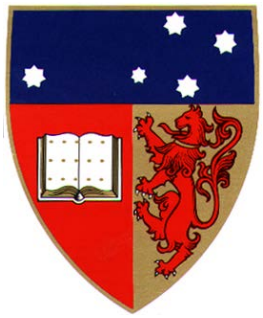

Emmanuel College

THE UNIVERSITY OF QUEENSLAND

Why Have Law At All?

By

The Hon Mr Justice Bruce H McPherson CBE

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Emmanuel College
The University of Queensland
Enriching lives since 1911

Emmanuel College is Australia's ninth, and The University of Queensland's first residential college, and was founded by the Presbyterian Church of Queensland in 1911 with the first students taking up residence in Wickham Terrace in 1912. As the Presbyterian Church moved towards partnership with other religious denominations during the 1970s, Emmanuel College also came under the auspices of the Uniting Church. Upon its inauguration, Emmanuel College was an all male residence but this changed in 1975 when women were admitted as collegians. Now, the College numbers around 340 students with half our population being female.

Further change was experienced by the College when it moved in 1955 from its original site in Wickham Terrace to its present location on the main University campus in St Lucia.

Since 1911 Emmanuel has stood for excellence in all round education and has had seven Rhodes Scholars during its history. Its graduates have gone on to make a major contribution to Australia in many areas, including as doctors, scientists, teachers, engineers, lawyers and judges, politicians, ambassadors and diplomats, and church leaders.

This is the first in what will become a series of Emmanuel Papers devoted to topics of broad interest in areas of law, education, history, politics, science and religion.

Justice Bruce McPherson's paper was given at the inaugural Sir Harry Gibbs' Law Dinner at Emmanuel College on 25 August 2006. The Rt Hon Sir Harry Talbot Gibbs GCMG, AC, KBE (1917-2005), or Bill as he was known to his friends, was born in Sydney and educated at Ipswich Grammar and The University of Queensland where he attended Emmanuel College. He was admitted to the Queensland Bar in 1939 but his life at the Bar was interrupted by the Second World War in which he served as a Major from 1942-1945. During 1954-1967 he taught within the Law School at The University of Queensland while also maintaining a very successful practice at the Bar, becoming a QC in 1957 and from 1961 until 1967 as a Judge of the Supreme Court of Queensland. In 1967 he moved to a Federal jurisdiction in Sydney as a Judge of the Federal Court Bankruptcy and also the Supreme Court for the ACT. In 1970 he became a Justice of the High Court of Australia and was Chief Justice from 1981 until his retirement in 1987.

During his retirement he was very active in issues dealing with Australian society and the Law. As Patron of the Samuel Griffith Society, he was devoted to upholding the Australian Constitution. In 1944 he married Muriel Dunn, a graduate of The University of Queensland and Women's College and they had three daughters and one son. Both the Gibbs and Dunn families have had a long association with Emmanuel College. Sir Harry was until his death a Fellow of Emmanuel College and Patron of the Emmanuel College Foundation.

THE AUTHOR

The Hon Mr Justice Bruce H McPherson CBE

Justice Bruce McPherson was born in Melmoth, South Africa and educated at Durban High School and the Universities of Natal and Cambridge. He was admitted to the Queensland Bar in 1963 and became a QC in 1975. From 1982 to 1991 he served as the Chairman of the Law Reform Commission for Queensland and was a Judge of the Supreme Court of Queensland from 1982 becoming in 1991 the Senior Puisne Judge. Since 1991 he has been a Judge of Appeal in the Court of Appeal, Supreme Court of Queensland and since 1990 has held a similar role in the Solomon Islands. He has published two major books, *The Law of Company Liquidation* and *The Supreme Court of Queensland 1859-1960*.

Why Have Law At All?

Years ago, when I was a law student at the University of Natal, I heard an address by the great Lord Denning, then a Lord Justice of the Court of Appeal in England.

That occasion was, I believe, in 1955. In 1958 I heard Lord Denning deliver the same address at the Law School in Cambridge. Later, after I came to Australia in 1960, I heard him deliver it yet again at a dinner in Brisbane. I must be one of very few to have heard Lord Denning say the same thing in three different continents.

