Summary of Fuller, 'The Case of the Speluncean Explorers'

Wednesday, 25 February 2015

This is a summary of a fictitious case created in Lon L Fuller, ‘The Case of the Speluncean Explorers’ (1949) 62(4) *Harvard Law Review* 616. The case takes place in the equally fictitious ‘Commonwealth of Newgarth’, and Fuller’s article contains five judicial opinions that explore the facts from different legal perspectives. It is useful as an illustration of the scope and diversity of Anglo-American legal philosophy in the mid-20th century.

Basic facts

A group of cave explorers (spelunkers) are trapped by a landslide. Approaching starvation, they make radio contact with the rescue team. Engineers on the rescue team estimate that the rescue will take a further 10 days. After describing their situation to physicians, they are told it is unlikely that they wil survive another 10 days without food.

The explorers ask the physicians whether they would survive if they killed and ate one of their number. The physicians advise, reluctantly, that they would. When asked if they ought to hold a lottery to determine whom to kill and eat, no one on the rescue team is willing to advise.

The radio is turned off, and later a lottery is held. The loser is killed and eaten. When they are rescued they are prosecuted for murder, for which, in the Commonwealth of Newgarth, a guilty verdict carries a mandatory sentence of capital punishment.

The opinions of the judges

The defendants were initially convicted and sentenced to be hanged by the 'Court of General Instances of the County of Stowfield' but have brought a petition of error before the court. Truepenny CJ provides a more complete overview of the facts than is above.

Each judge gives a separate opinion: Truepenny CJ,

Judgment of Truepenny CJ

Statement of facts

The four defendants and the deceased were part of the 'Speluncean Society', an amateur cave-exploration organisation, and became trapped in a cavern as a result of a landslide. The remote location made rescue difficult, time-consuming and expensive. Ten workmen were killed in the rescue.

In addition to the Society's funds, it took an additional 800,000 'Frelars' (ie, the currency of the Commonwealth of Newgarth) provided by popular subscription and legislative grant to rescue the explorers. After 32 days, they were rescued.

Early on it was recognised that death by starvation was a possibility. On the 20th day, it was realised that the explorers had a two-way radio of sorts and oral communication was established.

The engineers informed the explorers that at least 10 more days would be needed to rescue them. Upon further inquiries, a team of medical experts informed that explorers that considering the conditions and rations inside the cave, the chances of survival for a further 10 days were remote.

The explorers asked whether they would survive if they resorted to cannibalising one of the number. It was reluctantly confirmed they could. Whetmore asked if casting lots as to whom should be eaten was advisable; no physician, judge, government official, minister or priest would provide an answer.

No further messages were received from within the cave. When the explorers were released, it was learned that on the 23rd day after entering the cave, Whetmore had been killed and eaten.

The defendants' testimony, accepted by the jury, was as follows:

> *Whetmore proposed that they derive the necessary sustenance from killing and eating one of their number. Whetmore also proposed casting lots, using a pair of dice he happened to have with him. Initially the defendants were reluctant to adopt this desperate measure, but agreed when hearing the radio conversations. The*

explorers devised and agreed upon a method of using the dice to cast lots.

Before the dice were cast, Whetmore withdrew from the arrangement claiming he would wait another week. 'The others charged him with a breach of faith and proceeded to cast the dice.' Before throwing the dice on his behalf, the defendants asked Whetmore to declare any objections to the fairness of the throw. He did not object, and the throw went against him.

Whetmore was put to death and eaten.

The defendants were treated for malnutrition and shock, then indicted for murder. At trial, the foreman of the jury (a lawyer by profession) asked the court whether the jury could find a special verdict that left it to the court to say whether, on the facts as found, the defendants were guilty. Both prosecution and defence accepted this.

On the facts as found by the jury, the trial judge ruled the defendants were guilty of murder and sentenced them to be hanged, the mandatory sentence.

Post-trial, the jury joined in a communication to the Chief Executive of Newgarth, requesting the sentence be commuted to imprisonment of six months. The trial judge did similar. The Chief Executive waits for the Supreme Court's disposition of the petition of error before making a decision regarding clemency.

Judgment

Truepenny CJ holds the course taken in the first instance to be 'fair and wise'; and the only course open to be taken. The Chief Justice acknowledges that no exception to the statutory provision applies, regardless of how sympathetic people may be.

The Chief Justice prefers to rely on possible executive clemency, described as 'mitigating the rigors of the law', and proposes that the Supreme Court joins in the communication to the Chief Executive, expecting clemency to be granted. Justice can be done in this way, without disregarding either the letter or spirit of the law.

Thus, Truepenny CJ upholds the conviction.

