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Keeping incest in the family

David Field [1]

In its recent decision in R v Rose (2009) 227 FLR 433;[2009] QCA 83, the Queensland Court of Appeal held that it did not constitute the crime of "incest" for a man to have consensual intercourse with the seventeen year old daughter of his former de facto because, in terms of s 222(8) of the Queensland Criminal Code, the two were "entitled to be married". The author argues that this decision has unfortunate implications, for future "victims" of such crimes, for the normally understood distinction between a "right" and a "freedom", and for the consistency of Queensland State law in this area with related laws of the Commonwealth

The facts

The essential facts of the case were that R had been convicted of six counts of incest with the daughter of the woman who described him at trial as her "ex-fiance". R was further described on appeal by McMurdo P [2] as having "assumed the role of father to the complainant" ("C"). At the age of seventeen – in order to complete some work experience during her Year 12 school year – C stayed with R in a Brisbane unit in which they shared a bedroom. It was during this time that the offences were alleged to have occurred, three of them while C was still seventeen, and the remaining three following her eighteenth birthday.

Although, on appeal, R's behaviour was categorised [3] as "morally reprehensible", it was also acknowledged [4] that "Immoral behaviour does not . . . . always equate to criminal behaviour", as the Court set out to examine those provisions of the *Criminal Code* 1899 (Qld) which purport to regulate sexual relationships between persons who have met as the result of a de facto relationship between the accused and the parent of the alleged "victim".

The Code, section 222

It was immediately obvious that, in its desire to be both politically appropriate and socially facilitative, the Queensland Parliament had previously dug itself into a considerable statutory hole. As originally enacted, s 222 of the *Code* had set out to criminalise any "carnal

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[1] Associate Professor of Law, Bond University. The author acknowledges his gratitude to Professor Eric Colvin, Law Faculty, Bond University, for his helpful observations on an earlier draft of this article.
[2] At [2].
[3] By McMurdo P at [3].
[4] Note 3, at [5]

knowledge" between father and daughter. Then, in 1997, in order to redress a perceived ongoing problem with the sexual exploitation of young girls by men in less formal relationships with the mothers of their victims, the *Criminal Law Amendment Act* (Qld) of that year amended the section considerably. Specifically, it added subsections (5) and (6), which purported to extend the legal concept of "lineal descendant" [5] as follows:

> (5) A reference in this section to an offspring or other lineal descendant, or a sibling or a parent includes a relationship of that type that is a half, adoptive or step relationship.
>
> (6) For subsection (5), a reference to a step relationship includes a relationship corresponding to a step relationship arising because of cohabitation in a de facto relationship or because of a foster relationship or a legal arrangement.

This was taken by the Court to include the relationship between R and C which had arisen because R had been in a de facto relationship with C's mother, at least at the time when the carnal knowledge began, and the President had little difficulty in concluding [6] that

> . . . if the appellant is criminally liable for his charged sexual acts with the complainant, it is because of the application of the extended definitions of "offspring" and "parent" contained in s 222(5) and (6) to de facto relationships.

It would seem that the Parliamentary Second Reading debates on the Bill in 1997 [7] were, as described by McMurdo P [8], "vigorous", and that in particular there was considerable resistance by the then Opposition to any provision which might criminalise sexual relationships between <u>adults</u> who found themselves in a statutorily extended "step" relationship as the result of a de facto arrangement involving a parent. Additionally, concerns were expressed that the proposed new provisions would stigmatise, as "incest", sexual relationships between persons who were lawfully entitled to marry.[9]

In order to overcome these reservations, and ease the passage of the Bill through Parliament, the then Attorney-General introduced two amendments to it, which ultimately became subsections (7) and (8), and are in the following terms:

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[5] This is one of the traditional "forbidden degrees" of sexual relationship criminalised by s 222(a), and its paradigm case involves carnal knowledge by a father of his daughter.
[6] At [5].
[7] See Hansard, 20 March 1997, 696-731.
[8] At [9].
[9] Some doubt remained, however, as to whether or not this stigma might be lifted if the parties were to actually marry; see Hansard, note 7 *supra*, 728-9.

