Kenneth Sutton Lecture

Statutes and Equity

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It is an honour to be asked to deliver a lecture in memory of Kenneth Sutton. He was a distinguished scholar whose insights into common law and statute were both profound and detailed. A student of, or practitioner in, the law of insurance could never but be illuminated or corrected by his clear prose.

I wish to speak about statutes and equity, and their important relationship. These are reflections and thoughts, not any over-arching theory. They do not bear upon insurance directly, but the matters I wish to discuss are relevant to how one thinks about the value or norm that underpins insurance – good faith. Also, it is timely in the light of the recent Royal Commission that closely affected aspects of the insurance industry to consider the kinds of questions that I wish to discuss. Those questions are the techniques in requiring and assessing decency in commercial behaviour.

The relationship between statutes and equity is important – how they work together, the legal techniques in understanding and applying statutory provisions and equitable principles, and their respective places in a legal system built on the foundation of the common law in a democratic society.

Let me begin with statutes. In a representative federal democracy, statutes take their place as the expression of will of Parliaments within their circumscribed ambits of lawful power. Above all, a statute is a statement of will. The will, its meaning and reach, is to be discovered by, in the first instance, the process of ascription of meaning to the words used by Parliament, by the processes of construction and interpretation. Ultimately this is a judicial task. As John

Chipman Gray[1] pointed out over 100 years ago, however precise and peremptory the words of a statute are, it is for the courts to ascribe the meaning to them: to interpret the legislative act.

This is especially so in a federal compact where the divisions of responsibility and authority are constitutional questions, the answers to which are exclusively part of the judicial task.

The form and nature of the Parliamentary will or command are various. A statute may fulfil many functions: creating a criminal offence, providing for a new or varied right of action, or a tax, or the rules for the order of priorities for private securities, or for the admissibility of evidence. The function may be apt for strict rules admitting of great precision, or not, as the case may be. One feature of modern statutes has been the creation of norms of conduct expressed generally as commands for an expected standard of behaviour in relation to social, often commercial activity: s 52 of the *Trade Practices Act 1974* (Cth) (now s 18 of the *Australian Consumer Law*), and other provisions in trade or commerce that deal with unconscionable conduct and unfairness.[2] Some of these norms have an obvious relationship with equity, borrowing directly from it or using it terminologically and substantively as the statute's source of norms and values.

These statutes are examples of legislative policy, expressed in the required norm of conduct, becoming a source of law – as Cardozo J said in 1937: "a new generative impulse transmitted to the legal system." [3] Also, these statutes are more like vehicles for the development of a field of substantive judge-made law, the task of the courts being not so much to construe the language and ascribe meaning, but to develop the norm or doctrine chosen as the criterion for the operation of the statute; that is, to fill out the content of the norm. In these kinds of

[1] John Chipman Gray, *The nature and sources of the law* (The Macmillan Company, 2nd ed, 1931) at 124-125.
[2] *Competition and Consumer Act 2010* (Cth) sch 2, ss 20, 21, 22, 23 and 24; *Australian Securities and Investment Commission Act 2001* (Cth), ss 12BF, 12BG, 12CB, 12CC, 12DA, 12DB and 12DC.
[3] *Van Beeck v Sabine Towing Co,* 300 US 342 (1937) at 351.

provisions the Parliament plainly intends the courts to give shape to the broad mandate of the statute by the values and norms that the statute has expressly or implicitly chosen.[4] Further, these statutes can be seen to be what Justice Gummow referred to as "a socially directed rule, expressed as an abstraction, to the infinite variety of human conduct revealed by the evidence in one case after another" [5]. Such a rule (usually generally expressed in its abstraction) calls forth the need for the process of characterisation of the facts by reference to the content of the statutory norm aided, but not exhausted, by the construction and interpretation of the provision. This distinction, but relationship, between construction and interpretation, on the one hand, and characterisation, on the other, is important.

