JUSTICE, THE INDIVIDUAL AND THE COURTROOM: COMMENT ON BONYTHON; AILWOOD; KUKULIES-SMITH AND PRIEST

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I SEEKING JUSTICE

The scenarios presented in these three papers are all concerned with the search for justice through law. While popular culture typically depicts justice and law as synonymous, they rarely are, although the societal ideal is a fusion of the two. Justice, however, is a vexed and elusive concept, which is now heard only faintly in public discourse. Aristotle famously conceptualised justice as treating like cases alike;[1] Julius Stone, following Aristotle, regarded equality as the test of justice;[2] John Rawls never abandoned the idea of justice as fairness,[3] while Bentham believed that every object of law should be adjudged in terms of the maximisation of happiness based on the utility principle.[4]

More recently, Amartya Sen has suggested that justice needs to be ascertained in terms of a person's capabilities, which takes into account their heterogeneous personal and social circumstances.[5] Sen's conceptualisation of justice represents a radical departure from the more conventional theories because he challenges the idea of justice as an abstraction that can be applied universally. Rather than empty formalism, Sen makes it clear that justice cannot be indifferent to the lives that people actually live.[6] He recognises, furthermore, that to attain justice for the individual, we need the support of institutions which promote justice rather than trusting the institutions themselves as the manifestations of justice.[7] I suggest that Sen's theory of justice is salutary in light of the symposium theme of 'Justice Connections', as characteristics of identity, including sex, race, sexuality and disability, cannot be ignored in the constitution of substantive justice.

As it is, there is an inevitable tension between the individualistic and subjective understanding of justice, on the one hand, and the objective and universal understandings underpinning our legal system, on the other. The three presentations on which I have been

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[1] Aristotle, *Politics* (ed and trans J Warrington) (Everyman's Library, 1961), J M Dent & Sons, §1282b.
[2] Julius Stone, *Human Law and Human Justice* (Maitland Publications, 1966) 332.
[3] John Rawls, *A Theory of Justice*, (Oxford University Press, 1971).
[4] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Clarendon, [1823] 1907) 2, 170.
[5] Amartya Sen, *The Idea of Justice*, (Belknap Press of Harvard University Press, 2009). See also Martha C Nussbaum and Jonathan Glover (eds), *Women, Culture, and Development: A Study of Human Capabilities*, (Clarendon Press, 1995).
[6] Ibid, 18.
[7] Ibid, 82.

asked to comment involve quite different scenarios, but all highlight this tension, together with a desperate desire for *individual justice* in a context of *institutional in-justice*.

In one sense, these tensions are unsurprising as litigation — both civil and criminal — involves a conflict of values between opposing interests within an adversarial setting. While a court must make a determination, the outcome necessarily favours one party over the other, which may not accord with any of the iterations of justice mentioned. What is more, our judicial system favours procedural regularity, which is all too often confused with justice. Litigants, like the wider community more generally, are primarily concerned with achieving a substantively just resolution of a dispute.

Let me turn to the papers, which all support the proposition that procedural and substantive justice are not synonymous.

A Wendy Bonython: 'The Standard of Care in Negligence: The Elderly Defendant with Dementia'

This paper is concerned with the law of torts and involves a person with a mental illness or dementia who has caused harm to others. While excused by the criminal law, this is not the case in negligence according to prevailing Australian law, although the very word 'negligence' is curiously inapposite as it suggests a capacity for forethought on the part of the alleged wrongdoer.

The fundamental policy question which lies at the heart of negligence law is: who should bear the loss? Finding the mentally ill or cognitively impaired defendant liable would seem to be relatively unproblematic if the injury occurred in a situation where the loss was covered by insurance, as with a motor vehicle or workplace accident. However, this is not necessarily the case, as may be seen from *Carrier v Bonham*.[8] While the court found that the plaintiff bus driver was prevented from working again because of psychological trauma, the mentally ill defendant lost his house and was presumably reduced to reliance on social welfare for the rest of his life. Was that a just outcome? Didn't it compound the injustice of finding him negligent to start with? Wouldn't it have been preferable for the bus driver's insurer (motor vehicle or WorkCover) to bear the loss?