> (7) Also, for subsection (5), a reference to a step relationship does not include a step relationship that first arose after the relevant persons became adults.
>
> (8) This section does not apply to carnal knowledge between persons who are lawfully married or entitled to be lawfully married.

In her judgment in the Court of Appeal [10], McMurdo P pointed out that

> The exculpatory provisions in s 222(7) and (8) are unique to Queensland.

They are unique in that s 222 is the only statutory provision in Australia which makes it illegal for, as in this case, a man to have carnal knowledge of his de facto's daughter when she is over eighteen [11], and Parliament had clearly thought it necessary to exempt from such criminality acts of carnal knowledge between persons who might be considering marriage.

The meaning of "entitled to be lawfully married"

The difficulty which the Court faced in the instant case was how to interpret the phrase "entitled to be lawfully married" in subsection (8), since the appellant's submission was to the effect that this subsection absolved him from <u>all</u> criminal liability in respect of <u>all six</u> of the offences with which he had been charged, three of which had occurred while the girl was still seventeen. As her Honour pointed out [12], while the parties did not appear to have been contemplating matrimony at the time of the acts complained of, this did not affect the apparent application of the defence proviso of subsection (8), if they had been "entitled" to be married, had they so chosen.

The Court referred, for further enlightenment, to the *Marriage Act 1961* (Cth), which governs all marriages in Australia, and prescribes, in s 11, that a person is of "marriageable age" once they attain eighteen. Faced with this legislative brick wall, the Crown rightly conceded that the convictions in respect of the three acts of carnal knowledge which occurred after the "complainant's" eighteenth birthday should be quashed, as they were. This then left for the Court's consideration

> The more difficult question [of] whether s 222(8) also excluded the application of s 222 to [the offences] which were committed when the complainant was 17 years old and so in the

[10] At [13].
[11] This criminality is conditional upon their relationship having commenced before the girl became an adult.
[12] At [14].

> "twilight zone"; above the age of consent to sexual activity, but still not an adult. Was she then "entitled to be lawfully married" in the terms of s 222(8)? [13]

This in turn required the Court to interpret what was meant by the word "entitled" in the context of s 12 of the *Marriage Act*, which deals with marriage by persons aged between sixteen and eighteen. Such persons may apply to a local judge or magistrate for "an order authorising him or her" to marry. Such an order may only be granted when that judicial officer is "satisfied" that "the circumstances of the case are so exceptional and unusual as to justify the making of the order".

Clearly, this statutory regime establishes that marriage by a person aged sixteen or seventeen is to be regarded as the exception rather than the norm, and that it will first be necessary for the applicant to "show cause" why such an order should be granted. It is most definitely <u>not</u> a case of "Ask and ye shall receive", and the best advice which any lawyer would be able to give to a client wishing to be married at, say, age seventeen, would be "You have a right to make an application, but no guarantee of success. You certainly have no automatic "right" to get married".

Against this background, was it Parliament's intention that s 222(8) should apply to <u>all</u> persons aged between sixteen and eighteen who were eligible to apply for such an order, or was the word "entitled" to be restricted in some way, e.g. to those who had been granted such an order in their favour?

Having observed [14] that a consideration of the Parliamentary debate on subsection (8) was "of little assistance" in the matter, her Honour further noted that the word "entitled" was not defined in any of the statutes in which one would hope to find it defined [15], and that neither counsel in the appeal had been able to locate <u>any</u> legislative context in which the word "entitled" had been interpreted, but had fallen back on the submission that the word be given its "ordinary" meaning.

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[13] At [19], per McMurdo P.
[14] At [12].
[15] Specifically, her Honour identified, in this context, the *Criminal Code* (Qld), the *Marriage Act 1961* (Cth) and the *Acts Interpretation Act 1954* (Qld).

