Ball v McIntyre (1966) 9 FLR 237

- Supreme court of ACT

Facts

- Squatted on a statue of KGV after hanging a placard which said "I don't want to fight in Vietnam" on the statue. Refused to leave after a number of requests made by the police
  - Lead to a summary conviction under *s 17D of Police Offences Ordinance 1930-1961 (ACT)* for **'behaving in an offensive manner in a public place'**
- Evidence of two police officers being offended by the display
- Evidence of three university students and two journalists giving evidence of appellant not being offended

Appeal – Appellate judge's argument

- Ordinary person would put no weight in the fact that this was a particular statue of a particular dead king. In one's mind he would look at any statue, memorial or sculpture in a public place the same way
- Deemed that it was not a pre-arranged defilement, it was part of a spontaneous act of a political demonstration
  - **Must look at things in context**
  - Was not calculated to wound people's feelings
- There is also the question of whether or not the defendant's actions were that of political behaviour because of its nature and circumstances and whether it was also offensive behaviour

Defining 'offensive' and 'improper'

- Relies on *Anderson v Kynaston [1924] VLR 214* (note: considered victorian act, which is in similar terms to that under consideration to Ball v McIntyre, objective is also preservation of order and decorum in streets and other public places.)
  - **Offensive** refers to something much more direct than conduct which may ultimately turn out in a broad sense to be hurtful to a person's character
  - **Improper** has a wider meaning than 'offensive', offensive conduct is generally improper, but not necessarily the other way round.
    - Conduct which offends against standards of good taste or commonly accepted social rules, cannot be said to be offensive

What makes conduct offensive?

- Uses a previous case with similar facts in *Worcester v Smith [1951] VLR 316*
  - **Facts (similar to *Ball v McIntyre*)**
    - Defendant was one, of a party of persons, carrying banners outside the US consulate, banners bore various inscriptions. Refused to move on police request. **Held that behaviour not offensive**
  - *Kerr J in Ball v McIntyre* found in *Worcester v Smith* that the trial judge was correct in placing no emphasis in the fact that the defendant refusing to comply with police

        - Defendant's refusal to come down is not relevant, as I t is hard to envisage behaviour which is not offensive becoming offensive merely because it was continued despite a request to discontinue
    - *O'Brien J in Worcester V Smith* in regards to the **contents of the banners found 'there is nothing in the wording of any of the banners which could reasonably be taken to be offensive'**
        - Mere disagreement with political policy, while it may be in one sense offensive to some people, is not offensive in a sense which is used in the legislation
    - **Offensive** as per *O'Brien J in Worcester V Smith*
        - Must be such as is calculated to wound the feelings, arouse anger or resentment or disgust or outrage in the mind of a **reasonable person (dealt with in section below).** Political behaviour does not amount to offensive behaviour within the meaning of police offence

Which was the offensive behaviour?

- *Kerr J* states that it is hard to see that the facts of the case would be offensive without the climbing of the statue, this was also conceded by the state
- This implies that the offensive behaviour was the act of climbing on the pedestal and placing the placard on KGV.
- However, **an average reasonable man, would readily see that the defendant was engaged in political demonstration, he would see climbing the statue not as offensive but just a foolish ad misguided method to gain political attention. A reasonable man seeing truly political conduct would not feel wounded, disgust or outrage**.

Defining reasonable man

- Reasonably tolerant and understanding, and reasonably contemporary in his reactions

Kerr also states that his decision only deals with the precise spontaneous conduct in this particular manner.

- Not meant to indicate that other and different or similar conduct in a different setting would not be offensive. If there were another set of facts or others were to try to use the memorial as a place for political demonstrations, a reasonable man could well find behaviour offensive

Ratio

- An average reasonable man, would readily see that the defendant was engaged in political demonstration, he would see climbing the statue not as offensive but just a foolish ad misguided method to gain political attention. A reasonable man seeing truly political conduct would not feel wounded, disgust or outrage

Obiter

- Definition of reasonable man
- Spontaneity important
- Difference between offensive and improper conduct

- *Kerr* also states that his decision only deals with the precise spontaneous conduct in this particular manner.
    - Not meant to indicate that other and different or similar conduct in a different setting would not be offensive. If there were another set of facts or others were to try to use the memorial as a place for political demonstrations, a reasonable man could well find behaviour offensive