Fifty years ago, the High Court saw fit to adjust the ordinary standard of care to cater for the limitations based on foresight and prudence according to the age of a child (*McHale v Watson*),[9] but courts have not been prepared to make a comparable degree of adjustment for the mentally ill or cognitively impaired person. I found the reasoning of McMurdo P in *Carrier v Bonham* rather odd, to say the least, as the analogistic reasoning she purports to rely on is not carried through to its logical conclusion. The judge says that while there is an objective standard to be expected of an ordinary reasonable child of comparable age, there is no objective standard of an ordinary reasonable person suffering from a mental illness in view of variations in the condition. Because of this epistemological difficulty, the objective standard expected of the ordinary reasonable person becomes the default position and no cognisance whatsoever is taken of the impaired reasoning ability of the mentally ill person. Just as regard is paid to the subjectivity of the child tortfeasor, does justice not also require that regard be paid to the subjectivity of the mentally ill or cognitively impaired tortfeasor?

[8] *Carrier v Bonham* [2001] QCA 234.
[9] *McHale v Watson* (1966) 115 CLR 199.

Thus, while at criminal law, a mentally ill person is deemed incapable of forming the relevant mens rea, that person's mental state is deemed irrelevant civilly which, as Wendy Bonython points out, is both bizarre and inconsistent. I suggest that it is also grossly unjust because all the attributes associated with reason, including reasonableness and the reasonable foreseeability of harm, are assigned to a mentally ill or cognitively impaired person. This person is deemed objectively to understand who is their neighbour according to Lord Atkin's formulation.[10] Here, we see the way the legal system invariably favours the universal over the particular, even if it distorts the outcome.

Is this just? It certain does not satisfy the basic Aristotelian idea of treating like cases alike. Indeed, the universal application of the principles of negligence law, with its preoccupation with reason, reasonableness and ordinariness, appears to be manifestly unjust when applied to a person with a mental illness or cognitive impairment. The outcome seems to fail in respect of all understandings of justice. Rather than engage in an artificial exercise to assign fault, the anomaly in the case of those who are seriously cognitively impaired points to the desirability of a universal no-fault compensation scheme. However, the chances of reviving the call for such a scheme in the current neoliberal climate appear slim.

B Sarah Ailwood: 'Women's Voices Within and Beyond the Courtroom: Tegan Wagner's Story'

The facts of this scenario depart sharply from those dealt with by Wendy Bonython. They deal with the sexual assault of a 14 year-old girl — or really the aftermath of the assault — and the way in which she sought to attain a modicum of justice beyond the courtroom, not just for herself but for other young survivors of sexual assault. Sarah Ailwood adopts an original and uplifting approach to a depressingly familiar story by focusing on an examination of the role of autobiographical theory. Consequently, Sarah's paper does not focus on the well-known difficulties that inhere within sexual assault trials, although reference is made to the 're-traumatising' experience of the courtroom, including the fact that the young woman, Tegan, was subjected to almost 2,000 questions in cross-examination over three days. While two of the three brothers charged with sexual assault were convicted in what is, somewhat euphemistically, referred to as 'the criminal *justice* system', the injustice of what occurred within the courtroom led Tegan to seek substantive justice elsewhere.

Sarah shows how the young woman endeavoured to transcend the shame and indignity of the courtroom by writing a memoir, which acted as a cathartic aid to recovery. The memoir allowed her to present an alternative identity to that of the stereotypical rape victim constructed by defence counsel — she asked for it, she had been engaging in risky behaviour by drinking, etc, etc. The memoir acts as a counterpoint to the rigid 'question-and-answer' model which constrains the victim's testimony in the courtroom. The creation of a different self is thereby a means of securing a substantive understanding of justice, as opposed to the arid formalism of the courtroom. Sarah also argues that the autobiography facilitates a shift in focus from the victim to the perpetrators. This is something that feminist critics have long sought to do in the conduct of sexual assault trials but have been thwarted by the constraints of legal formalism and the historic weight of a masculinist bias in this area of law.

