Judicial notice

By Gerard Mullins

Many obvious facts that form the background of the knowledge of an ordinary person are assumed to be facts by courts. Obvious facts include the application of basic mathematical principles and time. But the knowledge of some facts, which might be regarded by some in the community as notorious, may not readily be assumed by a court in carrying out its fact-finding function.

The principle by which a court can take notice of facts that are notorious in the community is known as 'judicial notice'. The general principle (apart from statutory modification[1]) guiding judicial knowledge was stated by Isaacs J in *Holland v Jones*:[2]

> 'The only guiding principle – apart from statute – as to judicial notice which emerges from the various recorded cases appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court "notices" it, either *simpliciter* if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.
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> The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not "general" but "particular" facts. As to "particular" facts, even the judge's own personal knowledge is not to be imported into the case ...'

But a judge need not take a restricted approach. In *Commonwealth Shipping Representative v Peninsular & Oriental Branch Service*,[3] Lord Sumner stated:

> 'My Lords, to require that a judge should affect a cloistered aloofness from facts that every other man in the court is fully aware of and should insist on having proof on oath of what, as a man of the world, he knows already better than any witness can tell him, is a rule that may easily become pedantic and futile. Least of all would it be possible to require this detached and blindfold attitude towards events which the course of the later war burnt into the memories of us all.'

Cross on Evidence notes several familiar examples of cases in which the courts have taken judicial notice of facts without enquiry.[4] For example, that cats are kept for domestic purposes;[5] that the streets of London are full of traffic;[6] that a boy riding a bicycle in London traffic runs a risk of injury;[7] that young boys have playful habits;[8] that liquor is kept in a saloon bar of a hotel;[9] that the reception of television has become a very common feature of domestic life;[10] that 'grass' is commonly used as a synonym for Indian hemp;[11] and that a person who has drunk 15-20 schooners of beer in a few hours would be drunk.[12]

But *Cross* also notes that judicial notice has not been taken of how superannuation benefits are provided;[13] of the existence of a tobacco product called 'Winfield' sold in red and white packets;[14] or of the normal yield and current values of cannabis crops.[15]

The examples above give some guidance as to the types of matters of which a court might take judicial notice and those that might require proof. In practice, however, reliance upon judicial authority that a fact is one of which judicial notice will be taken is fraught with danger. Although one might safely assume that no proof is required that Christmas Day falls on 25 December of each year, the mechanics of the movements of a motor vehicle and the associated assumptions that one might rely upon may be significantly different from decade to decade.

Similarly, assumptions about the state of medicine that might have been regarded as being notorious facts to one generation might be quite different to another generation. In an article in 1990, Mr Justice Young observed:

> 'The comment that can usefully be made is that whilst one judge may very well because of his background think that something is self-evident, another will, for the same reasons, come to a different view and that accordingly such matters are not matters of which a court can take judicial notice.'[16]

Unless it can safely be concluded that a particular fact can be assumed with no reasonable doubt, then a practitioner should seriously consider proof of the matter in a trial. Failing to lead evidence may, even if judicial notice is taken by a judge at first instance, result in the matter being challenged and overturned on appeal.

Notes: **1** For example, s144 *Evidence Act* 1995 (NSW). **2** (1917) 23 CLR 149 at 153-4. **3** [1923] QC 191 at 211. **4** *Cross on Evidence*, Lexis Nexis, Butterworths online, para [3020]. **5** *Nye v Niblett* [1918] 1 KB 23. **6** *Dennis v AJ White & Co* [1916] 2 KB 1. **7** *Dennis v AJ White* [1917] AC 479 at 492. **8** *Clayton v Hardwick Colliery Co Limited* [1915] WN 395. **9** *Allchurch v Healey* [1927] SASR 370. **10** *Bridlington Relay Limited v Yorkshire Electricity Board* [1965] Ch 436. **11** *Ringstaad v Butler* [1978] 1 NSWLR 754 at 757. **12** *State Rail Authority of NSW v O'Keefe* (1995) 21 MVR 63. **13** *State Superannuation Board* (NSW) v FCT (1988) 82 ALR 63 at 75. **14** *Director of Public Prosecutions v United Telecasters Sydney Limited* (1990) 168 CLR 594. **15** *R v McCourt* (1993) 69 A Crim R 151. **16** 6 *Australian Bar Review*, para 189.

Gerard Mullins *is a barrister at Ronan Chambers, Brisbane.*
PHONE *(07) 3236 1882.* **EMAIL** *gerrymullins@ozemail.com.au*