VICTORIA UNIVERSITY OF TECHNOLOGY

S C H O O L

O F

M A N A G E M E N T

WORKING PAPER SERIES

Conflicts of Interest:
The Universal Blindspot

Fran Siemensma

19/2002

Conflicts of Interest: The Universal Blindspot

Fran Siemensma

Email – fran.siemensma@vu.edu.au

Abstract

Conflicts of interest are explored using the metaphor of a 'blindspot'. This address to the the Leo Cussen's Institute focuses on conflicts of interest beyond the relationship of lawyers to their clients. The social and civic implications of Solomon's reinterpretation of Aristotle' s Virtue Ethics are considered as a way to promote ethical legal practice in a pluralistic and secular society, such as Australia.

Introduction

The term 'blindspot' in everyday language reflects the physiology of the brain. Many confront this physical phenomenon through changes in traffic and driving patterns. Before relating it to legal and business practice, I would like to explore it as part of our physical world. Understanding the physical characteristics of the blind spot provides a way of characterising conflicting influences on professional lives.

Entering freeways requires a driver to move from a slow lane into fast flowing traffic. I shift in my seat, partly out of discomfort at accelerating to 100 kpm while on a link road, but more because I often lack a clear view of the freeway traffic with which I have to merge. I move backwards and forwards so that I can see all around me.   I have come to recognise two blind spots. One because my car's mirrors obscure one view of the road just behind me. The second because my eyes, and everyone else's, have a spot on each retina where the radial nerves enter, which consequently cannot capture an image. By shifting in my seat I can use parallax to overcome these constraints on my vision.   So as I enter the freeway, I move so as to compensate for both of these blind spots.

How does this image relate to the world of lawyers?   What are the equivalent transitions between access roads and freeways which could involve the negative consequences of the blind spot, namely the inability to see a potential clash or conflict.   In this case we are not talking about physical clashes, but those between what I shall call the different domains of our lives.   In this, I am referring to the work of an English academic, Stuart Hall, who writes about cultural identity and was long associated with the Centre for Cultural Studies in Birmingham.   Hall is a black West Indian, who graduated as a Rhodes scholar.   He is well aware of the irony of his academic history.   His life's work has involved the question of the individual identity of those who look and feel different from the society in which they live.

He has developed the concept of domains as a way of describing the discrete areas of our life which influence not only who we say we are, but also who we become.   Hall describes language as a 'constitutive' process; it does not merely describe who we are, but he argues that it also creates each of us, for ourselves and others (Chen, 1996, pp. 392 - 408).   Hall's project involved being black in Thatcher's England, but it is also useful for discussing what becomes of the personal identity of those who operate in arenas with equivalent, if more subtle, conflicts.

By conflicts of interests, I mean, at worst, contexts in which individuals may appear to be pitted in what Hobbes described as 'a war of all against all'.   Such situations reflect a sense of all-out competition with dire consequences for those who lose.   These situations may be regulated by law, but the interpretation of law is subject to changing circumstances, such as Alan Bond, an Australian entrepreneur, demonstrated by refusing to recognise goodwill in the purchase price of hotels he acquired.   Bond 'outraged publicans by pirating their businesses' goodwill' (Sykes, 1996, p. 214).   By breaking the convention of paying goodwill to publicans, he initially saved money, but also ensured the ultimate demise of his national brewing venture.   By destroying relationships with his distributors, he 'sabotaged' his overall game plan (op. cit. p. 215).   In corporate terms,

competition, and associated conflicts of interest are often seen as gaining, or losing the vital contract. The Bond Brewing example demonstrates that prioritising short term interests, namely profit, before longer term relationships, such as those with distributors, leads to business failure. Within organisations, such conflicts of interest can involve conflicting pressures such as whether an employer should promote a diligent and contributing employee, or the bright new graduate who threatens to leave.

The characterisation of conflicts of interests as 'blind spots' implies that individual business people and professionals, including lawyers, have to shift position in order to avoid a crash. What is meant by 'crashes' in this context? The current ethos of business and society overall promotes competition, individualism and winning. What are the values which can assist practising lawyers to anticipate and overcome conflicts? Going back to Hall's notion of domains, I believe we all have to recognise that the process of dividing lives into discrete areas creates the possibility of blind spots.

