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Brisbane Magistrates Court
Thursday 21st APRIL 2016, 2.15pm
Surfair Queensland

Judge J M Robertson

[1] This is not a recent issue. The extent to which a court lower in hierarchy of courts is bound by decisions of a higher court has been the subject of debate for some time. As an example, in the ALJ Vol 68 June 1994 402, the editor Young J observed that the doctrine of precedent is a major force in maintaining consistency in judgments of courts of the land. However, he also observed that the jurisprudence contains examples where (like most doctrines) its application may produce illogical results which may not fit in with the community's sense of justice. A humble example is the number of decisions annotated to s 78 of the TORUM at 532,545.20 of Volume 3 of Carters Criminal Law of Queensland. A Magistrate is faced with a number of conflicting decisions of single Judges of this Court about the construction of s 78(3). The latest decision in the annotations is my judgment in Commissioner of *Police v Klupfel* [2013] QDC 210. I invited the Attorney-General to appeal to the Court of Appeal as was then his right, but he did not.

[2] More recently, in (2012) 86 ALJ 478 Oliver Jones published an article entitled "When is the Federal Magistrates Court bound by the Federal Court". Although the Federal structure is legally different, never the less there are many similarities e.g. the District Court exercises appellate jurisdiction and has original jurisdiction; and until the emergence of QCAT, exercised appellate jurisdiction other than from the Magistrates Court. In that article, he discusses (2) Full Federal Court decisions; *Minister for Immigration & Multicultural Affairs v SZANS* (2005) 141 FCR 586 at [35] – [39], in which that Court took the view that the Federal Magistrates Court was not always bound by decisions of the Federal Court; and *Suh v Minister for Immigration & Citizenship* (2009) 175 FCR 515 at [29] where the view was taken that the Federal Magistrates Court is always bound by the Federal Court. Relevantly to a comment I will make later, this later court's view was expressed as a "concern" because "the matter was not the subject of argument".

[3] I think this is the difficulty in the analysis of the Acting Magistrate in *Knight v Raddie* [2013] QMC 15 to which John Allen has referred. His Honour was of the belief that he was faced with (2) conflicting decisions of the District Court in relation to a section of the Road Rules. Once again, I am implicated. Judge Martin SC describes my earlier decision as “irrelevant and obsolete”, which it was, as the law had been changed to overcome the point of law made by me in the earlier decision.

[4] His Honour went on to examine the doctrine of precedent as John has mentioned in his paper.

[5] In that case, the defendant was not legally represented. His Honour says he did invite submissions as to whether Judge Martin’s decision was binding, but it is unclear if he received any submissions. I suspect the legal research discussed in his decision was his own. One of the reasons articulated in the single Supreme Court decision from New South Wales and Victoria relied upon by the Magistrate in *Knight* for holding that the Magistrates Court was not bound by decisions of the District Court and County Court is quoted at [49] of his reasons:

> “ … because the court (that is the District Court) is routinely dealing with an unrepresented party … the court will often not have the benefit of informed legal argument from both ends of the bar table, or the assistance of the research capability that a represented party would bring”.

Ironically, that was exactly the position that his Honour was in.

[6] I am told that some heat and light has been generated among your number as a consequence of Judge Harrison’s decision in *Forbes v Jingle* [2014] QDC 204 in which his Honour adopted the reasoning of Henry J in *Commissioner of Police v Spencer* [2014] 2 Qd. R. 23 at [26] – [27] dealing with minimum mandatory penalties in s 754 of the Police Powers and Responsibilities Act.

[7] The Magistrate in *Sbresni v Commissioner of Police* [2016] QDC 18, held that he was not bound to follow Judge Harrison’s decision, and, in any event the decision was wrong as a matter of law. Of course, he did all that very politely and respectfully. When his decision came on appeal before me, the Commissioner of Police, represented by Counsel conceded that in both respects, his Honour was in

error. As my decision notes, I did not think it appropriate to go behind those concessions, so the legal position at this time is in accordance with *Forbes v Jingle*.

[8] As John has said in his paper, there abide statements of principle from the High Court which strongly supports his argument that the doctrine applies as between the Magistrates Court and District Court. The statement of Barwick CJ in *Favelle Mort v Murray* (1976) 133 CLR 580 at 591 is crystal clear:

> "Within (the) body of precedent there are decisions or statements of principle which a court will be obliged to follow and apply. The ultimate foundation of precedent which thus binds a court is that a court or tribunal higher in the hierarchy of the same juristic system, and this able to reverse the lower court's judgment, has laid down that principle as part of the relevant law".

This does not mean slavish adherence, but it does mean that as with my Court, our job is to apply the law not to make it.

[9] It is in the very essence of judicial officers to think that we are the re-incarnation of FE Smith or (closer to home) Harry Gibbs or Gerry Brennan, or (even closer to home) Pat Keane. The truth is we are not. I have often said that at any given time there may be 10 lawyers who are intellectually and emotionally equipped to be on the Court of Appeal; and probably the same Australia wide for the High Court.

[10] It is tempting to show what good lawyers we are but in reality we are in danger of undermining consistency, and therefore public confidence, if we embark on a frolic of our own, particularly when an issue has not been fully argued. Unless and until the Court of Appeal intervenes; the better view I think is that the doctrine does apply when it comes to matters of law which includes matters of construction, and I agree with John, where there are conflicting decisions e.g. s 78(3) TORUM, go with the most recent.