The National Legal Eagle

Volume 15
Issue 2 *Spring 2009*

Article 5

10-1-2009

Make no mistake- it could have legal consequences

David Field
Bond University, David_Field@bond.edu.au

Follow this and additional works at: http://epublications.bond.edu.au/nle

Recommended Citation
Field, David (2009) "Make no mistake- it could have legal consequences," *The National Legal Eagle*: Vol. 15: Iss. 2, Article 5.
Available at: http://epublications.bond.edu.au/nle/vol15/iss2/5

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in The National Legal Eagle by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

Make No Mistake – it could have Legal Consequences

Associate Professor David Field
Faculty of Law
Bond University

We all make mistakes, as the old saying goes. But how far will the law be prepared to smile indulgently at them, like a fond parent shaking their head benignly at a child's first encounters with life, and at what point will the big hammer come down on well-meaning, but unlawful, behaviour?

This was the big question asked in this year's Bond University Law Faculty High School Mooting Competition. Like previous competitions in recent years, it took a main theme and pursued it through both the Regional Rounds and the Final, minimising the amount of legal research which the students were required to conduct. This allowed concentration instead on the skills required in thrashing out a knotty point of law intermingled with arguable factual issues.

As every Criminal Law student can tell you, the courts recognise a distinction between mistakes of law and mistakes of fact. Mistakes of law are not tolerated (particularly not in Law exams, as I am fond of reminding my students) but honest and reasonable mistakes of fact are often excused by courts in all Australian jurisdictions. The difficulty lies in determining what amounts to a mistake of law and what is one of fact.

By way of simple illustration, if a man marries another woman during the lifetime of an existing wife, he may be subjected to a charge of bigamy (as opposed to being married to only one woman, which is normally referred to as monotony). If, however, he married again because he honestly and reasonably believed that his first wife was dead (for reasons other than the fact that she had not moved off the couch for a day or two) then this will be regarded as a mistake of fact and he will have a valid defence to any bigamy charge. If, on the other hand, he committed matrimony a second time because someone (even a lawyer) told him that he was not lawfully married to his first wife when in fact he was, this will be a mistake of law, and will not be excused. However, the man's bona fides may be taken into account when passing sentence.

It comes down to a point of principle which was well expressed by Callinan and Heydon JJ in the leading case of *Ostrowski v Palmer* (2004) 218 CLR 493 (at 527), in the following terms:

> A mockery would be made of the criminal law if accused persons could rely on, for example, erroneous legal advice, or their own often self-serving understanding of the law as an excuse for breaking it . . .
>
> At the same time, a person should not be penalised for making the decision to act in a particular way because they believe the facts to be other than what they are (for example,

Published by ePublications@bond, 2009

they believe, reasonably but wrongly, that they are about to be assaulted so they act in self-defence, which they would be entitled to do if they really were being attacked).

Armed with this piece of legal sophistry, students from almost all regions of Australia and, for the third year in succession, two regions of Malaysia, met in regional centres under the watchful eye of 'judges' sent out from the Bond Law Faculty. Each school was required to argue either the prosecution or defence side of a hypothetical scenario. The scenario involved a young student in trouble for the first time. The student was held in custody overnight following an assault in a nightclub. (We like to send out a moral message with all our scenarios!) He believed that the Magistrate, before whom he appeared the following morning, granted him bail. He then struggled with police when they tried to transport him to prison, believing that he was still in custody.

Is being on bail a question of fact or a question of law? On the one hand it could be argued that whether or not bail has been granted is a question of fact – was it, or wasn't it? The counter-argument is that whether or not one has the status of a bailed person is an issue of law.

The students are probably still debating this long after the judges who listened to their arguments disappeared down the runway on their return flights, but the short-term outcome of all this legal nit-picking was the selection of the following regional finalists for the Final Rounds held at Bond University on Saturday 25 July:

Smith's Hill State High School
Ipswich Grammar School
Marist College Canberra
Geelong Grammar School
Kingaroy State High School
Prince Alfred College
St. Laurence's College
Somerset College
Carey Baptist Grammar School
St. Clare's College
Glenmore State High School
Sabah Tshung Tsin Secondary School (Team B)
Elanora State High School
SMK St.Teresa (Team 1)

For the purposes of the Finals the factual scenario had altered but the underlying question had not. This time students were required to argue for or against a man who refused to assist police officers. They were investigating the possibility that his hire car might be stolen however the man knew that he had hired it honestly and legitimately at Brisbane Airport. This was all well and good, but the hypothetical car which had been handed to him was not the one specified on his hire documentation. In the words of the popular phrase, 'go figure'.

'Go figure' they did, in front of rotating panels of academic staff from the Law Faculty, made honorary 'judges' for the day. The 'judges' actually took to arguing the merits of the case among themselves in the judges' room during their tea breaks! It was in some ways a relief when the Grand Finalists, who were required to debate the whole thing all over again, were identified as Smith's Hill High School from Sydney and Sabah Tshung Tsin Secondary School (Team B) from Malaysia.

The state-of-the-art Moot Court 1 in Bond Law Faculty's purpose-built Skills Building was packed to capacity for this final contest of the day. It was overseen by a fresh panel of judges consisting of His Honour Judge John Newton from the Queensland District Court at Southport, Emeritus Professor Mary Hiscock from Bond Law Faculty, and yours truly, pushed through the courtroom door at the last minute when the third preferred judge was unavoidably detained.

To the accompaniment of 'oohs' and 'ahs' from doting (and in some cases bemused) parents, the Grand Finalists fought it out like true professionals, years ahead of their actual Year 11 and Year 12 High School status. The judges finally selected the Sabah Tshung Tsin Secondary School as the Grand Final winners.

Winners plaques, memorial trophies and medallions were distributed among the winners like confetti at a windy wedding and the final 'Outstanding Advocates' were announced as Sarah Judge (Kingaroy State High School) and Emily Vale (Glenmore State High School). Annebelle Yap of Sabah Tshung Tsin Secondary School was awarded the 'Overall Outstanding Advocate'. This entitles each of them to a 40% scholarship to study Law at Bond (subject to academic suitability).

Students, parents and school staff then retired to the University Club for a well-earned celebration dinner. A good time was had by all – until I gave the after-dinner welcome speech. Logically, it ought to have been delivered at the start of the proceedings at 8 a.m. that day – was that a mistake of law or a mistake of fact?

Have a Go:

If your school is interested in competing in the High School Mooting Competition in the future you can find more information at: http://www.bond.edu.au/faculties-colleges/faculty-of-law/scholarships-competitions/competitions/high-school-mooting-competition/index.htm