[10] *Donoghue v Stevenson* [1932] AC 562.

From the dispiriting experience of the courtroom, the young woman was prompted to begin her quest for justice. As Julius Stone reminds us, justice can be found in the most inhospitable places, including in the wilderness.[11] Thus, while the re-traumatising experience of the trial produced only a formulaic and shadowy sense of justice, Tegan's memoir was able to produce a more satisfying realisation of substantive justice and closure. Her empowerment through the writing of a memoir is a manifestation of Amartya Sen's understanding of justice as capabilities. Here is a young woman who refused to be cowed and who proceeded to write compellingly, not only from the perspective of her own sense of injustice in the courtroom but out of a desire to ensure justice for other young women. Tegan Wagner's memoir allowed her to imagine justice by writing creatively about her personal experience of the criminal justice system.

C Wendy Kukulies-Smith and Susan Priest: 'No Hope of Mercy for the Borgia of Botany Bay: Louisa May Collins, the last woman executed in NSW, 1889'

When we come to Wendy and Susan's paper, we are confronted with a very crude understanding of justice, for the choice before the criminal law was guilt or innocence — death or life. The authors tell us at the outset that the 'Crown had conducted itself in the ardent pursuit of justice', which seems to mean that a conviction was sought at all costs. We can only speculate as to the reasons for this. Although we are told that Louisa Collins was constructed as an aberrant example of womanhood, which was undoubtedly the case, we need to have more evidence before accepting that was why a conviction was so relentlessly pursued. It may also be that a culprit needed to be found to allay unease and restore harmony to the community following a suspicious death.

The understanding of justice underpinning the case appears to be the ancient one of *lex talionis* — an eye for an eye, a tooth for a tooth — ie a punishment should equal the injury sustained. This understanding of punishment as retaliation derives from tribal lore. It does not comport with any of the more sophisticated theories of justice that I adverted to at the outset. The Louisa Collins case underscores not only the uncivilised and unjust nature of state legitimised violence but the way injustice is compounded when a conviction is flawed.

Wendy and Susan undertook extensive archival research relating to the multiple trials of Louisa Collins to present an intriguing narrative based on the circumstantial evidence that was used to convict her. They do not speculate as to whether they believed Louisa was in fact responsible for the death of her husband. It is left for the reader to weigh up the equivocal evidence. Nevertheless, the case raises a number of pointed concerns regarding procedural justice which, as Amartya Sen intimated, is a prerequisite for the realisation of substantive justice.

The role of Chief Justice Darley is worthy of comment as he not only appears to have been one who 'sought a conviction at all costs', but he also either contributed to or compounded several procedural errors. First of all, in passing sentence, he made a gratuitous and improper remark to the effect that poison might also have been responsible for the death of Louisa's first husband, even though the jury could not agree on a verdict in that trial. Secondly, he plays a key role as an appellate judge, despite being the sentencing judge. Although Darley CJ and the two judges who presided over the first two trials comprised the appellate bench,

[11] Julius Stone, *Social Dimensions of Law and Justice*, (Maitland Publications, 1966) 798.

this glaring conflict of interest was not challenged. Thirdly, it was Darley CJ who advised the Governor through the Executive Council that there were no grounds for the exercise of the prerogative of mercy.

This case highlights the most powerful argument against capital punishment — ie, if a mistake has been made in the conviction, it can never be remedied and the so-called 'justice system' itself is permanently tarnished. The horror of capital punishment together with its propensity to commit further grievous wrongs violates all the basic tenets of justice. It causes a loss of faith in the judicial system, which must adhere to procedural regularity in order to produce just outcomes.

II CONCLUSION

Thus, while the three scenarios presented are quite different, they all underscore society's longing for justice — that it will seamlessly merge with the desire for procedural regularity. The hope is that procedural and substantive justice will not continue to operate as two parallel lines on a railway track — never meeting except as an illusion on the horizon. While fusion may be an ideal that is never in fact attainable, as the system is administered by flawed human beings, the three presentations remind us that we must not turn away from the bright star of substantive justice — the telos of any self-respecting legal system. I thank the presenters for eloquently reminding us of this important goal.