

## **Straight and Crooked Thinking: the Search for What is Right**

THE NINTH BIRKENHEAD LECTURE  
GIVEN IN GRAY'S INN HALL

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**The following is an abridged version of the lecture. The full text, including footnotes, is available in Gray's Inn Library and on the website.**

Lord Birkenhead was to some a controversial figure but he was undoubtedly two things: a good lawyer and loyal to this Inn. On his legal prowess, in the July 1900 *Law Quarterly Review* under the title 'The Rule in *Hadley v Baxendale*', FE Smith, then at Merton College Oxford, wrote an article in respect of which Master Heuston has written: 'No other Lord Chancellor, or indeed Law Lord, is known to have contributed to this scholarly quarterly at such a youthful age.' The promise of youth developed into a very sound lawyer.

Lord Birkenhead's love of Gray's Inn can be summed up in a passage written by his son in a biography of FE Smith (and this incidentally reflected my own reasons for joining the Inn back in 1975): 'It was the smallest of the Inns of Court; it was the most intimate and it breathed into FE from its beautiful timbered hall the mellow enchantment of Elizabethan England.'

This Inn of Court is the living embodiment of much of what the world respects about the English legal system and I mean by this the common law. The common law is the system of law which governs a number of jurisdictions around the world. In my home, Hong Kong, the common law is the system that is constitutionally prescribed as the legal system applicable to this Special Administrative Region of the People's Republic of China. Hong Kong's constitution, the Basic Law of which reflects (as the Preamble states) the basic policies of the PRC regarding Hong Kong, expressly provides for the application of the common law.

The common law, in its objective of arriving at just outcomes to legal

disputes (put simply, law is justice) requires not only firm and clear decisions but, equally important, compelling reasons for such decisions. Ultimately, the main yardstick for determining the correctness of a decision is the coherence and cogency of the reasoning in support. Another way of putting this is that the common law requires judgments to be made on a principled basis. As lawyers, we have all come across judgments and decisions which have sometimes surprised us not just in their outcome, but also in their reasoning. We are surprised because of the importance of reasoning as an integral component of the administration of justice in a common law system. It is one of its primary characteristics.

The title of this lecture is taken directly from a book first published in 1930 under the authorship of Robert Thouless. *Straight and Crooked Thinking* found its way into the recommended reading list when I first embarked on my legal studies over 40 years ago at Birmingham University. It was to prove to be one of the most influential books in my legal career because it underlined the necessity of proper reasoning in order to convince. My priorities as to whom to convince have evolved over the years from judges before whom I appeared to now the general public who have to be convinced of the work of the courts. Proper reasoning can be defined as straight thinking, and improper reasoning as crooked thinking.

In the book, instances of straight and crooked thinking are identified. The analysis and examples of crooked thinking are the more interesting: faulty logic, emotive language, flattery as a means to help persuade, playing on people's psychology and prejudices, etc. Looking at this in the legal context, I hope to be able to point to instances of what I will call crooked thinking, not in the sense of dishonesty or bad faith, but the use of legal tools in a tenuous and ultimately unconvincing way in order to arrive at certain legal outcomes. These outcomes may have seemed right in the age they were made but in modern times would be regarded as wholly unacceptable. There are of course countless instances of straight thinking and these comprise the vast majority of legal decisions, but the occasions in which Homer nodded are the more interesting.

A principled approach is always and indeed the only approach to decision making. It is in contrast to adopting a random – or worse, arbitrary – approach. So why is the existence of clear and fully reasoned judgments of such importance under the common law? To start with, they demonstrate the adherence of the courts and judges to the law

and her spirit. They also manifest the adherence to the Judicial Oath taken by judges. It is important that there is adherence to the law and the spirit of the law. In any society governed by the rule of law, one finds the existence of laws that fully respect the rights of the individual and the existence of an independent judiciary enforcing such laws. One of the empirical indicators of the existence of the rule of law is the transparency of the legal system, and a fully reasoned judgment enables anyone to see that there has been adherence to the law and her spirit. Without proper reasoning in judgments for everyone to see, all sorts of unfortunate speculation arises as to what might have generated the result.

The doctrine of precedent, which is often used as the prime example whenever one is asked to define the common law, has as its foundation the properly reasoned judgment, for it is the reasoning of judgments that is utilised in future cases. The doctrine of precedent encourages consistency, promotes certainty and constitutes the opposite of the arbitrary application of the law. It is, however, important in order for the system of precedent to operate properly that bad precedents are not created, because bad precedents, like good precedents, also last. Not everyone is convinced by the doctrine of *stare decisis* and it is of course not applicable in civil law jurisdictions.