Such a rule also calls forth the need for caution in the process of construction and interpretation, in the ascription of meaning. The reach of operation or engagement of the provision will be drawn from its application over time to that infinite variety of conduct. That means great caution needs to be shown in not attempting to fix for all time a rigid content of meaning to the words by over-definition at the outset. The temptation on judges (to which they often succumb) is to take the generality of the words chosen, rearticulate them in terms of attempted exhaustive meaning, often narrowing the generality in search of certainty, and then apply the rearticulated meaning to the facts before them. This risks freezing, by the rules of precedent, the meaning of the general words to one particular application of them by attempted rearticulated exhaustive definition. What is thereby created is a more particular and more precisely worded substitute or default or re-presentation of the general word. It is, of course, necessary for the judge to articulate in the context of the human conduct before him or her, why the general words apply or not, as the case may be. That *articulation* should *explain* what are the human elements that, in all these circumstances, lead to the conclusion

[4] See *State Oil Co v Barkat Khan,* 522 US 3 (1997) per O'Connor J, and see the illuminating lecture by WMC Gummow, 'The Common Law and Statute' in *Change and continuity: statute, equity and federalism* (Oxford University Press, 1999) at 6-11.
[5] Gummow, above n 4, at 18.

(by way of characterisation) that the general words apply, or not. By this process, construction of meaning of the words is interwoven with application to factual context and with explaining or articulating the relationship between the two.

The above involves a recognition that words can only do so much. There is a limit to text. Text is the vehicle for meaning, but meaning must apply to a whole human context. If a person is required by a statute to act fairly, or efficiently, honestly and fairly, or in good faith, or not unconscionably or in bad faith, the task of the court is to ascribe a generality of meaning to such words that conform to the generality of the expression, and develop through articulated application of them over time, case by case, the human reality of that meaning. This is not to be achieved through exhaustive particularised definitional reduction of the general into re-expressed atomic particular expression supposedly capable of fitting over the infinite variety of facts. It will be achieved by interpreting the words of generality by reference to the values that the statute requires and articulating, on a case by case basis, why the general words are engaged, or not. This recognises the reality that some concepts can only be expressed at an appropriate level of generality if they are to maintain their whole intended meaning.

Whilst statutes frequently provide for broadly expressed socially directed norms, there is a countervailing modern tendency in many other provisions of statutes (sometimes those accompanying the general norm) to see expression with attempted exhaustive and deconstructed particularisation. There is an apparent drafting determination to express ideas both exhaustively and by reference to particularised lists in a deconstructed fashion. One example will suffice. Sub-section 961B(1) of the *Corporations Act 2001* (Cth) requires a person who is providing personal financial product advice to act "in the best interests of the client". The language is simple, as simple as the concept itself, informed as it is by fiduciary loyalty. The provision is followed by sub-s 961B(2) (somewhat misleadingly referred to by

some as a "safe harbour provision") which sets out a long and cumulative checklist of matters which, if all done, will satisfy sub-s 961B(1). The general norm based on experiential and relational values is deconstructed and particularised into a collection of examples, thereby fragmenting the wholeness of the simple idea in sub-s 961B(1). The technique also limits the scope of the wholesome fiduciary notion with its contextual wholeness by focusing on a structured list of factors which may be inadequate in a given set of circumstances to vindicate the underlying norm.

Let me turn to equity. Equity is a word used in various senses. In a most general sense, equity in human transactions is that which is founded on justice, honesty and right and which arises *ex aequo et bono*: justice or a form of natural law.[6] As administered in courts of equity the jurisdiction was not as unformed, but nevertheless the principles that engage a court of equity derive from duties of imperfect obligation, reflecting the requirement to act honestly and with good conscience. This can be contradistinguished with the rule or right in law based on the perfectly formed and rule-based obligation, producing the correlative right, and so the contradistinction between right and obligation.

The work of equity, save in its exclusive jurisdiction, was the amelioration or supplementation of the application of the rule at law, or under statute. Aristotle defined the very nature of equity as the correction of the law, by ameliorating the defect of the necessary universality of law's rule.[7] This is the amelioration of the application of the abstract by reference to principles born of values derived from human experience and a sense of right conduct.