This means that we need an integrating principle to order our lives, because everyone experiences a potential conflict in balancing the requirements of family life, involving either parents, or children, personal career ambitions and the demands of work, whether that be a corporation or a small partnership. But beyond these links, these affiliations, there are equally important connections. Human beings are social animals who desire the respect of strangers. Some first recognise the importance of respect when it is lost. The prompt may come from corporate, national or international arenas.

One useful 'remedy' to the 'blind spots' associated with conflicts of interest is the practice of Virtue Ethics. This is a reworking of Aristotle's virtues, adopted by Solomon, MacIntyre and Taylor. Solomon addresses six virtues which those seeking clear vision might adopt as an ethical rear-vision mirror (Solomon in Coady and Sampford, 1993, pp. 27-45 ; Solomon in Woldring, 1996, pp. 22-41). The Virtue Ethics, being pre-Christian in their origin, meet the needs of a diverse secular society. Being group focused, they

accommodate the significance of professional employment to our identity; being humane, they consider the significance of the other in reaching our conclusions.

Ethics is essentially concerned with how people should act. Solomon highlights that any discussion of how business should operate, requires seeing corporate organisations as communities. They are places where individuals engage not only to earn money, but as a way of life. In other words, our professional lives shape our sense of identity. If you doubt this claim, recall what happens at social gatherings. A doctor, irritated by medical questions at parties, began describing himself as a train-shunter. After being then ignored, he chose to reclaim his professional label. Or another example, travellers must declare their profession when they leave or enter the country. And I experience few searches of my luggage as customs' officers seem to consider academics as trustworthy.

Solomon disputes the claim that companies are 'mere "legal fictions", mere devices for protecting assets and limiting liability' (Solomon in Woldring, 1996, p.31). He typifies them as 'communities' moulded by cooperation, loyalty and commitment to shared goals. The duties and responsibilities of business are seen within a group context. This perspective recognises that plurality and diversity are characteristics of both the corporation and the broader society.

Solomon typifies Virtue Ethics as having six dimensions which can be understood in the following way:

Community

This derives from the Aristotelian view that individual identity and the ability to be happy derive from the group to which we belong, which in classical Greece, was the city-state. Solomon believes that the organisation for which we work is a dominant influence, which

is not to deny the importance of family, friends and the larger society in which business operates.

Another version of this understanding is provided by John Carroll, whom I quote on the relationship of work to community, as typified by Raymond Chandler's character Philip Marlowe, of the 1930s:

> Marlowe's world was a … Los Angeles of grimy sweltering summer heat, dust, greasy vicious crooks, the weak unprotected, the powerful corrupt, a town without any spirit of community, without any trustworthy bonds between its people, without belief or law, without hope outside wealth – and the wealthy drown in their own listless despair, that of boredom. In this caricature of modernity the sole anchoring rock is vocation, the integrity of the one just man (Carroll, 1998, pp. 21-2) .

Excellence

This virtue derives its full meaning from the Greek translation of arete which conveys both virtue and excellence, thus it involves 'doing one's best, excelling'. It is the process rather than the goal of business. Avoiding doing wrong is not sufficient. Solomon sees excellence as building on the strengths of individuals, and involving both 'the bottom line' and ethics. Those who wonder how excellence relates to conflicts of interests, should recall the role played by American lawyers in delaying laws to counter the faults in subcompacts like the Ford Pinto, and the consequent increase in deaths and suffering which resulted from that delay (Shaw and Barry, 1992, pp. 86-88).

Role Identity

This virtue reflects the 'situatedness' of corporate roles. It involves the particular responsibilities of a specific job, and recognizes that ethics operate within a context. For example, think of the different responsibilities which lawyers hold, the differences between court and corporate work, the idea of Chinese walls within firms. Australian examples related to the role identity can be drawn from the sense of professional

responsibility demonstrated by the professionals involved in both the Bottom of the Harbour tax scam (Sutton, 1991), and the Trustees Executors and Agency (TEA) case (Grabosky, 1991). In both of these cases, professionals, including lawyers, assisted their clients to subvert either the spirit or the letter of the law. One conflict of interest involved providing advice to clients while also recognising the professional duty to be dispassionate and socially aware.