At Cambridge, the Law School's building was then located next to King's College Chapel. In delivering his address, it was the practice of his Lordship to end with a recitation of the judicial oath. It so happened that, when he did so on this occasion, the great organ in King's College Chapel began to play. Its sonorous tones flooded through what Wordsworth called that 'immense and glorious work of fine intelligence' and spilled over to where we were sat, forming a fitting accompaniment to Lord Denning's quavering voice. It was a memorable backdrop to the words of the judicial oath, and I marked it as something not readily to be forgotten.

For those who do not have the oath of judicial office by heart, let me recall its essential terms. In the form used in England since the 14th century is as follows:

> I do swear that...I will do right [meaning justice] to all manner of people...without fear or favour, affection or ill will.

You may think, as I do, that these words are well-chosen. They identify the fundamental qualities of impartiality and independence of mind that the judiciary are expected to show. They do so by picking out one by one the principal human weaknesses liable to infect the decisions of those who exercise authority over others in this way. Fear; favour; affection; ill-will. We tend to take it for granted that, in reaching a decision, a judge will exclude influences like these. Accepting that the rule of law is the foundation of democratic society, we sometimes forget that in less happier lands many people live under regimes that care little for impartially administered justice.

Imagine, then, our consternation when, on the morning after Lord Denning spoke at Cambridge, our lecturers called us together to explain we had been victims of misquotation. The judicial oath does not say:

> I will do justice.

What it says is**:**

> ...I will do justice...after [ie, according to] the laws and usages of this realm....

Lord Denning had deliberately omitted the words ‘according to law’.

The value of the judicial oath lies not in its emotional appeal to young student lawyers, as I was in 1958. It is more than mere exhortation. Its primary importance is that it is the only official formulation that a judge ever receives of his duty, which is to do justice according to law. To most non-lawyers, an oath to do justice might be thought to cater for everything that is needed. We all demand justice for ourselves; sometimes, we even insist on it for others. By contrast, the word ‘law’ has few pleasant connotations for most layman. It is widely perceived as something that is narrow, rigid, dry, archaic; at best quaint; at worst close to diabolical. It was not by accident that, in order to convey the antithesis of spontaneous human feeling, T S Eliot in *The Waste Land* chose the image of a lawyer scrutinising a legal document. When we are gone, he says, we will not be remembered by our obituaries:

> Or in memories draped by the beneficent spider
> Or under seals broken by the lean solicitor
> In our empty rooms.

It is not difficult to understand why lawyers and the law present themselves to people in such an unattractive light. The stock in trade of lawyers is words; and words rarely seem a fair return for honest wages, the more so when the form they take is advice that is unfavourable, or advocacy that fails.

The other problem is that law and lawyers are more or less inseparably linked with things that have gone wrong. They inhabit a world of broken marriages, broken bodies, broken promises. They compound such occasions of personal grief and tragedy by the inhuman practice of charging fees for the services they render. They do not scruple to do so when they lose their client's case. What is worse, they charge fees even when they win. A successful litigant sees his victory as the inevitable outcome, not of the virtues of the law or the ability or efforts of his lawyer, but of the natural justice of his cause. Why should anyone have to pay for that? The defeated litigant, on the other hand, knows that what he got was certainly not justice. It must therefore have been law, which is something which he never wanted but is now obliged to pay for. Both winner and loser are left with the innate feeling that the same result ought to have been attainable, and should have been achieved, at much less cost without resort to lawyers or the law.

Why, then, have law at all? Why, as Lord Denning's truncated version of the judicial oath implies, not have judges sworn only to do ‘right’ or ‘justice’? Why encumber that plain and simple process with endless legal traps and technical snares that are the despair of plain, honest, ordinary, decent folk?

There is an answer to this question, although it is surprising how little time and attention lawyers or anyone else devote to thinking about it. In the first place, general notions of justice vary enormously. What in a particular case appears just to the plaintiff, or to the particular adjudicator, seldom seems so to the defendant, or perhaps even to some other judge who might decide the same case. That is what was meant by the common lawyers of old when they condemned equity as resembling the Lord Chancellor's foot. By that, they meant that its length varied with the individual who happened then to hold the office. Moreover, an inquiry that is not bounded by any identifiable rule or objective criterion is obliged to take account of every conceivable personal and factual circumstance. Age, intelligence, wealth, mood, motivation, the character, psychology and reputation of the contending parties - all of them become relevant to determining the dispute, as do the time, place and circumstances of the event, its historical antecedents and the numberless infinities of its causes. For some, even a particular conjunction of the stars may seem to be decisive. Under such a regime, nothing is logically irrelevant. The time and cost of conducting enquiries like that are necessarily enormous. At the end of it all, if it is ever reached, one party at least must still turn out the loser. Somewhere a limit must be imposed on the materials to be ransacked and the time expended in the search for what is supposed to be complete truth and perfect justice.