Notes

- There was no destruction of property in this case
- The symbolism was not as contemporary in this case, say compared to the Australian flag
- No help as to what a reasonable excuse is

Class exam prep

- In previous years, students spent too long going into the facts of the case, which were in the end irrelevant to the judgement
- Do not have to look at whether the cases have been overturned
- Do not footnote in exams, can just say as 'xxx noted…. Blah'
- Have at least five thematically related readings for each question
- **Essay**
    - **Legal culture** used by *Ellis* to encompass all these different strands of legal analysis
    - Second half of readings focuses on law in context (both cultural or political)
    - Historical
        - Validity of law established 1788 onwards
        - Recognition of indigenous law, looking at cases from 19th century through to current day
        - Looking at laws which only applied to aboriginals, looking at law as an instrument of colonisation/dispossession
    - Legal reasoning
        - **Barrett case** (drunk navy man) / Harvey v police (speeding, control of car) or general legal reasoning
        - Legal formalism/realism/critical legal theory
            - Speluncean explorer/Dudley v stephens/one-armed swimmer
        - **Are legal decisions based on strict, objective application of rules or whether there is inherent flexibility/malleability in the interpretation of these legal rules**
            - Acknowledgement that judges have leeway in applying the law subject to their own experience or their own perception of what is just or what committee expectations might be
    - Different approaches to how the law operates in society
        - **Suggestion that law does not apply objectively across society as a whole. But it is in truth a vehicle to privilege dominant class or interest in society.**
        - Marx would argue law benefits economic analysis
        - Feminist argues law supports patriarchal system
        - CRT reveal limitations of law in addressing culturally embedded racism
        - EJ inadequacies of anthropocentric law in addressing environmental crisis
    - **Louth v Diprose**
        - Can be used as an example case to tie together, formalism, realism, feminism and narrative approaches to challenging the status quo

Sample Essay Question

The law should always be viewed from the standpoint of society, and not from the standpoint of the law itself… The law is made for society, and not society for the law. The interests of society are primary; the interests of the law secondary. Society is the master, and the law is the handmaid

- **Ideas that can be tied in**
  - **Might get extra marks for showing the alternate viewpoint or criticise the alternate view point**
  - Can start historically, the Magna Carta came about as a change to society, the barons opposed the arbitrary power of the kings
    - Example of law responding to society, and the interests of the society are primary here
  - Can tie in ideas of Marxism, where law is used to uphold the societal structure and how the dominant parties shape society (talk about what society is). This is because the dominant parties have the influence in terms of money. Their influence in the legislature means that they can push lawmakers to serve their interests, using law as a tool to serve the interests of the dominant society. Distinguish between the legislation and common law
  - Can also tie in the ideas of liberalism, and formalism of the law.
    - **Define liberalism**
    - **Define legal formalism**
      - Listen to the law word for word. It can be argued that it is not naturalistic, just because it is not "good" does not mean it is illegitimate
  - How can we tie in international law, what is society? Is it the Australian society or a more global society? Distinguish between public and private international law
    - We know there are principles in international law (a system of covenance and treaties), but what are the enforcement provisions?
      - The fact that Australia is looking for ways to circumvent their obligations, means that society is primary and law is secondary
    - The impact international law might have on our common law
      - Asylum seekers and global climate change law.
  - In terms of indigenous law, we can talk about how in terms of Australian society, there was no recognition of indigenous law and during time of colonisation, the Australians adopted the English common law because it benefited the dominant society at the time. There was no regard for indigenous law
    - C.f. in terms of customary law, society and law is intertwined it is a way of living, cannot be separated.
    - Australian law does not have pluralism (goes back to formalism)
  - Amendments to the constitution show law adapting to society's needs, therefore secondary to society
  - In terms of feminism, the fact that law is responding to feminism, shows that the law is changing to how women are treated throughout the
  - Can bring up amendments to the native land title act, changing the scope of the original bill to suit the more dominant party in society

- ***Donoghue and Stevenson*** expanding the scope of negligence to changing society, more retailers, more commercial business