Bad precedents are created when bad reasoning is employed. Where such precedents exist, this will have the effect of either preventing the development of the law or, worse still, damaging the fabric of the law. Where the law is no longer regarded as fulfilling its primary function of the protection of rights, society really ceases to be governed by the rule of law. The importance of the rule of law can be illustrated by reference to a scene from *A Man for All Seasons*, a play about Sir Thomas More, who was Chancellor in England during the reign of Henry VIII. In the scene, More is conversing with his future son-in-law, William Roper, who is trying to persuade Sir Thomas to arrest Richard Rich, whose perjury against Sir Thomas would eventually lead to his being sentenced to death. Sir Thomas insists he cannot do this since Rich has broken no law. He says that even the devil should be free until he broke the law. Roper is exasperated. Sir Thomas says to him:

‘What would you do? Cut a great road through the law to get after the Devil? ... And when the last law was down, and the Devil turned round on you – where would you hide, Roper, the laws all being flat?’

This country is planted thick with laws from coast to coast, Man's laws, not God's, and if you cut them down – and you're just the man to do it – do you really think you could stand upright in the winds that would blow then? Yes, I give the Devil benefit of law, for my own safety's sake!

I hope so far I have persuaded at least some of you of the importance of the process of reasoning in arriving at decisions. This has of course long been recognised by judges as being essential to the perceived integrity of a judicial decision. A properly reasoned judgment is after all likely to have reached the right result. However, what happens when improper reasoning is employed? The usual result is that a bad decision has been made and injustice results. One may ask rhetorically: so why should improper reasoning have been employed in the first place? One answer is that improper reasoning is employed in order to achieve what is perceived to be justice; in other words the school of 'the ends justify the means'. Another answer is to say that the judge has not intended to employ faulty reasoning – the 'mistake by inadvertence' school.

Yet another explanation is, I suppose, what sometimes occurs when the judge has simply made no attempt to reason like a lawyer ought to; here, it is not so much a case of faulty reasoning as no reasoning at all. I can illustrate this by a reference to *Republic of Bolivia v Philip Morris Companies Inc*. The issue was whether proceedings begun in Texas should be transferred to be heard in Washington DC. In stating that Washington DC was the more appropriate venue for trial, a judge of a District Court in Texas (no doubt tongue in cheek) said:

'the Court can hardly imagine why the Republic of Bolivia elected to file suit in the veritable hinterlands of Brazoria County, Texas. The Court seriously doubts whether Brazoria County has ever seen a live Bolivian ... even on the Discovery Channel ... Plaintiff has an embassy in Washington DC, and thus a physical presence and governmental representatives there, whereas there isn't even a Bolivian restaurant anywhere near here!'

The *Republic of Bolivia* case is simply an example of non reasoning. Of a more dangerous kind are those cases where there has been faulty reasoning by the employment of well known legal tools. These are dangerous because faulty reasoning may sometimes be employed to

hide a society's prejudices and to perpetuate such prejudices. The use of legal tools gives the decision a superficial air of respectability because legal reasoning is seemingly employed. It is in this area of social prejudice on which I want to concentrate. I do so not only because they provide for me the clearest examples of legal crooked thinking, but also provide important lessons to be learnt.

Before I embark on this exercise, I want to make it clear that it is not my intention to disparage the judges responsible for these decisions.

Racial prejudice and prejudice against women have plagued societies for a long time. We all of course know now just how unacceptable these prejudices are. The promise – or, rather, insistence – on equality is at the forefront of almost any constitutional instrument. But it was far from being true historically. In the United States, the promise of equality was contained in the 1776 Declaration of Independence. A war was waged to uphold that Declaration. The United States Constitution, coming into force in 1789, was based on it. The commonly shared wisdom is now that the Declaration of Independence was the promise for the nation and the Constitution was the fulfilment of that promise. The Preamble of the Constitution proudly declares: 'We the people of the United States, in order ... to establish justice ... to secure the blessings of liberty ... do establish this Constitution ...'

How could the concept of slavery be consistent with these important statements? Hard though it may be to accept, slavery was for centuries a venerable institution. The great Code of Hammurabi, often referred to as the ancestor of modern law, revered and protected slavery: a man who harboured a fugitive slave on his land would be executed, whereas if he returned the slave to his owner, there would be a reward; if a slave was injured, compensation would have to be paid to his owner. Despite Magna Carta, England had for many years a feudal system involving serfdom.

