding rights and placed on a 'no-fly' list.

The problem is particularly acute in competitive sport where rules are rigidly applied. Some years ago, Ian Thorpe accidentally fell into the water before a race. He was disqualified because of the mindless application of a rule designed to prevent swimmers from 'jumping the gun'.

In each of these cases, a norm was applied literally in circumstances where that application failed to fulfil the purpose of the norm.

These aberrations are often sought to be justified on the basis that the subordinate is incapable of exercising a discretionary judgment. It may be that emergency telephone operators, security guards and swimming umpires are less capable of this task than judges but is anyone really so lacking in common sense as to be incapable of realising that a request for a street address is irrelevant to a lost bushwalker, that there are innocent and non-innocent uses of the word 'bomb' near security barriers or that there is a distinction between falling in the water and jumping the starting gun. Much of the blame must lie on the instruction-giver or norm-creator who does not trust the subordinate decision-maker and who therefore fails to nominate exceptions and requires a rigid application of the norm.

I will deal first with the arguments for universal enforcement of the general principle in such cases and then with the various devices available to the law for dealing with the problem. I will then indicate my view as to the solutions.

The major argument in favour of a rigid approach is certainty. The law needs to be predictable and to be capable of straightforward application. Any principle which authorised judges to depart from legal principles or statutes in any case where the underlying purpose was not served by the particular application of it would lead to excessive subjectivity in decision-making and would make the purpose rather than the legal formulation the governing rule. A law which provided that one could park at bus stops whenever that conduct was not going to impede buses using the space would have a large uncertain field of operation. What if buses are scheduled to arrive once an hour and one parks for ten minutes immediately after the departure of a bus? What if there is a 20 minute stop-work meeting of bus drivers? What if the Transport Workers' Union decrees that its members should not stop buses at a particular bus stop.

Secondly, a law or principle may overshoot, undershoot or do both. The hypothetical park by-law overshoots in relation to the RSL's memorial but undershoots in relation to a person who brings a smoky and noisy bulldozer or crane into the park. If the by-law were to provide that no-one may bring smoky or noisy things into the park, there would be many borderline cases with resulting uncertainty, loss of predictability and cost. If one is to permit courts to override the law where it overshoots, should one apply a corresponding principle where it undershoots? This would be even more productive of uncertainty. There was an attempt in this direction in ancient Chinese Law, which had a code formulating various specific offences which carried specific penalties. There was then a prohibition on 'doing what ought not to be done' with a very wide range of penalties. Such a law is the reductio ad absurdam of a law designed to achieve perfect justice without any concern for certainty or predictability. A cynic might place a law prohibiting 'offensive behaviour' in this category. The High Court took an analogous approach to a law forbidding the use of insulting words in *Coleman v Power* (2004) 220 CLR 1.

Thirdly the uncertainty is even greater where it is the presence of an additional factor which leads to the anomaly. We can all relate to the example of the speeding driver on his or her way to a hospital. It is hard, however, to contemplate with equanimity a statute or rule of law which provided that any law could be disregarded if some additional factor made it unjust or undesirable for the law to apply in a particular case. One can well imagine the arguments on both sides which

would be put in a euthanasia prosecution if such a provision were to exist.

I turn to the possible mechanisms for dealing with the problem.

The first is to draft legislation (and, where appropriate, to develop common law principles) which incorporate the exceptional cases.

This gives rise to the issue whether one does so by general legislation making the purpose paramount or by specific legislation enumerating all desirable exceptions to a statutory provision.

Both have their disadvantages.

General purposive legislation (such as 'no-one shall bring a smoky or noisy thing into the park' or 'no-one shall park at a bus stop where such parking is likely to impede a bus picking up or dropping passengers there') has many of the vices associated with uncertainty. I do not include in those vices the inconvenience to the police officer or director of public prosecutions who needs to apply his or her brain to the decision to prosecute. For the reasons I have given, such laws are inimical to certainty even if they operate more fairly in the anomalous cases.

The enumeration of all desirable exceptions is likely to be beyond the wit of even the most imaginative parliamentary draftsperson. What drafter of a park by-law is likely to think of the example of the RSL memorial. Legislation such as that to which we are accustomed in the areas of income tax, company law and workers' compensation is frequently criticised for its complexity yet it is that very complexity which enables it to operate fairly and efficiently. The most that can be said is that the enumeration of exceptions is a convenient way of dealing with the problem but that it has limitations because it is rarely possible to predict in advance all possible desirable exceptions to a rule. One notes how frequently legislation of this type is amended. This should not necessarily prevent the listing of major foreseeable exceptions. An amendment to the Motor Traffic Regulations permitting one to park at bus stops during bus strikes would be an improvement, even if it did not cover every possible situation where such parking ought to be permitted.