[6] Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (Little, Brown and Company, 1853) at [1].
[7] See Aristotle's *The Nicomachean Ethics*, Book 5, Ch 15.

The human reality is that every system of law by written rules must be defective. There is an impossibility in devising abstracted universally applicable rules to cover every situation. There is a vain futility in attempting to write a rule, sub-rule and exemption for every human contingency. The answer has always lain in a flexible amelioration according to values and imperfect obligations to adapt to the just result, but only where necessary, and where the balance takes one.

The place of equity's approach to statute in the development of the modern approach to statutory interpretation is beyond today's subject matter. But the modern rejection of a literalist approach to meaning has its echoes, if not roots, in the conception of the equity of the statute.[8]

Although equity is founded on the ameliorative and supplementary character of principle morally founded, it is also deeply conceptualised. By the word conceptualisation I do not mean taxonomical categorisation. In *The Paradoxes of Legal Science*,[9] Cardozo said that "a fruitful parent of injustice is the tyranny of concepts". He was referring to taxonomy – the creation of categories by reference to abstraction that so often break up a whole human exchange or an experientially derived concept into parts. This deconstruction is often accompanied by decontextualisation – the removing of the whole from its human or experiential context. The technique of equity involves the rejection of this approach and of rigid categorisation or taxonomy. Equity's conceptualisation is informed by its pragmatism, and the experiential sources of human activity, human relationships and human weaknesses and vulnerabilities in the formation of its doctrines.

[8] See Gummow *op cit* at 18-22.
[9] Benjamin N Cardozo, *The Paradoxes of Legal Science* (Columbia University Press, 1928) at 61.

This urge to taxonomise or categorise is a human urge of the brain.[10] It is part of the human urge for certainty. Cardozo's warning in 1937 was explained in 1867 by Henry Maudsley in *The Physiology and Pathology of the Mind*,[11] when he said that humans have:

> a sufficiently strong propensity not only to make divisions in knowledge where there are none in nature, and then to impose the divisions on nature, making the reality thus conformable to the idea, but to go further, and to convert the generalisations made from observation into positive entities, permitting for the future of these artificial creations to tyrannise over the understanding.

This is an invaluable insight for lawyers into their techniques of thinking. Lawyers and drafters should have it on a sign on their desks. The urge to abstract and categorise human conduct into divisions by rules, and, often through metaphor, to view the divisions as almost physical conceptions taking the place of reality. Thus abstracted taxonomy is made almost physical by metaphor.

Of course, rules are essential, and taxonomical organisation is of assistance, often necessary assistance, but neither is everything, especially in equity, when conceptualisation is about human relational engagement, and addressing the relevant question in context. In legal reasoning, especially concerning concepts of subtlety that lack rigid definition, there can be utility, but danger lies, in giving physical form and structure in the imagination to conceptions, principles and relationships. Imagination, and the imagined form of thoughts, can be seen as a foundation of transmissible human ideas and conceptions through the collective imagination;[12] but imagined structure can become a false default for the conception, the principle, and the relationship and their application to the context of the concrete legal problems that may involve the harmonious interplay of equity and statute.

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[10] See Iain McGilchrist, *The Master and His Emissary* (Yale University Press, 2009).
[11] (Appleton, New York, 1867) at 323-324.
[12] Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Vintage Publishing, 2015) at 27-34.