What is perhaps more serious is that, without an objective standard of reference by which to reach a result, the defeated litigant soon begins to doubt the impartiality of the adjudicator who decides a case against him. Perhaps, despite his solemn oath, the judge who heard it was, after all, susceptible to fear or favour, affection or ill will. For an unsuccessful litigant, suspicion quickly hardens into certainty on discovering that in another case before or after his own, the same or another judge reached a different conclusion. Rules to which an adjudicator must conform therefore serve the necessary function of reducing occasions for suspicions of that kind. There must not be one rule for the poor and weak, and another for the rich and strong, or for those of differing race, colour, religion or politics.

There is a further objection to a system based entirely on individual notions of what is just in a particular case. Because no rule or principle for regulating human conduct could be derived from a decision based on subjective conceptions of what is just, or right and wrong, it would afford no criterion for resolving other disputes and would provide no guidance for avoiding similar litigation in the future. Every dispute would have to be submitted to adjudication in order to have it determined. Until the decision was given no one would know what it was going to be. In every case the result would be unpredictable. Afterwards, there would be no means of saying whether the decision was right or wrong. Without a binding rule, the number of adjudicators would need to be multiplied without limit. The outcome would be a form of judicial tyranny in which, as Sir Owen Dixon once remarked, courts and judges would come to exercise an unregulated authority over the lives of people and their affairs.

We cannot afford a system that functions like that. In the interests of economy as well as public confidence, justice cannot be custom-built; it must to a large extent be mass-produced. For reasons like these, society is forced to resort to generalisations about what is right and what is wrong, what is just or unjust. Generalisations are short-cut methods of giving answers to sometimes complex questions. They are therefore imperfect. Applying them to human conduct is, as social scientists never tire of warning us, fraught with risk of injustice to the individual. Taking refuge in general rules is a well-known form of intellectual short cut.

Regrettably, society cannot survive without rules of conduct. No known society has ever done so. Because generalisation is the foundation of all legal rules, it is necessary to ask what qualities a good rule should possess. The first is that it must be *simple and lucid*, so that everyone can know and understand it. Then it ought also to be *precise, not vague*, so that its scope and application can be identified and predicted in advance. It must, so far as possible, also be *comprehensive*, so that it will embrace all foreseeable circumstances. As well, it ought to be *flexible*, and so capable of being adapted to both prevailing and future needs, attitudes, and behaviour of the members of a progressive society.

Simply to state these requirements is to demonstrate that no single rule is capable of measuring up to them. Rules that are both simple and precise are never also comprehensive and flexible. Moreover, a rule which starts out in simple form tends in time to become complex as it is explained, added to, applied to new circumstances, and, in the process, qualified by exceptions. A well known example known is the Sixth Commandment. 'Thou shalt not kill' is the form of the injunction in the King James Bible. That is a simple rule, and it is precise; but what does it mean? Must we refrain from killing anything, animals, insects, and plants included? According to students of Hebrew, the meaning conveyed by the word in the ancient texts is not simply 'kill' but 'murder'. Recent editions of the Bible now use that word. That seems to imply that the victim must be human, since, apart from some ardent nature lovers, we do not ordinarily speak of murdering trees, animals or insects. But even to begin that enquiry is to start down the slope that ends in the law's embrace. The first small step moved us into the realm of language and philology, as well as legal history of a kind. At the next, we surrender to the high priests of the legal profession. What, then, you ask, is murder? Now, as the lawyer reaches for his fee book, the client must empty out his pockets, or abandon the enquiry altogether. It is there that alienation of the layman begins.

What looked like a simple rule turns out in the end to be a complex of half-answered and half-resolved questions. If murder is defined as the premeditated taking of human life, what then is human life, and when does it begin? Does the law consider it murder to destroy an unborn human foetus? The answer that has generally been given by the law is No; but when is a child born? *Answer* : when it has completely proceeded in a living state from its mother's body; if, for example, a foot still remains behind, it is at common law not murder to kill the child then; although by legislation

in some places it is now murder, and in some others it is a special statutory offence of child destruction. What then if, instead of actively killing the child at birth, you simply let it die? *Answer* : I'm afraid that is a rather large question. To respond to it will take much research and time; and if you wish to pursue this enquiry I shall have to insist on an additional fee.