Integrity

Solomon describes integrity as the 'linchpin' of the virtues. It involves two distinct and seemingly contradictory meanings, firstly to conform out of loyalty and responsibility, and secondly to rebel when it would be unethical to 'toe the line'. This virtue requires courage, the ability to 'perform under fire'. How do lawyers demonstrate integrity? The previous examples of changes involving taxation and financial services parallel the volatility associated with introducing a Goods and Services Tax (GST). And how does recent compliance with taxation law compare with that of the Bottom of the Harbour period? Are there other conflicts of interest which threaten the integrity of lawyers?

Judgement

The roles which we fill often conflict and when they do, firstly, we need to be able to acknowledge, and secondly, to resolve, a troublesome situation. Our judgements reflect the values of our family, education and profession. We are responsible to develop this capacity over our lifetime. It is neither mechanical, nor abstract, but takes the situation into account and involves weighing competing demands in order to reach a 'fair' decision. Good judgement enables us to detect our blind spots, so that we can negotiate around them. Education, supported by time taken for critical reflection, provides a lens to clarify our focus and sharpen our vision.

Holism

Many business people have a tendency to separate business and professional roles from the rest of life. A life worth living has many domains, but it is one life. Holism involves maintaining personal values at work. Its key focus is to prevent tunnel vision, or what might be described in this context as the blind spot.

Thus the Virtue Ethics, as reinterpreted by Solomon, recognise the gaps between the domains of our lives analogous to the blind spot in driving. They provide an ethical language appropriate for a diverse and pluralistic society. This approach acknowledges the tensions and conflicts inherent in professional lives, such as experienced by those practising law. It can encourage individuals to voice their values, especially to describe the value clashes inherent in a life which seeks to balance self interest and concern for others. It provides a base for movement, equivalent to leaning backwards and forwards to compensate for the blindspot when driving.

Conclusion

Integrity is important. It is especially important to professionals such as lawyers and business people whose success rests on their good reputation. How do these individuals perceive integrity ? What means do they use to recognise threats to integrity? Answers to such questions involve the issue of care - the need to recognise the interconnections between our worlds and those of others. What do we value? It is essential to pose questions regarding values to ourselves individually, and also to be able to discuss them in our places of work, as well as with our friends and professional colleagues. The issue of profit is significant. But in order not to be blinded, we need to see it as a means, not an end in itself. Profit may be an outcome, but if it becomes the goal, it glues us into our seats so that we are unable to compensate for the blind spot. We become stuck, fixed, unable to see the obstacles in front of us.

The language of daily life creates and recreates us. The language of business and the professions involves the capacity to acknowledge responsibility to ourselves and to others. Who do we want to be? The answer to that question demands an engagement with complexity. Solomon's adaptation of the virtues nurtures a sense of personal identity built on broader responsibilities.

The consequences of ignoring blind spots are underlined by Lady Macbeth's final preoccupation with that 'damned spot' which tainted and taunted her to death. All professionals face the risk of being potentially haunted, despite the fact that they are unlikely to kill those whom they have hosted. Professional actions involve giving advice and service. The way in which professional responsibility is met affects how others will see us, and our own future peace of mind.

References:

Carroll, J. 1998, *Ego and Soul: The Modern West in Search of Meaning*, Harper Collins, Sydney.

Grabosky, J.1991, The Demise of Trustees, Executors and Agency Co. Ltd, in P Grabosky and A Sutton (eds) *Stains on a White Collar*, Hutchinson, Australia. pp.15-30.

Chen, K-H, 1996, 'Hall interviewed by Kuan-Hsing Chen', in *Stuart Hall: Critical Dialogues in Cultural Studies*, eds D Morley & K-H Chen, Routledge, New York, pp. 392 – 408.

Shaw, W. H. & Barry, V. 1992, *Moral Issues in Business*, Wadsworth, California.

Solomon, R. C. 1993, 'Virtue Ethics', in *Business, Ethics and the Law,* ed C.A.J. Coady, & C. J. G. Sampford, The Federation Press, Annandale, NSW.

Solomon, R. C. 1996, 'Virtue Ethics and Business Ethics' in *Business Ethics in Australia and New Zealand*, ed K Woldring, Nelson, Melbourne, pp. 22-41.

Sutton, A. 1991, The Bottom of the Harbour Tax Evasion Scheme in *Stains on a White Collar*, eds P. Grabosky & A. Sutton, Hutchinson, Australia. pp. 1-14.

Sykes, T. 1996, *The Bold Riders: Behind Australia's Corporate Collapses*, Allen and Unwin, St Leonards, NSW.