The nature of equity influences the necessary technique of its application. In *Jenyns*,[13] Dixon CJ, McTiernan and Kitto JJ discussed the technique of equity as follows:

> The jurisdiction of a court of equity to set aside a gift or other disposition of property as, actually or presumptively, resulting from undue influence, abuse of confidence or other circumstances affecting the conscience of the donee is governed by principles the application of which calls for a precise examination of the particular facts, a scrutiny of the exact relations established between the parties and a consideration of the mental capacities, processes and idiosyncrasies of the donor. Such cases do not depend upon legal categories susceptible of clear definition and giving rise to definite issues of fact readily formulated which, when found, automatically determine the validity of the disposition. Indeed no better illustration could be found of Lord Stowell's generalisation concerning the administration of equity: "A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case": *The Juliana*.
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> (Citations omitted)

This requirement for complete analysis of the facts is mirrored by equity's technique in how it conceptualises. The concepts and their proper conceptualisation require an adherence to the demands of context, including importantly the reason why a question is being asked, and the relationship of that to the underlying applicable norm. Thus in Meagher, Gummow and Lehane, in commencing the *tour de force* that is Chapter 4 entitled "Equitable Estates and Interests", the authors say:[14]

> An examination of the nature of equitable estates and interests demonstrates that in equity there is no system or hierarchy of property concepts which, once comprehended, is a sufficient guide for all purposes and at all times. The

[13] *Jenyns v Public Curator (Qld)* [1953] HCA 2; 90 CLR 113 at 118-119.
[14] *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (Butterworths, 2nd ed, 1984) at 97 [401].

> truth is that the equity conscience elicited varying resolutions of competing or inconsistent interests and doctrine was tempered with pragmatism.

In 1981, in *Burns Philp Trustee Co Ltd v Viney*,[15] the deeply erudite equity judge's equity judge, Justice John Kearney, said:

> The administration of equity has always paid regard to the infinite variety of interests and has refrained from formulating or adhering to fixed universal and exhaustive criteria with which to deal with such varying situations. The approach traditionally adopted by equity has been to retain flexibility so as to accommodate the multitudinous instances in which the fundamental equitable rules fall to be applied.

This approach was, however, framed and informed by stable principles built on the imperfect obligation of good conscience.

Some of the subtleties in the formation and application of equitable doctrine can arise from the nature of the process of characterisation discussed by Dixon and Evatt JJ in *Attorney-General (NSW) v Perpetual Trustee Co.*[16] Characterisation, with its importance of the essential over the inessential and of substance over form, plays its part, beyond construction and definition, in moulding conceptions and giving a contextual answer to concrete legal problems. Examples of this equitable approach can be seen in the proper characterisation of rights of a residuary legatee in an unadministered estate in *Livingston's Case*,[17] of a beneficiary under a discretionary trust in *Gartside v Inland Revenue Commissioner*,[18] of a mortgagor seeking to set aside a fraudulent sale by the mortgagee in *Latec Investments*,[19] of a

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[15] [1981] 2 NSWLR 216 at 223-224.
[16] (1943) 63 CLR 209 at 226-227.
[17] *Livingston v Commissioner of Stamp Duties* (1960) 107 CLR 411; *Commissioner of Stamp Duties v Livingston* (1964) 3 All ER 692; 112 CLR 12; *Meagher, Gummow & Lehane* (LexisNexis, 5th ed, 2015) at [4-025]-[4-160].
[18] *Gartside v Inland Revenue Commissoners* [1968] AC 553; [1967] UKHL 6; 1 All ER 121; 2 WLR 277; *Meagher, Gummow & Lehane* (5th ed) at [4-075]-[4-080], [4-115], [4-220].
[19] *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265; *Meagher, Gummow & Lehane* (5th ed) at [4-165]-[4-260].

company's continuing (beneficial) ownership of company assets in a winding up in *Linter Textiles*,[20] and of the purchaser's or option holder's interest after contract.[21] Danger lies in moving from the process of characterisation from the facts of a concrete legal problem to creating a defined category therefrom, with abstracted defined elements, which category will drive further analysis by mechanical general application. The danger is to be appreciated by recognising, as shown by *Latec Investments*, that an equitable right may be characterised differently depending on the context.[22]

Let me return to statutes and their relationship with equity. The statutes that deal with moral values are expressed in language that evokes a moral sense and a requirement for a conscious awareness of self and empathy. Questions such as "Is that fair?" or "Is this unconscionable conduct?" evoke a relational human value and emotion. To answer such a question one does not go to a particularised definition or a checklist, but to a source of rightness of human engagement. It is as much empathetic emotion or sentiment, as rule.

