

ALL TOPICS/CLASSES INCLUDED IN FULL NOTES

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1 Class 1 - Introduction

1.1 What is Ethics

Study of the principles → guide people in choosing between what is right and what is wrong, in deciding upon the best course of action and in judges the actions of themselves/others

1.2 Collaboration

R v Bilal SKAF, R v Mohammed SKAF [2004] NSWCCA 37

- 18 months after conviction one of the jurors in the trial spoke to a solicitor at a BBQ → the juror said that he only went to the park to "clarify something for my own mind...The only juror who knew about the visit was the one who was with me."
- What the jurors didn't realise was that, because of the murder, the local council had significantly improved the lighting and other amenities in that park.
- This means they did not get an accurate idea of how well or not the witnesses would see the alleged crime and culprits.
- **s53 (4) of the Evidence Act** → the jury are forbidden from conducting their own experiments
- The relevant legal ethics → the lawyer would have to inform authorities
 - The right to a fair trial
 - The lawyer's Duty to the court
 - The lawyer's Duty to the law
 - Additional duty as officer of court to report
 - Role in the administration of justice.
- In this case the lawyer told the Sherriff.
- As a consequence → laws were changed afterwards so the victim no longer had to take the stand on appeal, but the transcript from the original hearing could be read out instead.

1.3 Lawyers and Ethics

- US Model Rules of Professional Conduct (2004) → a lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice
- As Advisor
 - Lawyer provides a client with an informed understanding of a client's legal rights and obligations
 - Explains their practical implications

- As an advocate
 - Zealously asserts the client's position under the rules of the adversary system
- As a negotiator
 - A lawyer seeks a result advantageous to the client
 - Consistent with requirements of honest dealings with others
- As an evaluator
 - A lawyer acts by examining a client's legal affairs and reporting about them to the client or to other

Julian McMahon and LexLasry QC - Cooke Dewi, Lawyers to tell Nguyen of his fate, *The Age* (2005)

Julian McMahon and LexLasry QC were the two lawyers who represented NuyenTuong Van, a 25-year-old Australian, convicted of importing drugs into Singapore. Nuyen was arrested in December 2002 and was executed on 2 December 2005. **The discussion here is not about Nuyen's crime – it is about the role of his lawyers.** They represented him on a pro bono basis, throughout the various appeals, told him of his execution and were with him when he died. At the time of his execution hundreds of lawyers in Melbourne also gathered outside the city's county court to protest against what they considered to be the Howard's government's lack of real pressure on Singapore.

2 Class 2 - Ethics, Theory and The Law

2.1 Ethical Approaches

2.1.1 Virtue ethics

- Emphasis upon character rather than compliance with rules or the consequences of actions
- If a person focuses upon developing a virtuous character, they will know what to do in ethical dilemmas
- E.g. the decision to lie/or not to lie reflects on a person's moral character

2.1.2 Teological Approach

- Lawyer's should accept personal responsibility for the consequences of their advice → obligation to further the performance of the legal system
- Lawyers owe duties to their clients and to society
- Lawyer's must act with integrity → their practices are consistent with their principles, even in the fact of strong countervailing pressures

2.1.3 Standard Conception of lawyering/ Deontological ethics

- Lawyers are simply governed by the rules

- Requires lawyers to do what their duty demands, regardless of the outcome
- Encourages lawyers to act zealously for their clients
- Lawyers are playing a role that effectively separates them from the consequences of the client's actions
- *Wolgast* - 'where moral considerations are blocked from view'
- This model of lawyering is affirmed by the adversarial system's expectation → advocate's role is simply to argue the issue leaving the court to decide the outcome

2.1.4 Postema Moral Responsibility in Professional Ethics – two central ideas

| <i>Partisanship</i> | <i>Neutrality</i> |
|--|---|
| Lawyer's sole allegiance is to the client | Once lawyer accepts client's case , must represent the client |
| The lawyer is the partisan of the client. | Regardless of lawyer's opinions of the client's character and reputation |
| The lawyer is committed to the aggressive and single minded pursuit of the client's objectives | Ignore moral merits of the client's objectives |
| | Lawyer not responsible for the consequences of his professional activities as long as he stays within the law |

2.1.5 **Consequentialist ethics**

Consequentialism is based on two principles:

- Whether an act is right or wrong depends only on the results of that act
- The more good consequences an act produces, the better or more right that act

2.2 **Lawyering options**

2.2.1 **Traditional, adversarial approach**

- Lawyer's duty to the client overrides all other duties and considerations
- Must act in the best interests of your client even if you act inconsistently with your own views
- Amoral approach → personal values are considered irrelevant to your obligation to your client
- You are not morally accountable for your actions as a lawyer
- **Rather** → client is morally responsible for the consequences of carrying out their instructions

| For Traditional Approach | Against Traditional Approach |
|---|---|
| Essential to the successful operation of the adversarial system of trial | Likely to lead to the development of undesirable personality traits on the part of the lawyer |
| Present client's case in the manner most likely to lead to success, but depends on you having all the available info | Lawyer's lacking integrity |
| Guarantee that you cannot disclose info to others → client more readily gives info | Subvert and subsume the private personality |
| More likely to lead to access to the law for all → lawyer's accept all clients | Adversarialism tends to favour wealthier clients since they can afford the best lawyers |