And so on. Nothing in life ever seems to be easy; but the legal system is expected to provide answers to all these questions and many more. In doing so the rule ceases to be simple. It attracts additions and exceptions that end up making it complex. Really simple rules are relatively few in number. They take the form of broad generalisations capable of endless application to new circumstances. But their very generality reduces their utility as precise guides to human conduct. To say you must drive with reasonable care says nothing about how fast you may drive your car, but only that you must do so in a way that does not create foreseeable risk of injury to others. Its application depends on prevailing circumstances. It is in other words, a comprehensive and adaptable, but extremely imprecise, rule of conduct. To know whether you have conformed to such a rule in a particular case, you may need to consult a lawyer, or, worse still, go or be taken to court.

Rules of law are thus torn between competing pressures of having at one and the same time to be both simple and comprehensive, as well as precise and flexible. Not only are specifications like those impossible to fulfil, but in an increasingly complex and sophisticated society they tend to spawn myriads of other more specific rules. Numerous and complex rules require a highly trained and numerous regiment of professional interpreters and administrators. Altogether, the law consists of some tens of thousands of generalisations about human actions and transactions, and the results that will follow if they are ignored. In the past, a standard text used in Australia has been *Halsbury's Laws of England*. Now in its 4th edition with revisions, it comprises more than 50 or so volumes each of about 1,000 pages. It thus embodies a total of more than 50,000 pages of individual generalisations and exceptions representing the results of thought and experience in the art of human problem-solving going back some 800 years. Recently published Australian legal encyclopaedias are now displacing the English version of *Halsbury*. That may make the local law more readily accessible to Australian practitioners, but it will not reduce its content or complexity. The process of growth and refinement will continue for as long as society survives.

Because of the increasingly populous and complex nature of our society, legislatures are now intervening with greater frequency, in more detail, and often with less clarity, than in the past. By doing so they create a fertile breeding ground for lawyers. The Marxist thesis that, in a truly socialist society, law and lawyers eventually wither away is now consigned to the scrap-heap of history. Under communism legal functions did not disappear. They were transferred to police, party members, bureaucrats, and prison warders. In democracies, there is every indication that, with greater emphasis on individual rights and readier access to a multitude of

courts and tribunals for ventilating real or imagined rights and wrongs, more and more of society's useful human resources will be diverted into making, interpreting, administering, and enforcing the laws that regulate our lives. Adopting a Bill of Rights inevitably escalates the process, as well as the time taken to resolve disputes between the state and its citizens.

Viewed objectively, and apart from the personal ambitions of those hoping to make a career in the legal profession, such an outcome is not an encouraging prospect for the future. Lawyers, it is often said, are an unproductive element of the community. Their contribution to the common good consists of written or spoken words. Few of their words have much currency in the market place of elevated ideas or the chronicles of human aspirations. Lawyers survive as a profession only because their fellow citizens have not yet discovered an acceptable way of managing without them. Recent world history teaches that attempts to do so produce tyrannies even greater than the law and lawyers they are designed to eliminate. Supporting tyrannies, as well as getting rid of them, is an expensive process both in terms of human suffering and its impact on individual happiness and achievement. Justice apart from law may seem a noble ideal; but it remains at base an unpredictable and therefore potentially dangerous conception that leads to tyranny. Most notably unless you have rules of law, and know what they are, it is impossible to reform by altering them. Law and legal systems exist because, like democracy itself, other methods of regulating society have in the long run proved more wasteful and less satisfying to live under than the system we have now. This much at least is certain. Justice does not long survive without law and it will never do so. Human experience shows this to be so.

I dedicate these thoughts and words to the memory of Sir Harry Gibbs. I do so because he embodied, better than almost anyone else I have encountered, the spirit and dignity, the clarity of thought and language that exemplify a great and a good judge. ‘Blessed is the man’ says the Psalmist:

> Who walks not in the counsel of the wicked
> nor stands in the way of sinners,
> nor sits in the seat of scoffers.
> But his delight is in the law of the Lord,
> and on his law he meditates day and night.
> He is like a tree
> planted by streams of water
> That yields its fruit in its season
> and its leaf does not wither.
> In all that he does, he prospers.

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