In the common law context, two matters militate against general or specific exceptions. General ones are likely to confer greater discretions on future courts and to reduce certainty. Specific ones require social prediction by courts which are unsuited to that task and are contrary to received doctrine about the distinction between ratio decidendi and obiter dicta as well as the separation of powers itself.

A second and related solution is to authorise regulations or ministerial proclamations creating exceptions to a statutory rule. This merely changes the identity of the decision-maker. The major practical difference is that regulations are simpler to create, amend and repeal than parliamentary legislation and that ministerial proclamations are even more flexible. The same problems about generality and specificity apply.

The third solution has merely to be stated to be rejected. It is to have a general statutory provision (perhaps in an interpretation act) enacting that no statute is to apply where the specific application would fail to achieve its purpose. This would have the effect of reducing all statutory law to subjective determination by courts based on personally developed and excessively general norms. The conferral of this type of power on judges is one of the major vices relied upon by opponents of bills of rights. Certainty and predictability would be the casualties. There would also be an issue in many cases as to whether one looked to the immediate purpose or the ultimate purpose. For example is the purpose of the hypothetical park by-law to make the park safe, quiet and emission-free or to increase the enjoyment of users of the park. These purposes might lead to different results if the memorial was considered by many to be particularly ugly.

Fourthly, in the criminal area (which encompasses the examples I have given thus far), there are in existence a range of filters already available to prevent unreasonable applications of the law. These are:

- The ability to decide not to prosecute
- The prosecutorial discretion to offer no evidence
- The power of a court to stay proceedings as an abuse of process (although to date this power has not, to my knowledge, been used in the present type of case)
- The power of a court under s 19B of the *Crimes Act 1914* (Cth) and corresponding state legislation (including s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW)) to find the offence proved but, without proceeding to conviction, to dismiss the charge
- The application of these four filters mutatis mutandis to an appeal; and, ultimately
- The vice-regal power of pardon

In practice, one of these, particularly the first, is likely to preclude the imposition of any punishment upon the RSL for erecting its memorial or upon a driver for parking at a bus stop during a bus strike or for speeding on the way to hospital in an emergency.

These filters are highly desirable. Indeed, provisions such as s 19B may be characterised as a significant Australian contribution to criminal jurisprudence. When one describes these provisions to United States or United Kingdom lawyers, one is frequently greeted with disbelief, and even with the occasional suggestion that they are contrary to the rule of law. They are not a total panacea. If anything, they constitute a recognition of the problem I have described. They do not contribute to certainty since their application can rarely be accurately predicted. One must also remember that a decision never to prosecute in certain types of case can itself be an instrument of oppression – for example if it is applied generally to police officers.

A similar approach is taken in procedural law. Virtually all rules of court throughout Australia contain provisions authorising the court not only to extend or abridge any time limit but also to dispense with any of the rules themselves.

A fifth solution lies in the law of construction of statutes.

In *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113, McHugh J said:

> Nevertheless, when the purpose of a legislative provision is clear, a court may be justified in giving the provision 'a strained construction' to achieve that purpose provided that the construction is neither unreasonable nor unnatural. If the target of a legislative provision is clear, the court's duty is to ensure that it is hit rather than to record that it has been missed. As a result, on rare occasions a court may be justified in treating a provision as containing additional words if those additional words will give effect to the legislative purpose.

This goes further than any previous case on purposive construction and it remains to be seen how durable the passage will be in the future. It provides ready solutions to the truck in the park problem – one could construe 'bring' to mean 'drive' or one could say that a defunct and immobile truck is not 'a truck'. It is harder to apply it to parking at a bus stop during a bus strike.

There is a useful example of the difficulty with this solution in the English case of *Whiteley v Chappell* (1868) LR 4 QB 147. Section 3 of the statute 20 & 21 Vic. c.105 (dealing with the election of guardians of the poor) provided that:

> If any person, pending or after the election of any guardian ... shall wilfully, fraudulently and with intent to affect the result of such election ... (im)personate any person entitled to vote at such election ...

he commits an offence.

W pretended to be an elector who he knew had recently died and thereby exercised a vote. The divisional court (reversing the trial judge) held that he was not guilty because a dead person is not 'a person entitled to vote'.

The case is frequently used by United States academics as an example of the undesirability of the English literalistic approach to construction as opposed to their own purposive approach. In fact the issue is not so simple. A literal approach could lead to the opposite result if one were to read the prohibition as applying to a person who both pretended to be another person and pretended that that person was entitled to vote. A purposive approach might fix upon the purpose of preventing other electors suffering inconvenience from this early form of identity theft. This would not apply to the impersonation of a dead person although a broader purposive approach (assuming that the purpose was to prevent electoral fraud) would result in conviction. The facts of the case thus illustrate that literalism does not necessarily lead to certainty as, indeed, a purposive approach does not necessarily lead to the most desirable result. All that one can say with certainty is that there will always be a measure of uncertainty as to whether one applies a literal or a purposive test, at least until the dictum of McHugh J is universally accepted or rejected.