2.2.2 Responsible lawyer approach

- Emphasizes your role as an officer of the court and a trustee of the legal system
- Emphasis upon your responsibility to facilitate the public administration of justice
- Act consistently with the law: not just the letter of the law but the spirit of the law
- Overriding duty to maintain the justice/integrity of the legal system, even against the interests of your client
- Maintains a distance between their personal values and professional behaviour instead substitutes the values inherent in their role as an officer of the court and in the law itself

2.2.3 Social justice - moral activism

- Emphasizes role as an agent for justice through legal reform, public interest lawyering and client counselling
- Opportunity to ensure that the legal system is fair and just
- Concerned about problems such as access to justice and inequality before the law
- See yourself as morally responsible for your actions as a lawyer, and you make the effort to advise your clients to do the right thing

2.2.4 Social justice - ethics of care

- Insists that you remain morally responsible for your actions as a lawyer even when carrying out your client's instructions
- Concerned with personal and relational ethics
- Focuses on relationships and social obligations

- Responsibility to community in which you live and work

In 2005, the Crown Prosecutor Margaret Cunneen spoke to law students at the Sir Ninian Stephen lecture at Newcastle University on the Skaf Case.

In the case of, *MG v R* [2007] NSWCCA 57, one of the co-accused with Bilal Skaf, criticised Cunneen for publicly supporting the complainant, on the basis that the criminal trial process was not fair to the accused.

Ms Cunneen breached both Bar Rule 59 and the Prosecution Guidelines.

- She both published material concerning a current trial and commented in a forum
- The breaches were either deliberate or made without adequate reflection as to the obligations of a crown prosecutor.

3 Class 3 - Legal Players – Lawyers I

3.1 Types of lawyers

| Solicitors | Barristers |
|---|--|
| Provide a variety of legal services → personal and business matters | lawyers who provide legal advice and opinions, who specialise in representing clients before courts or tribunals |
| Work is usually office based, sometimes represent clients in courts (esp lower courts) | Barristers do not directly deal with members of the public; instead they take ‘briefs’ from solicitors. |
| Mainly appears for preliminary and interim hearings, before the parties engage in formal argument. | Argue cases before civil, criminal and industrial courts |
| Interview clients about their needs/problems | Argue cases before tribunals and arbitrators |
| Provide legal advice and recommend appropriate courses of action | Provide advice/opinions about difficult legal questions |
| Draft contracts, deeds, trusts, wills, leases, and other documents | Confer with instructing solicitors |

3.2 Cab Rank Rule

Prohibits a barrister from refusing a brief, whether to act as an advocate or to advise, **UNLESS:**

- The barrister is already professional committed
- Has not been offered a proper fee
- Is professionally embarrassed by a prior conflict of interest
- Lacks sufficient experience or competence to handle the matter

Dan O’Gorman SC (2012), ‘In Defence of the Cab-Rank Rule’, Hearsay, Issue 55

- ⇒ Barristers must act on a first come, first served basis, just like cab drivers just as a cab driver must drive the next person in line at the rank
- ⇒ This rule is a fundamental rule of the independent Bar
- ⇒ The Rule has been judicially stated in various ways
 - a) Brennan J has outlined the rule: “I would add, obiter, an observation about the duty of counsel to accept any brief which is offered to him or her at a reasonable fee provided it is in a field in which the counsel ordinarily practises and the counsel is not otherwise committed: the “cab-rank” rule.”
 - b) Chief Justice de Jersey - “ethically, barristers are constrained not to choose their clients.”

| ADVANTAGES | DISADVANTAGES |
|--|---|
| Ensures that <u>ALL</u> litigants are able to obtain the services of a barrister | There are so many exceptions to the rule that it is, in effect, impossible to enforce; |
| Protects barristers from any adverse consequences that could arise from accepting a particular brief. | The rule could be abused by wealthy clients who have the ability to tie up all of the best barristers with experience in a particular area; |
| Everyone gets access to the law | The rule does not apply to solicitors. |
| If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client... the profession would become the puppet of the powerful. – Brennan J | Unlike cab drivers, barristers must establish with their clients a relationship based on trust |

Arguments against the rule

- 1) **Cab-rank rule should no longer exist because there are so many exceptions to the rule means that it is impossible to enforce**
 - ⇒ does not withstand scrutiny
 - ⇒ It is acknowledged that there are many exceptions to the rule, including the fact that a barrister is otherwise engaged or too busy to accept the brief on offer
 - ⇒ However, the mere fact that there are many ways to subvert the operation of a rule in general, or the cab-rank rule in particular, should not be reason for abandoning it, nor should the fact that the rule is often broken or not adhered to.

- 2) **Cab-rank rule may be abused by wealthy clients able to tie up all of the best barristers with experience in a particular area**
 - ⇒ Cannot be a valid argument today because the competition between barristers is now so much greater than was the case
 - ⇒ There are now thousands of barristers practising throughout Australia with a right to appear throughout the whole of Australia

- 3) **Rule should not apply to barrister because (unlike cab-drivers) barrister must establish with their clients a relationship based on trust**
 - ⇒ If the client lies to the barrister and to the court, or otherwise behaves in a way that reflects adversely upon the client, such behaviour does damage to the client but not to the barrister.
 - ⇒ While the client must trust the barrister, the barrister need not trust the client.