This is a standard procedure in statutory interpretation, assuming that the word itself is an "ordinary" one [16], and in accordance with this process, the Court had recourse to two dictionaries, the *Australian Concise Oxford Dictionary* and the *Macquarie Dictionary*. The first of these yielded two alternative definitions of the word "entitle"; they were:

> to give . . . a just claim
>
> to give . . . a right.

The *Macquarie Dictionary* also yielded something similar, namely

> to give . . . . . a title, right or claim to something.
>
> furnish with grounds for laying claim.

A research officer employed in the Court of Appeal had also located one previous decision in which the Court had considered the meaning of "entitled", namely *Agen Biomedical Ltd v Rankin*[1998] QCA 282, which had concerned the issue of whether or not, under previous *Supreme Court Rules* [17], a party adversely affected by a judgment might bring to the attention of the court new facts which arose after the granting of the judgment, and which "entitled" that party to be relieved from that judgment. Following what was described [18] as having been an "expansive construction" of O 45 r 1 by the same Court in *KGK Constructions Pty Ltd v East Coast Earthmoving Pty Ltd* [1985] Qd R 13, the Court in *Agen Biomedical* had ruled that the word "entitle", as employed in O 45 r1 did not connote "an absolute right", but "merely a possibility of applying for relief". On that basis, it had concluded [19] that the meaning to be given to the word "entitle", in the context of O 45 r 1, was

> . . . . capable of referring to instances in which the person seeking relief has to depend upon a favourable exercise of discretion and claims no absolute right to relief.

Such an interpretation clearly corresponds with the second suggested definition of "entitle" to be found in the *Macquarie Dictionary*, namely "furnish with grounds for making a claim", and on the basis that this dictionary definition and the interpretation already arrived at twice

[16] See, e.g. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 162. As is argued below, however, it might have been better had attention been focused instead on the normally understood legal meaning of that word.
[17] Specifically O 45 r 1.
[18] By McMurdo P. at [21].
[19] At [9].

by the same Court "tend to support" [20] this more liberal interpretation of the word "entitlement", her Honour concluded [21] that the correct interpretation of s 222(8) was that

> . . . . the appellant and complainant were "entitled to be married" when she was 17 years old at the time of the occurrence of [the remaining three offences on the indictment]. . . . The complainant . . . . was 17 years old and entitled under the *Marriage Act* to lawfully marry the appellant after obtaining an order of a judicial officer and with the necessary consent. She therefore had grounds for laying a claim to be able to lawfully marry . . . It follows that s 222 does not apply to the conduct alleged against the appellant in [the remaining counts].

She was supported in this interpretation by the two other judges sitting on the appeal. Muir JA put his interpretation of subsection (8) more directly [22]:

> I think it correct to say that the word "entitled" normally signifies the existence of a legal claim or legal right. That is, a right to obtain or enforce something, whether by legal process or otherwise, without having to obtain or satisfy conditions or approvals.

His Honour was clearly persuaded by the reasoning of the Full Federal Court in *Little v Registrar of the High Court of Australia* (1991) 29 FCR 544 at 552, in which it was said of the phrase "entitled to practice", within the context of the *Judiciary Act* 1903 (Cth), s 49, and by reference to the *Shorter Oxford English Dictionary*, that:

> Its sense is to be derived from the ordinary meaning of the word 'entitle' which is 'to give a rightful claim to anything' . . . In that ordinary sense it attaches only to a practitioner who has satisfied all conditions necessary to establish the rightful claim to practise.

However, as his Honour added [23]:

> . . . . "entitled", like most words in the English language, has a variety of meanings, depending on the context in which it is used.

It is therefore perhaps significant that in *Little*, it was emphasised by the Court that a person would only be "entitled to practice" once he or she had satisfied all the necessary conditions to do so. This is not, it is argued, the same position as that occupied by a person who has yet to persuade a judicial officer to exercise a highly discretionary "power" in their favour.

