BILLS V BROWN TAS SUP CT SERIAL NO 54/1974

THE HON. JUSTICE STEPHEN ESTCOURT AM

In my respectful opinion many contemporary judgments are overwritten. In some cases this can be attributed to the increasing complexity of the law, wrought in particular by modern legislative drafting. In others however, it can be attributed to judges feeling the need to carry the fruits of the labours of research into his or her reasons. This has been described as ADK - the anxious display of knowledge. It is in my view to be discouraged.

It has not always been so. During the decade that he was on the bench from 1968, Justice David Montagu (Bob) Chambers made a substantial contribution to the work of the Supreme Court of Tasmania. The law reports for those ten years are filled with examples of his capacity to inform everything he did with a sound combination of legal learning and good practical sense. He had a grasp of principle and a knowledge of the provisions and the working of the *Criminal Code* that few could emulate. He was a strong member of his Church and was Church Advocate and later Chancellor of the Anglican Diocese of Tasmania, but he was possessed of a dry sense of humor which very occasionally, in arguably appropriate cases, he allowed to emerge in his work.

One such case, my favourite, which will be remembered forever in the Tasmanian legal profession was *Bills v Brown*, an unreported decision of Justice Chambers published in 1974. It was however, the manner in which Chambers J published his decision in Court, more than the result, which became the stuff of legend.

A few minutes before going into court to give his decision, he called his associate into his room and told him that he was concerned that no-one was reading his judgments. Handing him the judgment he said, "This should fix it". As soon as his associate had convened the court and announced the case, the judge commenced reading aloud his reasons for his decision. He said, as his very first words to all assembled in court, "You can go and get F**ked". After a pause, he followed this up by saying, "These are the words alleged to have been used…". There then followed his reasons for finding that whether or not the word was indecent depended on the circumstances in which they were used.

The reasons for judgment, reproduced in these pages, are remarkable in my view not only for the impact of the opening words, but for their brevity, their simplicity, the judge's clarity of analysis and his judicious use of precedent. They are also significant as an example of a judge identifying and accommodating changes in contemporary standards of propriety in the community.

Who has not admired the simple, staccato style of Lord Denning's judgments? In *re James (an Insolvent)* [1977] Ch 41 for example:

> "David Emlyn James is a lawyer who has gone astray. He was a partner in a firm of five lawyers practising at Lusaka in Zambia. James went off with a sum of £ 60,000 belonging to the firm or its clients. He disappeared. But the story goes that, with the money in his pocket, he gambolled round Europe and came to rest for a while in England".

In *Bills v Brown* Justice Chambers' opening two paragraphs described the legal problem facing him with refreshing clarity in a succinct form. He then dealt with the inevitable failure of the second ground first, thus clearing the way for his analysis of the first ground. On the way to that, ultimately successful ground, some wry but restrained disbelief is evident. The judge noted that it was not necessary for the prosecution to prove that the words used were heard by someone other than the police constable, but that the constable "claimed" that there were other people in hearing range and that the words were spoken in a loud voice. Then came the judge's sardonic observation – "The applicant was seated in a parked car at the time. It was 12.15 am."

Chambers J then isolated the magistrate's guiding consideration that "In my view any person who publicly utters the word 'F**k' commits the offence." Really? Even

IMAGE: ADOBE STOCK

in 1974 that was an extreme view as was clear from the test articulated in the New Zealand decision adopted by the judge – *Police v Drummond* (1973) 2 NZLR 263. Nevertheless, Chambers J did not rush to judgment. His Honour instead, identified the magistrate's legal error and expressed it clearly – "I think he fell into error in adopting such an absolute and unqualified view." And, after adopting the test in *Police v Drummond*, the judge explained the error with the same simplicity and brevity – "… by shutting his mind to the surrounding circumstances and adopting the absolute test that he did [the magistrate] misdirected himself in law."

There remained however, the question of whether the order for conviction must necessarily have been set aside, given that it was open to the magistrate, applying the correct test, to have found as a fact that in the particular circumstances of the case the language used was indecent. With the same clarity and economy of expression, Chambers J identified and explained the magistrate's compounded error, namely that he did not consider judicially whether, in the light of the particular circumstances and the setting in which the words were used, they in fact amounted to indecent language.

Again, in my respectful opinion, many judges cite and quote from more judgments than are necessary to authoritatively establish a proposition. Often one case is sufficient and all that is necessary given the doctrine of *stare decisis*. Chambers J resisted that temptation saying, "I see no point in adding further dicta on a subject that judges have often discoursed upon." What his Honour did, was to choose what he regarded as the best example to cite, but not quote from.

Of the greatest interest to me concerning this case is the practical, common sense way in which Chambers J picked up the test of "contemporary standards of propriety in the community" and illustrated from his own experience as a judge where such standards might lie. He noted that in a record of interview with a detective, an accused, after stating his age as "thirty F**king seven", thereafter used the same adjective 17 times in answering only 15 questions.

Thus, by his judgment, Chambers J not only judicially propounded the test to be applied by magistrates, by adopting for Tasmania the statement of principle in the New Zealand Court of Appeal decision of *Police v Drummond*, but he also made it clear that the word "F**k" had become commonplace.

This decision served as precedent much used by local lawyers but it had a wider impact in that to my certain knowledge it resulted in far fewer prosecutions for the use of a word that is today regularly used in the course of prime time television programs.

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