Judgment of Foster J

Foster J criticises Truepenny CJ's attempt to 'escape the embarrassments of this tragic case.' His Honour believes that the very law of Newgarth is on trial, and if the defendants are found to have committed a crime the law of Newgarth is 'convicted in the tribunal of common sense'.

The first ground for this opinion is that positive law's foundation is the possibility of human

social coexistence. Where this coexistence becomes impossible, the condition underlying the law ceases to exist. Foster J states that the maxim *cessante ratione legis, ceassat ipsa lex* ('the reason for a law ceasing, the law itself ceases') applies (though acknowledging it is not usually applied to the whole of the enacted law).

Foster J considers the coexistence principle to be axiomatic. All law, regardless of subject, is directed towards facilitating and improving human coexistence — regulating fairly and equitably 'the relations of their life in common.' Foster J states clearly:

> *When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.*

Foster J holds that the explorers were outside the jurisdiction of the Commonwealth: 'If we look to the purposes of law and government, and to the premises underlying our positive law, these men when they made their fateful decision were as remote from our legal order as if they had been a thousand miles beyond our boundaries.'

The explorers were 'not in a "state of civil society" but in a "state of nature"' and consequently the laws of the Commonwealth of Newgarth do not apply. The principles of law to be applied are those that were appropriate to their condition, and 'under those principles they were guiltless of any crime.'

[In common law jurisprudence, such approaches have been rejected. Consider, as the leading example, the case of R v Dudley (1884) 14 QBD 273 DC where necessity was rejected as a defence to murder. In that case, two shipwrecked men killed and ate a cabin boy who was in a coma. On the other hand, in Cooper v Stuart (1888) 14 App Cas 286, the Privy Council held 'In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute', basing this on Blackstone's Commentaries.]

Foster J argues that 'It has from antiquity been recognized that the most basic principle of law or government is to be found in the notion of contract' and considers that the agreement to cast lots was 'a new charter of government appropriate to the situation'. Dismissing sceptics, Foster J asserts that it is clear that Newgarth's government is founded on some sort of voluntary charter of government to which the current government can trace itself. The authority to punish is derived from the original compact and no higher source; 'what higher source should we expect these starving unfortunates to find for the order they adopted for themselves?'

[Fuller has Foster J say 'Sophistical writers have raised questions as to the power of those remote contractors to bind future generations'. A 'constitutional contract' does not

operate the same as a civil contract, I would suggest.]

> *If it was proper that … ten lives should be sacrificed to save the lives of five imprisoned explorers, why then are we told it was wrong for these explorers to carry out an arrangement which would save four lives at the cost of one?*

Foster J then proceeds to 'hypothetically' reject the above premises, and assumes that the law applies to the explorers, despite their being somewhat removed from society. This second grounds concerns the interpretation of the statutory provision and promotes an approach to statutory interpretation identifiable as the 'purposive approach.'

Foster J illustrates this with a fictitious example (*Commonwealth v Staymore*) where the law was not applied because a defendant was unable to avoid breaking the letter of the law. A second example (*Fehler v Neegas*) involved a clear typographical error, and the court did not take a literal interpretation.

Foster J argues 'there is nothing in the wording of the statute that suggests' an exception of self-defence: 'The truth is that the exception in favour of self-defense cannot be reconciled with the *words* of the statute, but only with its *purpose*.'

[Ironically in some jurisdictions this reasoning relating to self-defence does not hold up. For example, in New South Wales there are clear statutory defences, including one of self-defence: see Crimes Act 1900 (NSW) s 418.]

Foster J then goes on to discuss the reasoning behind the self-defence exceptions, arguing that the law cannot deter killing in self-defence where a person's life is threatened. In such cases, the killer 'will repel his aggressor, whatever the law may say.' Foster J applies this reasoning to the explorers — the law does not create a significant deterrent to persons faced with starvation.

Foster J discusses, briefly, judicial usurpation — where a court is accused of usurping the legislature by giving a statute or provision a meaning not immediately apparent to the casual reader who is unaware of the objectives it seeks to attain. Foster J acknowledges without reservation that the court is bound by the statutes and 'exercises its powers in subservience to the duly expressed will of the Chamber of Representatives', but defends judicial interpretation by saying that

> *The stupidest housemaid knows that when she is told … to 'drop everything and come running' [her master] has overlooked the possibility that she is at the moment in the act of rescuing the baby from the rain barrel. Surely we have a right to expect the same modicum of intelligence from the judiciary. The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.*

Foster J concludes that the conviction should be set aside.

Judgment of Tatting J

Tatting J begins by stating that in his duties as judge he is normally able to separate the emotional from the intellectual reactions and decide cases based solely on the latter. His Honour concedes that it is not possible in this case for him to do that, finding himself torn between sympathy and abhorrence and unable to dismiss these considerations.