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[20] At [22].
[21] At [22]. Her Honour also cited *Beckwith v R* (1976) 12 ALR 333 as authority for the additional consideration that, "as a last resort", statutory provisions giving rise to criminal sanctions which are ambiguous should be strictly construed in favour of the person who stands to be adversely affected by them.
[22] At [37], citing, inter alia, *Hill v Hasler* [1921] 3 KB 643.
[23] At [39].

Likewise, his Honour [24] cited *Hill v Hasler* for the proposition that:

> The fact that a person cannot exercise a "right" without first obtaining an order of the Court does not mean, necessarily, that no entitlement exists.

However, that statement is equally capable of referring to a situation in which the person may be seen, objectively, to satisfy all the preconditions for obtaining a court order in their favour, with the result that the court order is a pre-ordained formality. This was close to being the situation in that case, which concerned the question of when a landlord might be "entitled to obtain possession" of a dwelling house in terms of legislation [25] which sought to limit domestic rent increases to periods during which the landlord "would be entitled to obtain possession" of the premises.

In distinguishing between those situations in which the landlord had a clear and obvious right *ex lege* to obtain possession (e.g., under the common law as it then stood, at the expiry of a valid notice to quit) and the situation in which the right to possession flows from an order granted by a court, Lord Sterndale MR observed [26]:

> The words "entitled to possession" seem to me to mean having a legal right to possession. I therefore think that in this case as soon as the notice to quit had expired the landlord but for the Act would have been entitled to obtain possession thereunder. If the tenant had then gone out, the landlord could immediately have gone in. As the tenant did not then go out the landlord was in a position to obtain an order for possession from the Court; and if he was in a position to obtain an order for possession from the Court, I think he was "entitled to obtain possession" within the meaning of this sub-section . . . .

Is this the same position as that occupied by C in this case? She was certainly entitled to make an application to a judicial officer for an order entitling her to marry, but she was surely not "entitled to be married" <u>without</u> that order. This is because the legislation which governed her case granted a wide discretion to the judicial officer as to whether or not to grant such an order, and it could not be predicted in advance (as it could in the two cases relied on by Muir JA in the instant case) that the applicant would be qualified to receive the necessary permission without further enquiry. It is one thing to "tick all the boxes" in an application process which is so heavily pre-ordained by statute that this is all that is required;

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[24] *Ibid*.
[25] The *Rent and Mortgage Interest (Restrictions) Act* 1920 (E & W), s 3(1).
[26] At p.652.

it is another thing entirely to seek judicial leave under a statutory provision which leaves a wide discretionary power in the hands of those who will make the eventual decision.

This is no doubt why his Honour was at pains to conclude [27] that

> The above discussion shows that "entitled" in subsection (8) is not used in the sense of a right which may be exercised without the need to satisfy any condition or obtain any approval.

There was even more patent irony in the judgment of the final appeal judge in this matter, Atkinson J, who observed [28] that:

> Apart from the matters referred to in the Parliament, there is yet another reason that explains why subsection (8), which provides a complete answer to the charges of incest in the present case, was necessary. It ensures that the State law is not arguably inconsistent with Commonwealth law and that no question of constitutional invalidity arises . . . .
>
> It is beyond power for a State law to declare illegal an action which is lawful under a law of the Commonwealth made within one of the Commonwealth heads of power.
>
> If Commonwealth legislation, made within power, permits certain activity, then State legislation may not prohibit or criminalise such activity . . . . marriage between the appellant and the complainant would be lawful under Commonwealth law [29]. Consensual sexual intercourse is a lawful incident of marriage. Accordingly . . . the Queensland statute has not purported to prohibit what the *Marriage Act* permits so the question of constitutional validity of the Queensland statute does not arise.