Moral values are not worked out rationally; they are not defined. Moral values can be seen as a form of experience that is irreducible, like colour or smell.[23] So, expressing rules for them is difficult, and expressing definitions of them is impossible.

How does equity do it? It recognises moral values in their relational context at the requisite level of generality: loyalty, honesty, trust, confidence and conscionability born of the context and the particular relationship. The extent of such concepts and what is required depends always on the circumstances and context. Expressions such as "relation of confidence",

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[20] *Federal Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* [2005] HCA 20, 220 CLR 592 and *ElecNet (Aust) Pty Ltd v Federal Commissioner of Taxation* [2016] HCA 51; 259 CLR 73.

[21] See e.g. *Lake Macquarie City Council v Luka* [1999] NSWCA 447; 106 LGERA 94 and *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582.

[22] Such as for divisibility or for priorities.

[23] As McGilchrist, above n 10 at 86, said of Scheler and Wittgenstein, referring to Max Ferdinand Scheler's *The nature of sympathy* (1923) and Ludwig Wittgenstein's *Tractatus Logico-Philosophicus* (1921).

"relation of influence", and "fiduciary relation" do not describe fixed categories possessing fixed and uniform characteristics. Their content and the obligations of conscience flowing from them depend upon the particular circumstances.[24] There are also rules, sometimes very strictly applied, such as the conflict rule governing fiduciaries. Such rules are directed proscriptively to context; not prescriptively requiring the doing of certain things at certain times. This reflects the inability to express a moral value other than at the requisite level of generality (such as sub-s 961B(1)). To require particular things to be done (such as in sub-s 961B(2)) presumes that one can predict the factual context of the moral value and the best way in that context to see it vindicated. On the other hand, one can protect the moral value and its vindication by expressly forbidding behaviour or states of affairs that is or are likely to undermine the value. An example is the rule not to put oneself in a position where one's self interest may possibly conflict with the duty to the person to whom undivided loyalty is owed. The rule is simple and born of human experience. Its strictness in its unqualified expression creates the environment for trust to be confidently expected, and it also creates the ease of assessment of breach. What attracts the rule is a human relationship of a particular character. The rule protects the relationship prophylactically.

Statutes that deal with morality or rightness of behaviour need to be expressed at a requisite level of generality. They must, however, also provide the values and considerations that will attend the judgments that must be made of the generally expressed norm. But the expression of those statutory considerations should not be definitional. To the extent that the statute over-particularises a human, relational, moral value by abstractly expressed prescriptions, it risks draining the human reality from it, by transforming something able to be recognised as a whole (loyalty, trust, acting in another's interests) into a deconstructed checklist,

[24] *In re Coomber* [1911] 1 Ch 723 at 728-729; and *Jenyns* 90 CLR at 132-133.

unrecognisable as a whole, only seen to be satisfied by detailed consideration of abstracted parts.

It is important to recognise, however, equity's structure and form and its proper rejection of mere idiosyncratic personal response. In *Muschinski v Dodds*,[25] Deane J expressed this forcefully, but recognised the informing and inspiring role of values, in particular fairness and justice, in the development of equitable principle.

Let me illustrate by an examination of the equitable rules or principles attending moral behaviour and conscience, and an illustration of their application by a master of equity.

Equity would set aside a transaction if it was the product of undue influence or of unconscionable behaviour. These expressions of generality overlapped, but undue influence focused on the freedom of will of the donor and unconscionability on the behaviour of the recipient taking advantage of a weakness or vulnerability of the donor. The framework of relief was given structure by a degree of taxonomy made flexible by generality informed by principle. So, for undue influence, if property was transferred by one to another in certain categories of relationships, equity would presume undue influence. These presumptions were not abstractedly rule-based, but were derived from the wisdom of human experience. If penitent gave to priest, if client to solicitor, if child to parent, if patient to physician, if ward to guardian, and if fiancée to intended husband, equity would require the recipient, the person with the presumed influence, to prove that the transaction was the product of a free will. Flexibility was provided for by the ability to prove that an *ad hoc* relationship of influence existed such that the recipient, the person with proved influence, was required to prove that the transaction was the product of free will.