Relevant for the purposes of this lecture is the question of how the courts dealt with the issue of slavery and what reasoning they employed. In England, the celebrated case of *R v Knowles, Ex parte Somersett* (1772) 98 ER 499, a habeas corpus action heard by Lord Mansfield in the Court of King's Bench, had decided against slavery as an institution. His reasoning, curiously vague for Lord Mansfield who was one of the clearest minds in matters involving commercial law, can be interpreted to mean that slavery was illegal on account of it finding no basis in the common law; there was no precedent for it.

The courts of the United States took a different course. The infamous case (the term as used by Justice Sandra Day O'Connor, formerly an Associate Justice of the Supreme Court of the United States) of *Scott v Sandford* (1857) 60 US 393, a decision of the US Supreme Court under Chief Justice Taney, is a classic example of unacceptable legal reasoning which gave rise to the danger of a perception of a lack of judicial independence. There, an African American (Dred Scott) and his family had been assaulted by his alleged master and owner, Sandford. He brought an action in the Federal Courts in St Louis, Missouri, in trespass. The issue which eventually made its way to the Supreme Court was whether Dred Scott had the necessary locus standi as a US citizen to make a claim against Sandford. Only US citizens could sue.

In determining this issue, the Court had to construe the meaning of citizen under the US Constitution. Chief Justice Taney regarded it as his obligation to interpret the Constitution in accordance with what its drafters meant. In his judgment, he said (correctly, although, as it turned out, somewhat disingenuously): 'It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws.' The Supreme Court held that, despite the fact that in the course of moving from state to state Dred Scott had resided in Wisconsin where slavery had been outlawed, he remained a slave when he returned to Missouri. As such, it was felt his status did not enable him to be treated as a citizen of the United States. Chief Justice Taney, in the course of his analysis as to what the framers of the Constitution had in mind, referred to black people as 'a subordinate and inferior class of beings' and 'an inferior order, and altogether unfit to associate with the white race'.

Those are strong and unacceptable words. The inadequate legal reasoning, devoid of humanity, simply and totally ignored the concept of human rights and dignity, and the spirit of the law. True it is that Chief Justice Taney was associating himself with what he thought were the views of the majority of Americans at the time (although this is debatable) but, even accepting this, he did not display the courage, the vocation and judicial independence that is the hallmark of a judge. By holding as it did, the Supreme Court laid itself open to the accusation that it had not been truly independent. The (by our standards) outrageous reasoning led many people to think of that case as representing an unfortunate chapter in the history of the US Supreme Court and that the Court, for once, did not display the independence for which it is now famous. As Chief Justice Beverley McLachlin has often

remarked, courage and conscience are judicial qualities needed in any judiciary.

As Professor Fehrenbacher noted, the judgment was ‘judicial in its language’. Superficially, I suppose it was. The judgment proceeded as if the question was really just one of constitutional interpretation and the Chief Justice even remarked that the court was not pronouncing on the justice or injustice or the policy behind the slave laws. That part of the Constitution requiring interpretation was whether African Americans could be considered citizens, because only that category of persons could sue.

For me, this is an early example of crooked thinking. It involved the use of legal tools, in this case legal analysis in the form of confining the issue to one of statutory interpretation and also saying (as really no more than camouflage) that the Court was not pronouncing on matters of policy, in order to disguise a blatant disregard for what should have been the correct answer and, instead, to reach an answer that reflected the times. It is crooked thinking because the correct answer was not only obvious (by our standards), but the reasoning needed to reach a correct conclusion was also clear: a respect for the concept of equality and liberty, both of which were, as we have seen, inherent in the Declaration of Independence and the United States Constitution itself and, of course, common sense. The dissenting opinion of Justice Benjamin Curtis can be seen in sharp contrast: Scott was a citizen of the United States; he was a citizen because all persons born in the United States were citizens, and the fact that he was an African American was irrelevant to that conclusion. Justice Curtis resigned from the Supreme Court after the decision in *Scott v Sandford*.

I have already remarked that, where faulty reasoning is employed, a wrong result becomes the consequence and a legal precedent is thereby created having the effect of perpetuating an injustice, often at great cost. The result of *Scott v Sandford* was that a catalyst was created that led eventually to a Civil War. It was not until the passing of what became known as the Reconstruction Amendments of the United States Constitution – that is, the 13th, 14th and 15th Amendments – when slavery was abolished, that citizenship was given to former slaves and a prohibition against race or colour being a bar to the right to vote was enacted.