Indigenous

- Australian courts do not accept legal pluralism and the distinct identity of the Indigenous people
  - *R v Murrell (1836)* found that there was a unitary principle of law
- During colonisation, principles of the rule of law were broken
  - Laws were acted upon the aboriginals arbitrarily, the governor of NSW had total power (judicial, legislative and parliamentary)
- Indigenous were British subjects form the start, however the relationship was paternalistic, if indigenous weer compliant, they were to be protected, if not Phillips authorised them to treat them however arbitrarily. No due process *Larissa Behrendt (2009)*
  - Mass killings and martial law would be considered unjust and against rule of law

Protection Era

- By 1911 all states had passed a protection act (exception of TAS) based on Victoria's *Aborigines Protection Act 1869*
- Enacted so that protectors could be appointed to 'protect them', make them friendly to settlers, induce them to labour, lead them to civilisation and religion.
  - Put in place an extensive bureaucratic system for the control of Aboriginal people
  - On some reserves, superintended was given absolute power *Larissa Behrendt 2009*
- Not overturned till 1960s

Amendment to constitution

- 1967 amendment to the constitution allowed ATSI to be counted in census, also allowed government to make laws regarding ATSI people
  - There was an expectation that the government would use this power benevolently to end discrimination
- This faith was misplaced, see Mabo, Wik, Native Title Act and Native Title Amendment Act, see below

Voting

- s 4 of *Commonwealth Franchise Act (1902)* barred Aboriginals from voting in federal elections
- Indigenous Australians did not achieve same voting rights and obligations until 1983

Mabo decision

- The *Mabo* decision recognised that the Meriam people held rights to their land under their own system of law, and that those rights should enjoy the protection of the Australian law
  - Conclusion of this case defined what the common law is, and had always been, even if this had not been recognised until the *Mabo* case. Past dealings could have potentially been illegal. ATSI before had no right to

land (terra nullius) and acquisition of sovereignty automatically vested ownership of land in crown
    - However, cannot claim land where land where rights have been extinguished (in freehold – granted, leased or sold)
- **Queensland response**
    - In pre-empting outcome of *Mabo*, Qld passed *Queensland Coast Islands Declaratory Act 1985* which deemed complete ownership of all of Queensland to be in crown regardless of whether native title now or ever existed
        - Overturned by high court, deemed to violate *Racial Discrimination Act 1975*

- ***Native Title Act 1993***
    - Provided for recognition and protection of native title
    - Established Future Act Regime (provided for right to negotiate over mining grants)
    - Established mechanism for determining claims to native title (national native title tribunal)
    - Provides for compensation but not for consent and negotiation for extinguished land

- ***Wik Peoples v Queensland (1996)* and *Native Title Amendment Act***
    - Reduced certainty for mining ventures and pastoralists
        - Were outraged
    - Government proposed a 10 point plan *(Native Title Amendment Act 1998)*
        - Validates many grants given by government
        - Raised threshold for registration of applications to claim land title (limiting access to procedural rights)
        - Suspended *Racial Discrimination Act* to do this

Customary law

- Customary law has lost a lot of its meaning in the process of translation and cannot shed the Western definition of the word 'law' *Heather McRae 2009*
    - Probably a combination of 'nature, philosophy and psychology', more akin to 'tradition'
    - Heavy emphasis on paying back and obligations, value different things to us
    - Not written, relies upon transmission from one generation to next

- **Incorporation** *Heather McRae 2009*
    - Recognition of certain aspects of ATSI customary law at discretion of state legal system
    - Reinforces a power relationship where the dominant legal system chooses how and when to incorporate compatible portions of customary law
    - This does not increases, but decreases the pluralism within state
    - Assumes mainstream legal system has the capacity to fully comprehend complex systems of customary law and cultures

- **Customary law's response to Australian legal system** *Heather McRae 2009*
  - Spearing now may be replaced by compulsory community work
  - Young girls now no longer required to marry older men

Recognition of customary law

- Recognised by *Mabo*
- Customary laws in the area of criminal law has been extinguished *Walker v NSW 1994*

Way forward

- **Treaty**
  - Substantial resistance to a treaty as a way to achieve reconciliation with ATSI. A treaty is essentially to negotiate the sovereignty of the land *James and Field pg. 107*
  - No evidence of genuine partnership between Australians and aboriginal people

- **Constitutional reform**
  - At present, federal constitution makes no reference to Indigenous Australians. Constitution is bedrock of Australian law, can only be changed via referendum.