[25] (1985) 160 CLR 583 at 615-616.

The doctrine of unconscionable bargains was directed to the conscience of the party by reason of his or her behaviour in taking advantage of the vulnerability of the other. The expression of the rule or principle only went to a certain degree of generality still framed by value judgment to allow the equitable technique described in *Jenyns* to be applied. This approach was assisted by the willingness of equity to apply the evidential burden of proof flexibly upon demonstration of the hallmarks of unconscionability, through relationship or circumstance.

Let us see this at work in *Johnson v Buttress*,[26] a case of undue influence. It is a story that is to be read and imagined. It is a story set in the depression years in Sydney of an old man, a little odd and of little intellect. He was known as "Rocker". He was a poor working class man of little emotional stability who had come to the end of his working life. His wife had died. Mrs Johnson and her family were middle class people who knew Rocker through his deceased wife.

The case is the epitome of the technique of equity in *Jenyns*. It demonstrates, completely, how one does not deal with these equitable issues using labels or mechanical integers. There are no elements to a cause of action, as at common law. One must absorb the humanity of the relationship and examine what happened. The prose of Dixon J is evocative, yet restrained.

Rocker owned an allotment in working class Maroubra on which his cottage stood. He transferred it to Mrs Johnson. They were good to him, so he thought. The introductory picture of the relationship and the class differences in depression era Sydney are beautifully expressed:[27]

> The transferee…is a married woman named Mary Elizabeth Johnson. Her husband conducted a photographer's studio in Sydney and she occupied herself

[26] (1936) 56 CLR 113.
[27] Ibid at 126-127.

> with the responsibilities of a family of three grown-up children, a son and two daughters, and of a home at Rose Bay, where they all dwelt together. She had known the deceased Buttress for more than twenty years. Their acquaintance arose from his marriage. His wife, a widow with three sons, had a half or stepsister who was Mrs Johnson's aunt. This connection does not seem close but it proved sufficient to put the parties on the footing of relations. Buttress worked as a labourer at quarrying or the like, and the modes of life of the two families were not the same.

In the restrained and insightful language of the day, full of the implicit and unstated, the family participants and their lives were briefly sketched. Then there was a detailed examination of the transfer that was made. The narrative revealed the growing dependence of Mr Buttress on Mrs Johnson and her family after the death of his wife. The evidence did not disclose any predation or dishonesty of Mrs Johnson or the family. Indeed, Ms Johnson, Mrs Johnson's daughter, gave evidence that some few days before the transfer, Buttress talked to her mother and to herself about transferring the land at Maroubra and it was discussed in the family in a general way. In the first instance, her mother refused to have it; but her mother later decided, in discussion with Mr Buttress, that she would take the transfer and that the family would look after him for the rest of his life: give him a home, and give him everything he wanted, and give him the rent of the house.

The facts did not amount to proof of any unconscionable taking advantage of weakness or a positive body of evidence inconsistent with a full understanding of the consequences of his act. However (and this is the importance of the flexibility of equity's approach), if the evidence revealed a pre-existing relationship of influence, this would throw upon Mrs Johnson the burden of justifying the transaction as an independent act resolved upon by a free and understanding mind. This she could not do. However, if positive proof was required that the transfer was procured by improper exercise of an actual ascendency or domination gained over Mr Buttress in respect of the transaction, the case would fail.