However, notwithstanding the Reconstruction Amendments, inequality and prejudice persisted. The 14th Amendment contains in its

first section what is popularly known as the ‘Equal Protection Clause’ – in other words, the guarantee of equality. It was therefore supremely ironic that this Amendment, forged in the aftermath of the American Civil War in response to the end of slavery, should have given rise to a series of laws enacted in the Southern States which effectively imposed racial segregation – the ‘Jim Crow Laws’. Every aspect of life was affected, from the use of public conveniences to those institutions which affect everyone’s lives – marriage and education among others. Education was in many ways the worst of all; after all, it is through education that one is able to live a full life and enjoy that fundamental ideal contained in the United States Declaration of Independence, the ‘Pursuit of Happiness’.

We all know now that racial segregation cannot possibly be consistent with the right to equality. In principle, it is the precise opposite of equality in that an artificial barrier – race – is imposed; as a matter of reality, such a system is bound to result in practical differences. But what may seem obvious to you may not be obvious at all to a lot of people, certainly not at the relevant historical time. This somewhat twisted idea of equality (racial segregation) found favour with the United States Supreme Court in 1896 in *Plessy v Ferguson* 136 US 537 (upholding the validity of a Louisiana law providing for segregation in railway carriages). The effect of the decision was to confirm the legal validity of the ‘separate but equal’ doctrine.

In a nutshell, the doctrine was that the constitutional right to equality was not inconsistent with segregation, as long as the facilities available to white people and to other races were the same. The doctrine at its very highest may barely pass a test of logic (and it is certainly a legal fiction) but it could not disguise the real reasons behind its application in practice. The Court tried to apply logic and reason. However, the judgment of Justice Brown contains a revealing passage:

‘We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in [the 1860 Act providing for separate railway carriages], but solely because the colored race chooses to put that construction upon it.’

The decision has of course to be seen in the context of the times.

The legal reasoning technique used in *Plessy v Ferguson* was that of logic: segregation did not mean inequality as long as everyone in the segregated groups was equal. Like *Scott*, the effect of *Plessy* was to be a millstone around the neck of the United States legal system until the Supreme Court mustered the courage to reverse the decision in *Brown v Board of Education* (1954) 347 US 483.

Like the decision in *Scott*, the Supreme Court in *Plessy* employed crooked thinking, this time using the legal tool of logic, convincing in most cases, in order not to disturb the then prevalent views of United States society. The use of suspect reasoning had to be employed in an attempt to give an important policy decision of the courts some legal basis and justification. The price that had to be paid was that the United States had to endure more than a generation of seething discontent.

When the courts are asked to determine important cases, important consequences follow, and the respect that the community will ultimately have in the law will depend on how such important decisions are made. Process and reasoning are all important.

The majesty of the English common law has been for me the most influential in all common law jurisdictions, if not in all jurisdictions. English mercantile law is a prime example. In the area of human rights, however, the English courts have not always been consistent. I referred to the important case of *Somerset*, which helped pave the way to the abolition of slavery. Inconsistency can be demonstrated by the slow progress regarding the position of women, and it is in this area where the reasoning of even the highest courts has been found wanting. While women could literally rise to the very top and become the Sovereign, lower down they were discriminated against.

At this point, I wish to acknowledge the Reading given by Master Beloff at Barnard's Inn in 2009. I have also been much assisted by an article 'Women and the Exercise of Public Functions' by Professor Enid Campbell.

I start with a frosty morning on 2nd December 1903. In the Moses Room of the House of Lords, in which there hangs a fresco of Moses bringing down the Tables of Law from Mount Sinai, Ms Bertha Cave made submissions before a special tribunal consisting of the Lord Chancellor, the Lord Chief Justice and five senior judges. As reported in the *Times Law Reports*, the hearing lasted only five minutes. Ms Cave had sought to be Called to the Bar by Gray's Inn but she had been refused on the basis that only men had hitherto been admitted to practise at the Bar.

No woman had ever been admitted. The special tribunal agreed. The Lord Chancellor is reported to have reasoned thus: since there was no precedent for women to be admitted to the Bar, Ms Cave's application was rightly rejected. The tribunal presumably had regard to the view of the Inn. A contemporary report refers to this:

'A representative of Gray's Inn has stated that the objection of the Benchers was based on the simple ground that when the Inn was founded the possibility of lady students was never contemplated. The statutes of the Inn, therefore, while containing no definitive bar against women, ignore the sex so absolutely as to leave the Benchers, in their opinion, no power to admit a lady.'