Judicial Reasoning (Jurisprudence)

Political reasoning/realism

- Judge legitimately takes into account a wide range of political considerations

Judicial reasoning/strict formalism *James and Field pg. 376*

- Application of pre-existing law rather than creation of new law; must be consistent with past decisions of legislatures and court
- It is possible to apply the law to factual situations as if the law were a self-contained objective system, never any external considerations
- **Also consistent with literalism**
- Do not deny there are political consequences, but are just consequences of objective decision making

- **Pros**
  - Consistent with rule of law
  - Addresses potential personal biases of judges (as they tend to be drawn from a narrow section of community)
  - Controversial moral and political choices are to be made by elected legislature representatives instead

- ***HLA Hart*** (positivist/moderate formalism)
  - Mistake to view legal system as closed logical system which is objective
  - This is due to a penumbra of uncertainty with law (no single definitive definition of words in law)
    - However, words have context-independent literal meaning in easy cases
  - Due to this penumbra, in difficult cases, judges have to use discretion in deciding how to apply legal principles and rules, forced to create new law.
  - No real answer

- ***Lon Fuller*** (moderate formalism)
  - Disagrees with HLA Hart, posits there is no such thing as context-independent literal meaning
  - When something falls within letter of law but not in spirit, letter should give way to spirit **(purposive approach)**
    - Although no regarded as judicial activism, argues that ignoring letter of law in spirit of law, they are not making law or departing from it, but actually being faithful

- ***Ronald Dworkin*** (moderate formalism)
  - In hard cases, judges have to go beyond rules, but disagrees with HLA hart that law is indeterminate
    - The answer can be reached not by applying legal rules but by identifying the underlying legal principle.
    - Judges can be said to be 'making new law' every time they announce a principle that has never been officially announced before
  - One armed swimmer brought up in *Hutchinson's* writing would have won

Legal Realism *James and Field pg. 376*

- Law is one of many methods of social control
- Argues that judges make decisions on the basis of their instinctive response to the facts and cases of other non legal factors such as policy or morality
  - Judges take advantage of the fundamental indeterminacy of legal rules and locate precedents and provisions that support their instinctive opinions about a case
    - Judges hide their instictinve reasoning behind the guise of objective reasoning behind the guise of objective reasoning
- Do not reject the possibility of a rational, scientific approach, but disagrees with the simplistic and unrealistic approach taken by formalists
- Common law is a set of incremental changes
- Open to judicial activism
- *Patrick Parkinson 2013* is of the opinion that the weakness of traditional accounts of legal reasoning lies in the assumption that individual cases lay down precedents which become binding for the future. It is more appropriate to say that a succession of cases establishes a precedent, as the benefit of hindsight is needed to analyse the scope and degree of generality of a single judgement
  - Uses *Donoghue v Stevenson* as an example, limited to just snails in opaque bottles? Other products

Death of declaratory theory *Patrick Parkinson 2013*

- High court showing more readiness in departing from previous decisions
  - Supported by the high court where *Brennan J in O'Toole v Charles David Pty Ltd (1991)* said no one in law now accepts that judges simply declare the law
- *Commonwealth v Hospital contribution Fund* sets out grounds for overruling previous law

Judicial activism

- Most significant case is *Mabo*
- *Donoghue v Stevenson*
  - Expansion of the law of negligence
- Progressivism in the interpretation of constitution by HC has been labelled judicial activism *James and Field pg. 385*
- **Pros (realists argue for)**
  - If parliament unwilling to modify law, judges should be willing and able to do so

- **Cons (formalists argue against)**
  - Gives law a retrospective operation, in regards to future disputes (not fair)
  - Judiciary is 2nd rate law maker, judges have little to no experience in policy creation
  - Inconsistent with separation of powers

- However, it can be argued that there is a limit to an extent of judges being able to do this, see judicial independence below

Judicial independence

- Can be undermined by improper appointments to bench
- Parliaments remove more and more judicial functions from courts and vests them in statutory tribunals
- Judges can actually be held accountable
  - Public scrutiny and appeals to higher courts
- Government can change law in response to policy consequences they do not like regarding a judge's decision
  - *Wik* case