His Honour finds Forster J's opinion 'is shot through with contradictions and fallacies.' Tatting J is critical of the 'state of nature' argument, finding that there is no clear basis for the assertion that the explorers somehow escaped the jurisdiction. His Honour cannot pinpoint when the supposed transition of jurisdiction occurred.

Tatting J also points out that the courts of Newgarth are 'empowered to administer the laws of that Commonwealth', and questions from where the authority to decide cases under the 'law of nature' could possibly be derived.

His Honour then examines the content of the 'code of nature' proposed by Foster J and describes it as 'odious'. Under the agreement, for example, Whetmore would not have been able to exercise his right to self-defence in the cavern as it would be contrary to the bargain.

Tatting J finds the notion that criminal law relating to murder cannot operate as a deterrent where a person is faced with the alternative of life or death to be convincing. Citing the fictitious case *Commonwealth v Parry*, Tatting J agrees that the interpretation of self-defence provided by Foster J is supported, though that case 'seems generally to have been overlooked in the texts and subsequent decisions'.

Nevertheless, his Honour states that deterrence is not the only purpose. Orderly retribution (citing *Commonwealth v Scape*) and rehabilitation of the wrongdoer (citing *Commonwealth v Makeover*) are two examples: 'what are we to do when it has many purposes or when its purposes are disputed?'

But, conversely, the 'taught doctrine' in law schools is that 'The man who acts to repel and aggressive threat to his own life does not act "willfully," but in response to an impulse deeply ingrained in human nature.' His Honour holds that in the case of the explorers, they 'acted not only "willfully" but with great deliberation'.

Tatting J then describes the two paths available: either to follow the 'virtually unknown precedent' of the Supreme Court in *Commonwealth v Parry* that the crime of murder does not sufficiently deter those whose lives are threatened, or to follow the conventional doctrine of self-defence taught in law schools that it is not a wilful act, 'but which, so far

as I know, has never been adopted in any judicial decision.'

Tatting J appreciates the significance of precedents relating to judicial correction of legislative errors; but inquires as to whether the Court should be expected to disregard or overturn the precedent in *Commonwealth v Valjean* where a defendant was convicted for stealing a loaf of bread, despite the probability that he would starve.

While the circumstances do diminish the element of deterrence, it does not remove the culpability of the explorers entirely. Tatting J is unwilling to create a new exception to murder on the basis that the scope would need to be adequately defined for application in future cases — Foster J's proposed rule lacks any coherent and rational principle.

However, his Honour concludes that he cannot judge the case impartially. In Tatting J's view, an alternative charge would have been more appropriate. In the absence of an alternative, no charge should be been brought: 'It is to me a matter of regret the the Prosecutor saw fit to ask for an indictment for murder.'

Tatting J withdrew from the decision of the case, 'wholly unable resolve' his doubts.

Judgment of Keen J

Keen J immediately sets aside two questions that, in his opinion, are not matters for the court: that of executive clemency and that of morality. Executive clemency is a matter for the Chief Executive, and the judiciary should not be seen to breach this separation of powers. Keen J *would* pardon entirely the defendants on the grounds that they had already suffered enough, but this is a remark made as a private citizen not a judge.

Nor does Keen J concern himself with questions of 'right' and 'wrong.' Judges are not to apply their conceptions of morality, but to apply the 'law of the land.' Keen J consequently dimisses 'the first and more poetic portion' of Foster J's opinion, and agrees that it contains an 'element of fantasy' revealed by Tatting J.

[Keen J's sentiments here are somewhat similar to Lord Mustill's in R v Brown [1994] 1 AC 212. That case involved consent to assault in the context of sadio-masochistic sexual activity. The court held (in a 3-2 majority) that consent was not a defence to assault, with Lord Templeman stating 'Cruelty is uncivilised.' Lord Mustill's dissenting opinion was that morality ought to be set aside and informed consent to private acts of violence will be sufficient to escape conviction.']

> *The sole question before us for decision is whether these defendants did … willfully take the life of Roger Whetmore. … I should suppose that any candid observer … would concede at once that these defendants did … .*

Keen J states that the difficulties in deciding the case arise from a failure to separate the legal and moral aspects of the case. His Honour criticises his fellow judges for shirking their responsibility to abide by the word of the law; his Honour is determined to put personal views aside.

Keen J is averse to Foster J's a purposive approach to statutory interpretation that would allow the court to justify a result it continues proper.

Keen J then provides a recount of the historical background of the judiciary's position. At 'judges did in fact legislate very freely [at] a time when the accepted principles of political science did not designate with any certainty the rank and function of the various arms of the state. … We now have a clear-cut principle, which is the supremacy of the legislative branch of our government.'

