

Reflecting on the Legacy of Chief Justice McLachlin

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We are all here to celebrate the legacy of your remarkable Chief Justice – a legacy which is inherited, not only by Canada, but also by other parts of the common law world – not least in the United Kingdom. In my country, her legacy is not just her jurisprudence, but also her shining embodiment of the virtues of diversity, and in particular gender diversity, in the judiciary.

Gender diversity in the judiciary

On 1 April 2003, less than 10% of the senior judiciary in England and Wales were women, but the judicial leaders – the Lord Chief Justice and Lord Chancellor – still believed in the ‘trickle up’ theory – that eventually all the able young women joining the legal profession would trickle up to the top without anyone having to do anything very much to change the system. This was a system in which all appointments were recommended by the Lord Chancellor, mainly on the basis of his ‘secret soundings’ amongst members of the existing judiciary - a recipe for cloning, even though it occasionally let a non-traditional candidate like me through the net.

Then, on 2 July 2003, Chief Justice McLachlin came to address a meeting organised by the Association of Women Barristers (of which I was then President), with the Association of Women Solicitors, in committee room 10 at the Houses of Parliament in London. The Lord Chief Justice of England and Wales was present. Chief Justice McLachlin explained why having more women on the bench was a good thing. She explained how this had only been achieved in Canada because of the concerted efforts of the legal profession, the judiciary and the politicians to make a difference. She made a powerful case and I think it hit home. 15 years later, we have an entirely different system of judicial appointments, independent of government and wholly merit based. We also have a much more diverse judiciary. We don’t yet have the figures for 1 April this year, but last year 22% of High Court judges and 24% of Court of Appeal judges were

women – still far too low, but much more than double the 2003 figures. We even doubled the number of Supreme Court Justices – from one to two. Thank you, Chief Justice McLachlin – we owe a lot to you.

I remember that meeting for another reason, which I quoted in a recent judgment about the treatment of transgender women by Job Centre staff:

“We lead women’s lives: we have no choice.” Thus has the Chief Justice of Canada, the Rt Hon Beverley McLachlin, summed up the basic truth that women and men do indeed lead different lives.¹

Our lives are different, not just because of the choices we make but because of the way that other people perceive and treat us. By using her words, I was able to acknowledge the centrality of gender in most people’s lives and how desperately important it is for trans people to be recognised and related to wholly in their reassigned gender, the gender that they have always felt themselves to be.

Occasionally our gender may make a difference to our judging – and even to other people’s judging, because casual, almost unconscious, sexism is difficult to voice when there is even one woman around to challenge it. But much of the time it makes no difference. The legacy which Chief Justice McLachlin has left to the law of the United Kingdom is not in areas where her gender might be thought to have played a part, but in the mainstream principles of public law, common law and equity. There are four main areas where her judgments have regularly been cited in recent UK cases: proportionality, illegality, unjust enrichment and equitable compensation, and vicarious liability.² I expect that some, at least, of these will feature in more depth in other contributions to this conference.

¹ *R (C) v Secretary of State for Work and Pensions* [2017] UKSC 72, [2017] 1 WLR 4127, para 1.

² I am most grateful to my Judicial Assistant, Penelope Gorman, for the help she has given me in finding these references.

Proportionality

*Bank Mellat v Her Majesty's Treasury*³ concerned the implementation of sanctions against those whose activities were thought to support the nuclear programme in Iran. The issue was whether excluding one particular Iranian bank from the London financial markets was a proportionate means of protecting UK national interests from the threat posed by that nuclear programme. Lord Sumption (for the majority) and Lord Reed (for the minority) both adopted a four part analysis of proportionality along Canadian lines. Lord Reed described the analysis of Chief Justice Dickson in *R v Oakes*,⁴ as 'the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning'. The benefit lay in breaking it down into distinct elements: (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right – or as you would put it 'pressing and substantial'; (2) whether the measure is rationally connected to that objective; and (3) whether a less intrusive measure could have been used without unacceptably compromising the attainment of the objective – or as you would put it whether it is 'minimally impairing'. But those three alone are not enough. The key concept is (4), as explained by Chief Justice McLachlin in *Alberta v Hutterian Brethren of Wilson Colony*,⁵ the case about whether requiring everyone to have a photograph on their drivers' licence was a proportionate restriction of religious freedom. Even if the objective is sufficiently important and the measure is rationally connected to that objective, and the objective cannot be achieved by a less intrusive measure, it still has to be asked whether the harm done by the limitation of a protected right is proportionate to the public benefit conferred by that limitation. In other words – do the ends justify the means? There will be some means which are so destructive of the right that they cannot be justified.