In discussing the possibility of an *ad hoc* pre-existing relationship of influence, Dixon J expressed the principle with illumination:[28]

> But while in these…relationships their very nature imports influence, the doctrine which throws upon the recipient the burden of justifying the transaction is confined to no fixed category. It rests upon a principle. It applies whenever one party occupies or assumes towards another a position naturally involving an ascendency or influence over that other, or a dependence or trust on his part. One occupying such a position falls under a duty in which fiduciary characteristics may be seen. It is his duty to use his position of influence in the interest of no one but the man who is governed by his judgment, gives him his dependence and entrusts him with his welfare. When he takes from that man a substantial gift of property, it is incumbent upon him to show that it cannot be ascribed to the inequality between them which must arise from his special position.

In looking at the facts before him, Dixon J expressed himself with beauty and humanity:[29]

> The first and most important consideration affecting the question is the standard of intelligence, the equipment and character of Buttress. …it is the man's illiteracy, his ignorance of affairs, and his strangeness in disposition and manner that provide the foundation for the suggested relation. For many years he had leant upon his wife, and it is evident that, after her death, he was at a loss for guidance and support. He turned first to one and then to another for a prop. His affairs of business were in reality few and simple. But to him they seem to have loomed large. A claim that his deceased wife owed money for some cash orders threw him into a state of great excitement. The question whether he could obtain an old-aged pension troubled him. … In making a will in favour of his stepson's child, and then a second will in favour of Mrs Job, he showed how unstable his attachments were. …Little doubt can be felt that ultimately he came so to depend upon Mrs Johnson that a full relation of influence over him subsisted. …[The evidence] draw[s] a picture of an

[28] Ibid at 134-135.
[29] Ibid at 136-138.

> ignorant labouring man depending in many essential matters upon one whom he regarded as having all the advantages of education and position and in whom he confided. This picture is borne out by the description of his manner of life and the accounts of what he said from time to time. But the question remains whether, at the time of the transfer, she stood in that or any less relation of influence. It is not, I think, illogical to consider as an additional piece of evidence bearing upon this question the significance of the transfer itself. …the fact that Buttress was prepared to make over to her his sole property shows how far his trust in her had advanced. Faith in her future beneficence towards him must not be confused with present dependence and subjection. But the condition in which his ignorance and illiteracy placed Buttress must be kept in view. That condition coupled with his temperament, his odd behaviour and his inferior mental faculties made the habitual guidance and support of some one almost essential to him. That person would be called upon either to tolerate or to manage him. At a later date, Mrs Johnson occupied this position. At an earlier date, Buttress was instinctively seeking someone who would undertake it. …But [the evidence] shows beyond doubt that such matters of business as he had occasion to transact were managed by, or under the supervision of, Mrs Johnson. It shows that he was constantly in her company and that he relied upon her advice and depended on her kindness.
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> I think that when the circumstances of the case are considered with the character and capacity of Buttress they lead to the conclusion that an antecedent relation of influence existed which throws upon Mrs Johnson the burden of justifying the transfer by showing that it was the result of the free exercise of [Mr Buttress's] independent will. This, in my opinion, she has quite failed to do.

The judgment reveals the empathetic understanding of the human condition and of human relations that is involved in the assessment of human moral norms. The judgment also reveals equity's concern with, and protection of, the weak or vulnerable.

As Parliament reaches to require commerce to behave with a modicum of decency, fairness and good faith, it will be important for the nature and techniques of equity to be applied in the

resolution of disputes about such issues. This will involve an eschewing of any mechanical or rule-based approach to defining the norms or to articulating the wrong. What is required is the articulation of a narrative as to why, in all the circumstances, the norm of required behaviour was not met.

In this way, the living relationship between rule, value and the just experiential application of them will be advanced through a modern jurisprudence of statutes exhibiting and requiring equitable technique, a technique that rejects simple bright lines where fairness and decency of behaviour are being called for.

We saw in the GFC what happens when decent behaviour is submerged in a sea of greed. Moral norms in business not set effectively by regulatory checklists, but by the evolution, contextually, of norms expressed at the appropriate level of generality, with a clear identification of the values relevant to this assessment.

Sydney
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