Three points stand out. (1) The reasoning was weak. To say there was no precedent is perhaps a legal device of last resort to arrive at a conclusion. In order to get to that stage, a court will have (or at least ought to have) considered the matter after looking at applicable principles. It does not appear the special tribunal considered Ms Cave's application from the point of view of fairness, equality or even common sense. (2) The case was an important one and was obviously acknowledged to have important repercussions. There is no other explanation for the composition of the special tribunal. It can be inferred then that it was considered that the reasoning behind any decision would be critically evaluated. Yet, no proper reasoning was revealed. This provides a strong hint as to the correctness of the outcome. (3) The trouble with crooked thinking is that it promotes further crooked thinking. It was ominous that, as reported in the extract from *The Times Law Reports*, Ms Cave said to the press that, in the future, if there was any loophole, she would take advantage of it.

Ms Cave was not the first woman to seek access to the Inns. As early as 1870, 92 women had signed a petition requesting permission to attend a lecture at Lincoln's Inn. Permission was refused without any reason given. Bertha Cave's case and the view of the Inns of Court were entirely consistent with the way the courts had all along dealt with discriminatory practices against women. Reasoning to the effect that women were not included in a profession which admittedly consisted of men at that stage was hardly compelling: it was neither logical nor consistent with common sense. Even statute had made progress in this respect. The Interpretation Act 1856 stated that the use of the masculine

in statutes should include the feminine.

This statutory clarification did not herald any new era of equality, nor did it prevent the continued use of faulty reasoning. The dubious reasoning of the courts was already in existence in *Hope v Lady Sandhurst* (1889) 13 QBD 79. Lady Sandhurst was duly elected to the town council of the London County Council area of Brixton. The unsuccessful rival in the election petitioned against the result on the basis that Lady Sandhurst was disqualified on account of being a woman. The Municipal Corporations Act 1882 provided that 'every person shall be qualified to be elected and to be a councillor who is, at the time of election, qualified to elect to the office of councillor'. Lady Sandhurst was a person and she was entitled to elect and insofar as any further doubt remained, the Interpretation Act reinforced her position. The result of the case might appear obvious. The language of the statute was clear: if one could vote, one could also be elected. However, the Court of Appeal – the composition of which was one of the strongest of that era – held otherwise. A number of devices were used in the reasoning.

First, logic. Notwithstanding the statutory provision, which stated in terms generally that women could be elected if they could vote, in the specific statute under consideration, since there was a provision which expressly stated that women could vote, it must follow that women could only be elected if there was an express specific provision to this effect as well but there was none. This was, I would venture to suggest, simply warped logic at its worst, yet it proved to be attractive to all six judges.

Secondly, reference to what the common law and constitutional law had always been. This is a variation of the 'since time immemorial approach'. Lord Esher MR put it in these terms: 'I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public function.' In relying on an earlier authority, the Master of the Rolls used another legal technique – the wisdom of another judge (what I would call the 'Homer factor') – to refer to Willes J in the following terms: 'a more learned judge never lived'.

All this again constituted for me faulty reasoning. And a quite absurd result was created. Like other shaky decisions, this way of thinking in important cases provided a precedent for others to follow.

*Bebb v Law Society* [1914] Ch 286 was yet another extraordinary case. Ms Bebb wanted to take the Law Society's qualifying examination to

become a solicitor. She was told that if she presented herself to take the examination, she would be barred from entry. The Solicitors Act 1843 did not of course expressly bar women from becoming solicitors (it simply used the term 'person') but the Court of Appeal superimposed the requirement that persons could not become solicitors if they were 'disqualified'. This use of logic can be defended but it was of course not by itself enough to exclude women. The further device that was used by the Court of Appeal was that the common law position was that no women had ever been or applied to be a solicitor. As Cozens-Hardy MR said: 'There has been that long uniform and uninterrupted usage which is the foundation of the greater part of the common law of this country, and which we ought, beyond all doubt, to be very loath to depart from.'

It is also noteworthy that among the authorities cited were *Chorlton v Lings* (1868) LR 4 CP 374 and Bertha Cave's case. These cases, or rather their way of thinking, had become, in modern parlance, mainstream and moreover had become precedents. And yet, they were wrong. Every legal principle of equality, fairness and basic justice was jettisoned in favour of dubious and faulty reasoning (crooked thinking).