In the *Hutterian Brethren* case, Chief Justice McLachlin was concerned that this last and most important element had not featured strongly in the Canadian jurisprudence until then. The same may be said of our own jurisprudence, which adopted the first three elements in the case of *de*

³ [2013] UKSC 39, [2014] AC 700.

⁴ [1986] 1 SCR 103.

⁵ [2009] 2 SCR 567.

*Freitas*⁶ in 1999, but did not clearly acknowledge the fourth until much later.⁷ It is now firmly established. Chief Justice McLachlin's explanation of the 'meaningful distinction' between the first and fourth elements of the inquiry was quoted again by Lord Kerr in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*,⁸ a case about whether banning an Iranian dissident politician from coming to the UK to talk with politicians in the Houses of Parliament was a proportionate means of protecting the UK's 'fragile but imperative' relations with Iran. Some might find it strange that our government was prepared to imperil those relations by severely restricting the activities of a major Iranian bank but not by allowing a Paris based dissident to make a brief trip to the UK. We found the first disproportionate but the second not.

However useful it may be to break down the inquiry into its component parts, the reality is that answering the 'ends versus means' or 'individual versus community' question is always difficult: your court was divided in the *Hutterian Brethren* case and ours was divided in both the *Bank Mellat* and *Lord Carlile* cases.

Illegality

While our approach to proportionality is now well settled along Canadian lines, it has taken us longer to adopt a Canadian-style approach to the defence of illegality in tort, contract and restitution claims. In *Hounga v Allen*,⁹ one panel of the UK Supreme Court wrestled with a claim brought by a Nigerian victim of trafficking, brought to the UK to work illegally in domestic service and grossly ill-treated and exploited in breach of our labour laws until she managed to escape. It was accepted that she could not sue on the illegal contract of employment, but she sued for the statutory tort of race discrimination. But was her claim barred by the illegality? Lord Wilson asked, first, what is the aspect of public policy which founds the defence? And second, is there another aspect of public policy to which applying the defence would run counter? In

⁶ *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (Judicial Committee of the Privy Council).

⁷ In *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, at para 19, Lord Bingham stated that 'If insufficient attention has been paid to this requirement [striking a fair balance between the rights of the individual and the interests of the community] the failure should be made good'.

⁸ [2014] UKSC 60, [2015] AC 945, para 149.

⁹ [2014] UKSC 47, [2014] 1 WLR 2889.

answering the first question, he expressly adopted the analysis of Justice McLachlin in *Hall v Hebert*,¹⁰ the case of the drunken driver injured by a mixture of his own and his passenger's carelessness. The basis of the power to bar recovery in tort, she said:

'lies in the duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.'

Awarding compensation for injury to the claimant's feelings did not allow her to profit from her wrongful conduct; nor did it enable her to evade a penalty prescribed by the criminal law; nor did it compromise the integrity of the legal system by encouraging people like her to enter into illegal contracts of employment; on the contrary, denying her a remedy would compromise the integrity of the legal system by encouraging employers to exploit people in this way. (It also occurred to me that, even if she could not enforce her contract of employment, she ought to be able to claim a *quantum meruit* for the work that she had done.)

Meanwhile, another panel of the Supreme Court was deciding *Les Laboratoires Servier v Apotex Inc*,¹¹ a case with a Canadian connection. In brief, holders of a European patent for a particular drug and their licensed distributors obtained an interim injunction prohibiting the defendants from distributing the same drug. In return they gave the usual undertaking to compensate the defendants for their loss if it later turned out that the injunction should not have been granted. The European patent was then held invalid, so damages were assessed at over £17 million. Meanwhile, a federal court in Canada had held that the defendants were in breach of a Canadian patent. Should this illegality bar their claim under the English undertaking? The Supreme Court was unanimous in holding that committing the tort of infringing a foreign patent was not 'turpitude' for the purpose of the doctrine of illegality and Lord Sumption referred to the 'much-

¹⁰ [1993] 2 SCR 159.