Keen J turns his criticism towards Foster J personally, stating that his colleague does not generally respect the restricted role of the judiciary. His Honour uses Foster J as a prominent example of judicial reform of legislative enactments. The process of judicial reform is described as being in three steps:

- assigning or divining a single purpose for a statute (despite no single purpose existing in any statute),
- discovering that the legislator 'overlooked' or omitted something from the statute, and
- filling in the blank that is created as a consequence.

His Honour states that Foster J's interpretation is flawed because Foster J is attempting to include some purpose not revealed in the statute, but goes further than Tatting J. His Honour does not believe the purpose needs to be explained any further than being a 'deeply-felt human conviction that murder is wrong and that something should be done to the man who commits it.'

Keen J believes that inquiry should not be directed towards the purpose of the statute, but towards its scope; and likewise with exceptions. The actions of the defendants clearly fall within the scope of the statutory provision.

> *A hard decision is never a popular decision.*

Keen J firmly states 'judicial dispensation does more harm in the long run than hard decisions' and concludes that the conviction should be affirmed.

Judgment of Handy J

> *I never cease to wonder at my colleagues' ability to throw an obscuring curtain of*

> *legalisms about every issue presented to them for decision.*

Handy J holds the case to be one of the application of ‘practical wisdom’ not ‘abstract theory’, and ‘one of the easiest to decide’. Government is ‘a human affair’ in which people ‘are ruled well when their rulers understand the feelings and conceptions of the masses.’

> *Of all branches of the government, the judiciary is the most likely to lose its contact with the common man. … When a set of facts has been subject to [judicial] treatment for a sufficient time, all the life and juice have gone out of it and we have left a handful of dust.*

Handy J describes the distinctions argued by lawyers between when rules and principles ought or ought not to apply is a necessary evil; a consequence of formal regulation. His Honour prefers wide discretion and dispensation for the judiciary, save for a few fundamental areas (eg conduct of elections and appointment of officials).

> *We should take as our model, I think, the good administrator, who accommodates procedures and principles to the case at hand, selecting from among the available forms those most suited to reach the proper result.*
>
> *The most obvious advantage of this method of government is that it permits us to go about our daily tasks with efficiency and common sense.*

Handy J discusses at length the publicity surrounding the trial, as well as indications of public opinion (90% of respondents to a major poll believed the explorers should be pardoned or given a token punishment). Handy J states that to preserve the ‘accord’ between the judiciary and public opinion, a declaration of innocence ought to be made.

> *Certainly no layman would think that in letting these men off we had stretched the statute any more than our ancestors did when they created the excuse of self-defence.*

His Honour then acknowledges that his fellow judges will no doubt be horrified by the suggestion of taking into account the ‘emotional and capricious’ public opinion.

> *They will tell you that the law surrounds the trial of a case like this with elaborate safeguards, designed to insure that the truth will be known and that every rational consideration bearing on the issues of the case has been taken into account.*

Handy J lists four means of escaping punishment —

- a determination by a judge that the accused has committed no crime,
- a decision by the prosecutor not to ask for an indictment,

- an acquittal by a jury, or
- a pardon or commutation by the executive

— and states that within this framework, there should be no pretence that factual errors or emotional/personal factors are excluded. His Honour provides jury nullification as an example, and states that the jury would likely have acquitted regardless of any instruction given to them, and that this was only prevented by the fact that the foreman was a lawyer whose 'learning enabled him to devise a form of words that would allow the jury to dodge its usual responsibilities.'

His Honour points out that Truepenny CJ and Tatting J want 'common sense' to decide the case. Tatting J wants it prior to the trial (at the prosecutor stage) and Truepenny CJ wants it after the case (through clemency); neither want to have a personal part in it. His Honour also points out that there does not appear to be any public support for the Chief Justice's suggestion of upholding the verdict and requesting clemency.

Handy J goes on to express doubt that the Chief Executive will grant clemency, citing the Chief Executive's conservative views, and his personal knowledge (gained in an indirect way) that the Chief Executive is determined *not* to commute the sentence if the verdict is upheld.

His Honour describes one of the first cases he presided over when he joined the bench, stating that a common sense approach applicable then was applicable now. He concludes that, taking a common sense approach that considers his above discussion, the defendants are innocent and the conviction should be set aside.

Conclusion

Tatting J was asked by the Chief Justice whether he wanted to reexamine his position, but his Honour declined and affirmed he would not participate in the case.

The Supreme Court, divided evenly, affirmed the conviction. Fuller provides no further details as to the outcome.

0 comments

Your comment...

0 comments

Your comment...

Info

OlbrychtPalmer.net

mozart@olbrychtpalmer.net

OlbrychtPalmer