What, then, should be done? The battle-lines between certainty and fairness will remain so long as we have legal systems. Laws need to be expressed in general terms and virtually all generalisations have exceptions. The optimal solution lies in the middle. We cannot solve the problem for every case but we can do a number of things. These include:

- Encouraging parliamentary drafters to think laterally and to include more exceptions in their drafting
- Determining how far McHugh J's dictum should be enshrined
- Emphasising (and confirming the availability of) provisions such as s 19B in cases of legislative anomaly

In particular, I commend to the state government the amendment of the Motor Traffic Regulations to permit parking at bus stops during bus strikes.

The failure to recognise the need for exceptions also bedevils the fields of morality and human rights. The generalisation that it is wrong for a prospective employer to discriminate on the ground of the prospective employee's religion is clearly a sound principle of human rights. It is not, however, a universal truth. Clearly if a religious institution is employing a minister of religion, it is entitled to insist that the person belong to the particular religion. In the field of gender discrimination, clearly a producer of a play or film can insist that Attila the

Hun be played by a man or that Marie Antoinette be played by a woman. This type of exception is normally recognised by statutes but rarely by bills of rights. The point is that a wise and just general principle has exceptions. Supporters of capital punishment may wish to impose it for a variety of crimes; opponents of capital punishment usually do not wish not to have it imposed at all. Why can neither group recognise that there are cases where it should not be considered (perhaps the Bali nine) and cases where it may be justified (such as Hitler or the Bali bombers). Too often today both groups describe someone who favours their principle but is prepared to recognise an exception as a hypocrite. The most obvious example is abortion. Many proponents of a woman's right to choose refuse to recognise an exception for the horror known as partial birth abortion at 8 ½ months. Many 'right-to-lifers' refuse to recognise an exception to their anti-abortion stance in the case of a morning-after pill. In each case, the power of their arguments would be strengthened not weakened by the recognition of an obvious exception.

I should disclose that, since writing my first draft of this oration, I became aware of the work of the United States legal philosopher Frederick Schauer. Much of what I have said is similar to the views expressed in his 1992 book *Playing by the Rules*. His examples are different to mine – indeed his principal example is a rule forbidding dogs in a restaurant and the issue whether that rule should apply to a taxidermically stuffed dead dog on the one hand or to a live cat on the other. In self-defence I merely plead that we came to our conclusions independently.

I summarise my conclusion by saying that all generalisations, including this one, have exceptions and that loyalty to the generalisation should not prevent recognition of the exception. If I had to summarise it in two words, those words would be 'exceptions rule'.

American Bar Association (Section of International Law) Conference

On 9 & 10 February 2010, the American Bar Association (Section of International Law) held a conference in Sydney on 'Cross Border Collaboration, Consequences and Conflict: The Internationalisation of Domestic Law and its Consequences'.

One of the many highlights of the conference was a discussion between US Supreme Court Associate Justice Antonin Scalia and the Honourable Michael Kirby AC CMG, former justice of the High Court of Australia. The issue considered was the extent to which international law may assist or inform national courts in determining constitutional questions and human rights issues. Not surprisingly, the speakers were at polar ends of the debate as Justice Scalia adheres to the originalist theory of constitutional interpretation, while Michael Kirby takes the view that the Australian Constitution is a 'living force' which quite rightly may be coloured by legal developments and attitudes abroad.[1] However, Michael Kirby did manage to find some common ground, observing that both he and Justice Scalia are great supporters of the British tradition of dissent. He later invited Justice Scalia to attend joint therapy sessions with him to address that tendency.

On the second day of the conference, various judges and counsel from the United States and Australia participated in a moot court entitled 'The Art of Persuading Judges' at the University of Sydney Law School. The moot was highly entertaining, yet with the selection of Justin Gleeson SC and Andrew Bell SC as the Australian sparring partners, the organisers' intention to demonstrate a contrast between the renowned flamboyancy of the US bar and the more subdued approach of the Antipodeans, was somewhat frustrated.

Justice Scalia, when asked at the conclusion of the moot what the most common and annoying mistake made by counsel is, replied that that the failure of counsel to answer a question from the bench by way of 'yes' or 'no', followed by an explanation for that response, is aggravating. He said that many counsel regard questions from the bench as an inconvenient intrusion of their time when, in reality, answering a question is the only occasion that counsel can be certain they are not wasting their time.[2]

By Jenny Chambers

Endnotes

1. See the opening remarks of the Honourable Michael Kirby AC CMG, former justice of the High Court of Australia, reproduced on the following page.
2. In the US Supreme Court each party is allocated thirty minutes for oral argument.