¹¹ [2014] UKSC 55, [2015] AC 430.

admired' judgment of Justice McLachlin in *Hall v Hebert*. But the judgments revealed a disagreement between Lord Sumption (with whom Lord Neuberger, Lord Mance and Lord Clarke agreed) who espoused the 'reliance test' adopted by the House of Lords in *Tinsley v Milligan*¹² – does the claimant have to rely upon the illegality to found the claim? – and Lord Toulson, who favoured a more flexible test, based upon the 'integrity of the legal system'.

That disagreement also featured in *Bilta (UK) Ltd v Nazir (No 2)*¹³, in which Lord Sumption continued to favour the *Tinsley v Milligan* approach, and thought that *Hounga v Allen* turned on its special facts, while Lord Toulson and Lord Hodge favoured the more flexible approach, citing *Hounga v Allen* as an example. The disagreement did not have to be resolved in that case, but Lord Neuberger expressed the hope that an opportunity would soon come along for a panel of seven or nine to do so.

He did not have to wait long. We assembled a nine Justice panel for *Patel v Mirza*.¹⁴ Mr Patel had transferred a large sum of money to Mr Mirza for the purpose of betting on the price of Royal Bank of Scotland shares, relying on information which Mr Mirza expected to obtain from contacts in the bank. This would have been illegal insider trading. But it never happened because the inside information was not forthcoming. Mr Mirza refused to pay the money back and Mr Patel sued. We held that he was entitled to his money back – on the basis that returning the money would simply return the parties to the position in which they were before the transaction and avoid the unjust enrichment which Mr Mirza would otherwise enjoy. The majority espoused the more flexible approach and rejected the 'reliance test' espoused by the minority. *Hall v Hebert* featured extensively in Lord Toulson's review of the comparative law, and the 'integrity of the legal system' approach was described as a 'valuable insight'. The majority approach involved considering (a) the underlying purpose of the prohibition transgressed; (b) any other public policies rendered ineffective or less effective by denying the claim; and (c) the possibility of overkill unless the law was applied with a sense of proportionality.

¹² [1994] 1 AC 340.

¹³ [2016] AC 1.

¹⁴ [2016] UKSV 42, [2017] AC 467.

Lord Kerr agreed with this approach, although he did point out that Justice McLachlin had rejected the suggestion that the law of *ex turpi causa* should be replaced by a power to reject claims on grounds of public policy: but, he commented, what was the integrity of the legal system approach, if not a public policy consideration?¹⁵ But as I read *Hall v Hebert*, the real debate was not so much about the relevance of policy, but about whether it should be applied at the duty of care stage or as a bar at a later stage. *Hall v Hebert* was, of course, a tort case, whereas we have applied a version of that approach across the board, to claims in tort, contact and unjust enrichment. I wonder what the Chief Justice really thinks of our decision?

Unjust enrichment and equitable compensation

We have recently been reminded of her preference for principle over policy in the field of unjust enrichment. In *Peter v Beblow*,¹⁶ while upholding a claim for unjust enrichment brought by an unmarried cohabitant who had rendered domestic services for no reward, she warned:

‘There is a tendency on the part of some to view the action for unjust enrichment as a device doing what may seem fair between the parties. In the rush to substantive justice the principles are sometimes forgotten.’

She proceeded to ask whether the defendant had been enriched to the detriment of the claimant and then whether there was a juristic basis for that enrichment – and it was under the third head that she considered that policy questions might arise.

Her dictum was cited by Lord Reed in *Investment Trust Companies v Revenue and Customs Commissioners*,¹⁷ where the issue was whether the Revenue had been enriched at the expense of the company. Lord Reed cited Justice McLachlin when emphasising that claims for unjust

¹⁵ The fullest account of the ‘valuable insight’ in *Hall v Hebert* is in fact given by Lord Mance, who was in the minority.

¹⁶ [1993] 1 SCR 980, at 988.