There would, with respect, have been more force in this argument had the State legislation set out to penalise consensual sexual intercourse between those who <u>are</u> lawfully married. Nor was it true to assert that, in respect of the complainant while she was still seventeen years old, marriage between the appellant and the complainant would have been lawful under Commonwealth law, since this statement of law pre-empts, and effectively usurps, the

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[27] At [42]. The "discussion" to which he was referring was, ironically, his observation in the two preceding paragraphs of his judgment that s 222(8) ought not to be interpreted in a manner "inconsistent with any laws of the Commonwealth with respect to marriage". Arguably, this is precisely what his judgment achieved, and this point is expanded on below.

[28] At [43] - [47].

[29] With respect, her Honour overlooked an important link in the chain of argument. Marriage between R and C would only have been "lawful" if sanctioned under s 12 of the *Marriage Act*. Without that sanction, any purported ceremony of marriage between them could not have been described as "lawful". Such a marriage could only take place <u>after</u> judicial sanction, and the parties could not claim that they were "entitled to be married" without being certain, in advance, that this sanction would be forthcoming. The question in the instant case was not whether or not the parties would be lawfully married if the s 12 procedures were satisfactorily completed, but whether or not they were "entitled" to the grant of a discretionary order.

discretionary function of whichever judicial officer exercising Commonwealth power might have been allocated the task of deciding whether or not such a marriage might lawfully take place.

One might turn the argument on its head, and contend that it was the clearly-expressed will of the Commonwealth Parliament that a girl of seventeen should not enter into marriage, with its attendant "incident" of consensual sexual intercourse, without the official blessing of such a judicial officer, and that it would be inconsistent of the State government to enact a statutory provision which decriminalises such intercourse without such blessing.

"Hunger is not bread"

In the event, R's appeal was allowed in respect of all six acts of intercourse, including the three which occurred while C was still seventeen. It is, however, respectfully argued that, in respect of these three occasions, the Court was misled into applying an "ordinary and natural" [30] meaning to a word which has enjoyed over two centuries of specialised legal meaning, and that a safer precedent would have been set in this case had due regard been had to that legal meaning. As O'Connor J observed in *AG for NSW v Brewery Employees Union of New South Wales* (1991) 29 FCR 544 at 552 [31]

> Where words have been used which have acquired a legal meaning it will be taken, prima facie, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context.

Having "grounds for laying a claim" [32] is not the same thing as having that claim upheld; the very nature of any judicial process involves the assessment of a "claim" with a view to deciding whether or not it may be converted into a "right" under a court order. I may "claim" my entitlement to benefit under a trust, but I have no "right" to receive that benefit until I have proved that right in a court of law. The uncertainty regarding whether or not the "claim" will be converted into a "right" will be in direct proportion to the extent of the discretion given to those who are required to adjudge the application.

[30] See note 16, *supra*.
[31] This was an appeal involving the meaning of the word "trademark".
[32] See note 19, *supra*.

As long ago as the turn of the Nineteenth Century, jurist Jeremy Bentham, in a diatribe [33] against the pretensions he claimed to have found in the *Declaration of Rights* issued by the Jacobins in post-Revolution France, argued that "want is not supply; hunger is not bread". His point was the simple one that the only "entitlements" which we enjoy in law are those which are granted to us by the government of the day, and that we cannot enjoy such rights simply by demanding them.

A century later, the same theme was expanded upon by Wesley Hohfeld of Stanford University, who pointed out [34] that the only true "right" which a person can possess is one which imposes a "duty" on someone else. Thus, I have a "right" to be protected, while using someone else's premises, from all dangers arising from the use of these premises which are "foreseeable", and which "reasonable care" on the part of the occupier of those premises can prevent. At the same time, and as the result of the same rule of law, the occupier of those premises owes a "duty of care" to protect me in the manner described. Equally, I have a "right" to freedom from physical assault which imposes a "duty" on others not to assault me.

