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## Defining Justice?<sup>1</sup>

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Does 'justice' encapsulate some essential core meaning that is common to all of us, or does it, like beauty, exist only in the eyes of the beholder?

In other words, is justice a purely subjective quality, like the appreciation of artwork by Renoir or Jackson Pollock? If so, why isn't Osama bin Ladin's view of justice as meaningful and relevant as that of George W Bush, Mahatma Ghandi or Mother Theresa?

If, on the other hand, justice does have some objectively discernable features, what are they?

Questions like this regularly occur during consumer rights campaigns. They arise because of the tendency to resort to rhetoric about justice and fairness in order to justify a particular viewpoint. Unfortunately, appeals to 'justice' are empty unless everyone agrees on what we mean by the concept.

Some argue that justice is a value. If this is so, our search for common agreement on its features is doomed to failure.

Values relate to the way we feel about things and events. They concern our emotional and conceptual states and responses. They do not describe any objective external reality.

If justice is a value then when we say an event is 'unjust' we are not describing features of the event itself. Rather, we are merely describing our feelings about that event.

Feelings originate in the primitive part of our brain that lies beneath the structures responsible for conscious, rational thought.

When we assign meaning to events we use our emotions as a guide. These emotions can produce either a negative or positive evaluation of events. The role of emotion in evaluation leads to unfortunate outcomes.

For example, scientific research suggests that our emotional responses are not always based on conscious processes. This means the basis upon which we evaluate things is not always conscious and that evaluations are sometimes irrational. This conclusion is born out by experience.

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<sup>1</sup> Published in *Plaintiff*, Issue 57, June 2003, Pages 4-5.

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Sometimes people rationalise irrational feelings about events by recourse to values like justice. In short, reasons are later assigned to feelings in a way that produces a result that subjectively appears to be rational. The person then interprets that result as being 'just' or 'unjust' depending on whether it agrees with or differs from the outcome they really wanted. If this is true, justice means no more than getting your own way!

The lack of direct connection between feelings and reasons also leads to other difficulties.

Sometimes feelings can be manipulated by other people who know which buttons to press. This kind of manipulation—is pervasive in society. It forms the basis of advertising, political campaigning, sales, and even social control within groups. The ability to influence the way people feel about events helps to determine the behaviour that emerges in response to those events.

For example, people don't buy advertised products because they are informed about them. They buy them because advertising has made them feel they will benefit from the purchase.

The benefits may be intangible, irrational and non-existent, but this is no barrier where feelings are concerned. If you can make a person feel that they want something, they will think and act accordingly. The rational mind is weak if the emotional desire is strong! Some examples will illustrate this point.

For many years, tobacco manufacturers succeeded in convincing people that smoking made them feel sophisticated, adventurous and more attractive to the opposite sex. These feelings enabled tobacco manufacturers to sell products that clog lungs, cause foul breath, stain teeth and increase the risk of premature death. These outcomes are the very antithesis of why many young people took up smoking in the first place.

During the last United States election, the Republican Party mounted a subliminal television campaign against certain democrat candidates by flashing the word 'rats' after their photo. Subsequent research confirmed that repeated exposure to this advertisement would have engendered negative evaluations about the relevant candidates, making many voters less inclined to vote for them.<sup>2</sup>

Manipulative processes like this, when applied to the broad population, can alter the way large sections of the community perceive specific events. This is of critical importance in iterative political processes that are influenced by actual or perceived 'public opinion', such as the recent tort reform campaign.

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<sup>2</sup> Research conducted by Dr Joel Weinberger of Adelphi University NY.

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Given this reality, what possibility is there for finding common ground on concepts such as justice?

I believe that people who say justice is a subjective value are actually confusing two things. They confuse the way they feel about justice with what justice is (or ought to be). Fortunately an alternative route exists for defining justice, but it involves a detour through the concept of freedom.

Most people in our society are strongly committed to a belief in individual freedom. In other words, regardless of whether or not we are really as free as we think, we at least believe we should enjoy maximum freedom and are committed to ensuring this.

The paradox of freedom is that its dose must be carefully limited if everyone is to enjoy it. But the limits must go no further than ensuring that the freedom-seeking actions of some do not harm the freedoms of others. John Stuart Mill succinctly stated this principle:

The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>3</sup>

Freedom goes hand in hand with equality. That is not to say that all individuals are dealt an equal hand by nature. Jean-Jacques Rousseau conceptualised it in this way in 1762:

I conceive that there are two kinds of inequality among the human species; one, which I call natural or physical because it is established by nature, and consists in a difference of age, health, bodily strength, and the qualities of mind or the soul; and another, which may be called moral or political inequality, because it depends on a kind of convention, and is established, or at least authorised, by the consent of men. This latter consists of the different privileges, which some men enjoy... such as that of being more rich, more honoured, or more powerful... It is useless to ask what is the source of natural inequality, because the question is answered by the simple definition of the word. Again it is still more useless to inquire whether there is any essential connection between the two inequalities; for this would be only asking, in other words, whether those who command are necessarily better than those who obey, and whether strength of body or of mind, or wisdom, or virtue, are always found... in proportion to the power or wealth of a man.<sup>4</sup>

Individuals differ in their natural attributes, but they all aspire to freedom of thought, speech and action (to the extent that it does not harm others), equality, and reciprocal treatment by others and society in general. I believe this is the core common to all citizens in society.

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<sup>3</sup> J.S Mill, *On Liberty*.

<sup>4</sup> J Rousseau, *The Social Contract*.

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Key to this is the view that a civilised society ought to ensure its citizen's are not rendered less-equal through injury, oppression or the unwanted interference of others. Natural inequality through injury, when it is inflicted due to the neglect, sanction or encouragement of the state, also constitutes political and moral inequality.

Laws which increase the risk of injury or death to citizens by removing sensible incentives for safe conduct, and which then doubly injure the injured by depriving them of a true measure of recompense, make some citizens less equal than others. In the process, they lose a large measure of their expectations for liberty and happiness in life. They are made less free than others.

Karl Popper defined justice in this way:

(a) an equal distribution of the burden of citizenship, that is of those limitations of freedom which are necessary in social life; (b) equal treatment of the citizens before the law, provided of course, that; (c) the laws show neither favour nor disfavour towards individual citizens or groups or classes; (d) impartiality of the courts of justice; and (e) an equal share in the advantages (and not only in the burden) which membership of the state may offer to citizens.<sup>5</sup>

I believe that this is what justice should mean to everyone; liberty guaranteed by equality. If we adopt this approach 'justice' is not a value at all, but a commitment to social process that secures our self-interest within the parameters of a civil society.

We may greatly value justice such as this, but justice is not itself a value. It is a process that treats all equally. If this is the yardstick for justice in our society, then how does the Ipp-inspired legislative attack on the rights of the injured throughout Australia measure up?

It certainly has appealed to the feelings of many, but it has done so at the expense of equality. On that measure, underwriter driven tort reform is unjust. And it remains unjust, regardless of how you may feel about it.

This is my last President's Report. Thank you everyone, for the privilege of serving as APLA National President. Goodbye.

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<sup>5</sup> K Popper, *The Open Society and Its Enemies*.