¹⁷ [2017] UKSC 29, [2017] 2 WLR 1200.

enrichment are matters of right, depending on rules of law, only to be denied on the basis of legal principle and not as a matter of discretion.

Her principled approach to unjust enrichment was also apparent in *Peel (Regional Municipality) v Canada*; *Peel (Regional Municipality) v Ontario*,¹⁸ two citations from which appeared in *Benedetti v Saviris*.¹⁹ One was by Lord Clarke, quoting Goff and Jones' reference to her observation that the common law 'places a premium on the right to choose how to spend one's money'. The other was by Lord Reed (dissenting), who referred to her statement that "The concept of "injustice" in the context of the law of restitution harkens back to the Aristotelean notion of correcting a balance or equilibrium that has been disrupted'. The case was about how the enrichment was to be valued – and Justice McLachlin was prayed in aid in support of both sides – the one arguing for a 'subjective' approach of how much the defendant would be willing to pay for the claimant's services and the other arguing for an 'objective' approach of how much they were worth to him. The subjectivists won, but I am not sure which side Justice McLachlin would have favoured.

More significantly, in *Various claimants v Giambrone & Law (a firm)*,²⁰ the Court of Appeal has recently observed that Justice McLachlin's judgment in *Canson Enterprises Ltd v Boughton & Co*²¹ has on a number of occasions been cited by English courts as reflecting the English law on equitable compensation. Lord Justice Jackson quoted²² her rejection of an analogy with damages in tort:

“The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. . . . The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interests of the other. The fiduciary relationship has trust, not

¹⁸ [1992] 3 SCR 762.

¹⁹ [2013] UKSC 50, [2014] AC 938.

²⁰ [2017] EWCA Civ 1193, [2018] PNLR 2.

²¹ [1991] 3 SCR 534.

²² At para 50.

self-interest, at its core and when breach occurs, the balance favours the person wronged.’

Another valuable insight, you may think. An Italian law firm, practising in London and Italy, received deposits paid by British and Irish purchasers of Italian properties ‘off plan’ and released them to the Italian vendor and agent, despite having promised not to do so unless the guarantees required by Italian law had been supplied – which they were not. The Court held it irrelevant that the guarantees would have made no difference. The firm was ordered to repay the purchasers in full. We refused permission to appeal in December 2017.

Vicarious liability

Perhaps most influential of all has been Justice McLachlin’s contribution to the development of the law of vicarious liability, in *Bazley v Curry*,²³ *Jacobi v Griffiths*²⁴ and *John Doe v Bennett*.²⁵ We have all had to wrestle with the responsibility of institutions for sexual abuse perpetrated by people working within them. This affects both parts of the vicarious liability enquiry – the relationship between the institution and the perpetrator – which used to be a contract of employment – and the connection between that relationship and the acts complained of – which used to be summed up in the phrase ‘the course or scope of his employment’. The answer to the latter question came first.

How could acts of sexual abuse possibly be within the scope of a person’s employment? It was the last thing that the employer wanted him to do. *Bazley v Curry* and *Jacobi v Griffiths* supplied both the answer and the rationale – the answer was the ‘strong connection’ test and the rationale was the increased risk of harm arising out of the employer’s enterprise. In *Lister v Hesley Hall*²⁶ the House of Lords adopted a ‘close connection’ test modelled on the Canadian approach, Lord Steyn describing the judgments of Justice McLachlin as ‘luminous and illuminating’ and a genuine advance on previous thinking. The UK Supreme Court has recently applied that same approach

²³ [1999] 2 SCR 534.

²⁴ [1999] 2 SCR 570.

²⁵ [2004] 1 SCR 436.