Such "rights" exist *ex lege*, and require nothing more for their enjoyment or enforcement. Thus, the complainant in the instant case had a "right" to marry once she attained the "marriageable age" of eighteen and complied with the formal procedures. No-one – not even a parent – could prevent such a marriage by legal means. This "right" was of a type identified in both of the dictionary definitions of "entitle" previously cited, namely "to give . . . a right", and "to give . . . a title, right or claim to something ".

What description, by comparison, can one apply to the "entitlement" of the girl, while still aged only seventeen, to seek the leave of a judicial officer in order to marry, which she may only receive if she can "show cause" that hers is an exceptional situation? This was originally, and somewhat confusingly, described by Hohfeld as a "privilege", but has since become better known as a "liberty" [35]. Under s 12 of the *Marriage Act*, according to this distinction, a girl aged seventeen is at "liberty" to apply for a judicial order authorising her marriage, but has no automatic "right" to such an order, because the judicial officer to whom

[33] *A Critical Examination of the Declaration of Rights*, Article II.
[34] In 'Some fundamental legal conceptions as applied in judicial reasoning', (1913) 23 Yale L.J. 16, 31, and (1917) 26 Yale L.J 710.
[35] See, for example, Glanville Williams in *Éssays in Legal Philosophy* (1968 ed. Summerson), p. 121.

she makes application has what Hohfeld would call a discretionary "power" as to whether or not to grant it.

In the same way that "hunger is not bread", the "liberty" to apply for an order authorising one's marriage at age seventeen is not an automatic "right" to marry, and by no stretch of the English language could one describe a seventeen year old girl who submits an application under s 12 as having an immediate "entitlement" to marry. Indeed, there may be very cogent reasons why the judicial officer to whom application is made is persuaded not to grant such an order, and one of those reasons might well be that it appears to them that the girl is under the unhealthy influence of a man who has, for many years, been in loco parentis to her, or at least in a sexual relationship with her mother.

It is unfortunate that the Parliamentary debates which preceded the enactment of subsection (8) did not explore more fully what was being suggested. But it is possible to deduce from their general terms that the "mischief" which was being legislated against was that of sexual exploitation of impressionable young people by older people who had become a part of their wider family unit. As the Attorney-General expressed it [36] when defending the need for the amendments to s 222 which were being proposed:

> This is all about protecting people in a person's care and children in a family relationship. We have seen enough cases that involve de factos with stepchildren, half-stepchildren and so on. It is fair to say that I understand some concerns exist about the matter. However, I believe that, in this day and age, as a result of the types of family situations that exist, we are seeing more and more how de facto relationships are leading to incestuous circumstances. Unfortunately, a number of cases have occurred recently. This amendment is an attempt to overcome that situation.

Section 12 of the *Marriage Act* arguably has, as one of its underlying principles, the same broad objective, namely that of protecting young people from rushing headlong into unwise relationships as the result of familial pressures. Not only would a more restrictive interpretation of subsection (8) have satisfied what at common law was once known as the "purposive rule" of statutory interpretation [37], but it would have ensured that our State laws

[36] Hansard, 20 March 1997, 723-4.

[37] This now finds statutory expression in a variety of enactments, most relevantly the *Acts Interpretation Act 1954* (Qld), s 14A. The "rule" is that, when in doubt, one interprets legislation in accordance with the perceived intentions of Parliament.

relating to the sexual exploitation of family members were harmonised with Commonwealth laws designed to the same end, which was the objective claimed by Atkinson J.

In the end, it comes down to a question of public policy, and in its enthusiasm to be facilitative, the Court of Appeal has replaced a tried and tested legal concept with an ordinary word in its ordinary setting, and invited a potential conflict with Commonwealth law. If it was, and still is, the legislated will of Federal Parliament that those aged between sixteen and eighteen should require judicial leave before entering into a lawful sexual relationship with an older person, it is arguably counter-productive to allow a less formal version of such a relationship to flourish with impunity under Queensland State law.