The House of Lords fared no better. Section 27 of the Representation of the People (Scotland) Act 1868 provided that 'every person whose name is for the time being on the register ... of the general council of [the Universities of St Andrews and Edinburgh] ... should be entitled to vote in the election of a member to serve [in Parliament]'. In *Nairn v University of St Andrews* [1909] AC 147 the plaintiffs were five women graduates of the University of Edinburgh and thereby entitled to be registered on the general council of that University. Before the House of Lords, having lost at each level, they represented themselves. The House of Lords regarded the matter as so clear that the respondents' counsel were not called on to respond. Notwithstanding evidence that historically women did vote in the university parliamentary elections, the House of Lords said: 'It is notorious that this right of voting has, in fact, been confined to men. Not only has it been the constant tradition, alike of all the three kingdoms, but it has also been the constant practice, so far as we have knowledge of what has happened from the earliest times down to this day.' This was the use of what I have called the 'time immemorial' line of reasoning. The question before the House of Lords was said to be 'not difficult', although three full speeches were necessary to convince. This too is a device in legal reasoning: where no convincing reason can be given, it is then suggested that the point is an obvious or

a simple one – a form of crooked thinking.

To complete the story regarding women at the Bar, the British Sex Disqualification (Removal) Act 1919 ended much of the discrimination that had existed. The first woman to be Called was Ivy Williams in 1919. Gray's Inn began admitting women from December that year. The first to be Called at Gray's was Edith Hesling on 13th June 1923.

On 2nd May 1939, Rose Heilbron was Called to the Bar at Gray's Inn, the youngest woman to be Called. Among her very many achievements, she was the recipient of the Holker Scholarship of this Inn in 1935 and was the first woman Bencher in 1968. She was the Treasurer in 1985. But the focus of this talk is not on Dame Rose, but on one of her civil cases. It involves a famous cricketer (he captained the West Indies) who devoted much of his public life to helping minority groups in England – Lord Learie Constantine. The facts are vividly described by Master Hilary Heilbron in her description of what she has called a landmark case:

'His fame as a cricketer did not, however, lessen the discrimination and hostility he and his family suffered as a result of being black, emphasising the contrast, as his friend CLR James put it, "between his first class status as a cricketer and his third class status as a man". Learie Constantine became Rose's client. In July 1943 Learie Constantine was to captain the West Indies side against England at Lords in a charity match. He was given leave from his then employment with the Ministry of Labour as Welfare Officer in charge of West Indian technicians and trainees on Merseyside to do so. He had booked hotel accommodation for himself and his wife for four nights at the Imperial Hotel London and had inquired whether there would be any objection to his staying on the grounds of his colour and was told that there was not. When he arrived it was made clear to him that he and his family were not welcome. The manageress explained this to them in the most offensive terms by saying: "We don't have niggers in this hotel." When asked why, she replied: "Because of the Americans ... He can stop the night but if he does not go tomorrow morning, his luggage will be put outside and his door locked." He was then found alternative accommodation at the Bedford Hotel.'

Learie sued the Imperial Hotel. The case was tried before Birkett J and is reported at [1944] 1 KB 693. I refer to this case as an example of crooked

thinking, in that the law was stretched, many people think, beyond breaking point in order to achieve what was clearly a just result. At that time, there was no race relations legislation and racial inequality was not really at the forefront of constitutional discussions. Rose Heilbron had (ingeniously it must be said) pleaded the case on the basis of that special category of tort which is actionable per se. Constantine could not prove any damage and so had to resort to finding a parallel with the tort, actionable per se, relating to breach of duty by public officers. This was a real stretch but Birkett J held in favour of the plaintiff.

The result was undoubtedly a just one but I refer to it as part of the theme of straight and crooked thinking as another example where reasoning was laboured and unconvincing, albeit to arrive at a just result. However, it does provide a pleasant contrast to the unfortunate results of the other instances of crooked thinking.

The integrity of the common law is critical to its survival and its relevance. It is something we strive to maintain in Hong Kong. Compelling reasoning is an essential part of the common law tradition. The tools of logic, use of precedent, the search for principle and the proper interpretation of constitutions and statutes, are all part of the tools we employ to convince and to arrive at the right answer. Where, for whatever reason, the same tools are used improperly in faulty or unconvincing reasoning, unfortunately sometimes there is a price to pay. The public interest lies in judges arriving at the right decision applying proper reasoning, even if some members of the public (or even the majority of the public) for the time being think otherwise.

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