²⁶ [2002] 1 AC 215.

in relation to an egregious act of violence carried out by a petrol station employee against a hapless customer.²⁷

The answer to the first question was more troubling. Sadly, much sexual abuse has been perpetrated by priests, monks and other clergy who work within organised religion but are not its employees in the technical sense. In *John Doe v Bennett*, Chief Justice McLachlin held that the relationship of priest and diocese was sufficiently ‘akin to employment’ to make the diocesan episcopal corporation sole vicariously liable for the priest’s misdeeds. Once again, the rationale was the enterprise risk – ‘a person who puts a risky enterprise into the community may fairly be held responsible when those risks emerge and cause loss or injury to members of the public’. In *Various Claimants v Catholic Child Welfare Society*,²⁸ the UK Supreme Court held that the Institute of the Brothers of the Christian Schools (usually known as the Christian Brothers) was vicariously liable (jointly with the brothers’ actual employers) for sexual abuse carried out by members of the Institute at a boarding school for delinquent boys, relying very heavily on the Canadian jurisprudence in doing so. More recently, we have applied the ‘akin to employment’ test in the very different context of the work done by prisoners in a prison.²⁹

But we have now gone even further than you have done. In *Armes v Nottinghamshire County Council*,³⁰ we found a local authority which had a child in their care vicariously liable for acts of physical and sexual abuse carried out by foster parents with whom the authority had placed the child. We distinguished the Canadian case of *KLB v British Columbia*³¹ on the basis that the English courts had not adopted deterrence as a reason for extending vicarious liability. However, Lord Reed also observed that:

‘The most influential idea in modern times has been that it is just that an enterprise which takes the benefit of activities carried on by a person integrated into its organisation

²⁷ *Mubamad v WM Morrison Supermarkets plc* [2016] UKSC 11, [2016] AC 677.

²⁸ [2012] UKSC 56, [2013] 2 AC 1.

²⁹ *Cox v Ministry of Justice* [2016] UKSC 10, [2016] AC 660.

³⁰ [2017] UKSC 60, [2017] PTSR 1382.

³¹ [2003] 2 SCR 403.

should also bear the cost of harm wrongfully caused by that person in the course of those activities.’

That influential idea can, of course, be traced back to *Bazley v Curry*, as can the idea of enterprise risk, which also played its part in our decision. The foster parents provided care as an integral part of the local authority’s organisation of its child care services. It was an activity carried on for the benefit of the local authority. And it created a relationship of authority and trust between the child and the foster parent in circumstances where close control could not be exercised, thus making the child particularly vulnerable to abuse. Ironically, therefore, while control used to be the watchword of vicarious liability, in that case it was the lack of control over a situation of the local authority’s own making which led to it.

Conclusion

There are many more cases than these in which first Justice and then Chief Justice McLachlin has been cited in our courts. Canada is probably the ‘go to’ jurisdiction when we are looking at comparative law, followed by Australia, New Zealand and Hong Kong, and, in some areas but not others, the United States and South Africa: so much so that if we find that we are departing from recent Canadian authority, we are troubled about it.³² Some of us were sorry that judgment had not been given in *Carter v British Columbia (Attorney General)*³³ before we had to give judgment in our own assisted suicide case.³⁴

One of the reasons why the approach of Canadian courts is of such interest to us, and to other courts outside Canada, may be your openness to cross-cultural influences. Your Supreme Court has been active in and encouraged the frequent use of foreign law. This may be, as Markesinis and Fedtke suggest,³⁵ because your mixed cultural background has prepared you for a multi-

³² Eg *Whitlock v Moree* [2017] UKPC 44, where the Board was divided about the effect of banking documents on the beneficial interests in a joint bank account, especially in the light of *Niles v Lake* [1947] SCR 294 and *Pecore v Pecore* [2007] 1 SCR 795.

³³ [2015] 1 SCR 331.

³⁴ *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 654.

³⁵ *Judicial Recourse to Foreign Law: A New Source of Inspiration*, UCL Press, 2006, p 84.

cultural approach to law. Unlike the United States, you are more prone to a ‘dialogic’ model. This includes reference, not only to UK, Commonwealth and American case law, but also to civilian systems. As they say:

‘The Canadian universalism may thus demonstrate the confident state of an eclectic mind which does not see in transnational judicial dialogue a threat to national individuality or an impoverishment of the local legal culture but, on the contrary, a source of constant inspiration and reinforced judicial legitimacy.’

My few examples have shown that this is very much a two-way dialogue – from our point of view, we have probably learned more from you than the other way about, and Chief Justice McLachlin’s valuable insights are a large part of the reason for that. I am looking forward to learning more about them, and about her, at this conference.