Postmodernism and judicial notice: How common is common knowledge?

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Abstract
This article considers how postmodernist thought can illuminate the doctrine of judicial notice. Specifically, it considers how postmodernist critiques of empiricism have challenged the idea of ‘indisputable’ facts which inform judicial decision-making. It argues that, while the practical realities of judicial administration must be borne in mind, increased sensitivity to the arbitrary nature of notorious facts will lead to more accountable decision-making.

Keywords
Arts and law, judges, judicial power, legal philosophy, legal theory, jurisprudence, critical legal theory

In 2006, Susan Crennan delivered a speech entitled ‘Postmodernism and the Law’. Crennan’s thesis was that ‘postmodern social critique … has an influence which has gone beyond the universities and is certainly to be felt in the law’. She introduced postmodernism as

an attitude of mind which rejects the assumptions about human progress and the power of reason, and perceives the law as a repository or expression of authoritarian power about which scepticism should be encouraged.

The definition strikes as at once defensive and overgeneralised. Like most philosophical movements, postmodernism lacks such a totalised credo. Rather it embodies a mix of diverse theoretical strands, often at odds with one another. To the extent that some postmodernist thinkers are concerned with structures of reasoning, there is no unified characterisation of law as a repository of authoritarianism.

In fairness, Crennan’s purpose was only ‘to touch lightly on something of interest without presuming to offer any conclusions’. Tasked with explaining cultural theory in the wake of Marx to a group of Herbert Smith Freehills litigators, she was perhaps justified in taking a broad-strokes approach. Notwithstanding, her speech stands as an important call, largely unacknowledged within conventional legal circles, for interrogation of the law’s doctrines and institutions within the framework of postmodernist thought.

In this article, I want to consider how postmodernist thought might illuminate the doctrine of judicial notice. Specifically, how postmodernist critiques of empiricism have challenged the idea of ‘indisputable’ facts. I argue that while the practical realities of judicial administration must be borne in mind, increased sensitivity to the arbitrary nature of notorious facts will lead to more accountable decision-making.

The inquiry is motivated by a conviction that judicial notice is an influential doctrine which lurks in the shadows of judicial decision-making, unseen and unarticulated. In shining a sceptical light on judicial notice, I hope to expose the dangers of treating knowledge as ‘common’ in the law.

What is judicial notice?
Judicial notice is the principle that a court can find that a fact exists, despite that fact not being proven under the rules of

1Susan Crennan, ‘Post-Modernism and the Law’ (Speech, Herbert Smith Freehills Litigators Dinner, Melbourne, 11 September 2006) 6.
2Ibid 7.
3Ibid 14.
Evidence. These are often called ‘notorious’ facts. The principle has been consolidated in the Uniform Evidence Law, and exists as a freestanding doctrine in common law evidence jurisdictions.

Kenneth Davis distinguishes between (i) adjudicative facts, which are facts in issue in a trial, and (ii) legislative facts, which are any facts which help the court reach its decision. Judicial notice has limited scope with regard to adjudicative facts since a trial turns on the evidence provided for and against the points in issue. Conversely, with legislative facts judges have felt themselves relatively free to apply their own views of and to make their own enquiries about social ethics, psychology, politics and history where relevant without requiring evidence or other proof.

Isaacs J proposed two ‘sub-classes’ of legislative facts. The first includes those which the judge decides after independent inquiry. The process behind these facts is generally more visible. For example, in Woods v Multi-Sport Holdings Pty Ltd, McHugh J and Callinan J debated whether the court could have independent regard to statistics showing the national rate of accidents.

The second includes facts which judges rely on without the need for further inquiry. This covers any fact which is ‘so generally known that every ordinary person may be reasonably presumed to be aware of it’. These range from the mundane (cats can be kept as pets; London is full of traffic) to the more questionable (children may be distressed by family litigation; publicans generally monitor conduct in their premises; garage sales are a ‘familiar event in Australian suburbania’). This article focuses on this second class of notorious fact, since they are relied upon in judgments without any stated justification.

Judicial notice is necessary but dangerous

Judicial notice exists by necessity. For most aspects of litigation, it would be a ‘waste of time’ to provide evidence for a notorious fact. In this sense, it enables efficient administration within the courts, which ultimately enhances public justice. In times of increasing costs and delay, such efficiency is crucial.

Yet the exigencies of court administration should not mask the danger inherent in the principle. As noted in Cross on Evidence, that notorious facts do not need to be proven makes them in one sense the ‘antithesis’ of evidence law. Allowing for untested propositions in a trial undermines Australian courts’ commitment to procedural integrity. The risks of the principle have been considered by commentators such as Reg Graycar and Susan Drummond. Their ideas will now be canvassed, before considering how they can be developed with reference to postmodernist thought.

Is common knowledge common?

A critical approach to notorious facts

While the group of Critical Legal Studies (CLS) theorists which arose in the United States in the 1970s did not purport to have a unified goal, their work generally sought to demonstrate the ambiguity at the heart of supposedly impartial and rigid legal doctrines. Although CLS theorists did not always speak in strictly postmodernist terms, their movement owed much to the work of French theorists such as Michel Foucault, usually associated with postmodernism.

Modern CLS scholarship continues this preoccupation with the dominant sources of judicial knowledge, and how judicial decision-making affects marginalised groups. Australian theorist Reg Graycar, writing in the 1990s, addressed these concerns with regard to the principle of judicial notice. Graycar recognised the ubiquity of notorious facts, noting the manner whereby they inform decision-making:

Judicial notice and the use of ‘common sense’ assumptions by judges, are all bound up in the epistemological question of how judges know the world they construct (with such authority) in their judgments.

Here, Graycar identifies the ‘unannounced’ quality of judicial notice and calls for its critical demystification.

An immediate objection to Graycar’s thesis might be that notorious facts are, by nature, insignificant since the doctrine only applies where parties do not contest a

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4 Dyson Heydon, Cross on Evidence (LexisNexis Butterworths, 10th Aust ed, 2015) 105.
5 Ibid 105–6.
6 Evidence Act 1995 (Cth) s 144; Evidence Act 1995 (NSW) s 144; Evidence Act 2008 (Vic) s 144; Evidence (National Uniform Legislation) Act 2011 (NT) s 144; Evidence Act 2001 (Tas) s 144; Evidence Act 2011 (ACT) s 144; Holland v Jones (1917) 23 CLR 149, 153.
7 Kenneth Culp Davis, ‘Judicial Notice’ (1955) 55(7) Columbia Law Review 945, 952.
8 Heydon (n 4) 106.
9 Holland v Jones (1917) 23 CLR 149.
10 Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, [62] (McHugh J).
11 Holland v Jones (1917) 23 CLR 149, 153 (Isaacs J).
12 Nye v Niblett [1918] 1 KB 23.
13 Dennis v AJ White & Co [1916] 2 KB 1.
14 Gattanach v Melchior (2003) 215 CLR 1, 126 [347] (Heydon J).
15 Cole v South Tweed Heads Rugby League Football Club (2004) 217 CLR 469, 482 [35] (McHugh J).
16 Neindorf v Junkovic (2005) 222 ALR 631, 657 [100] (Callinan and Heydon JJ).
17 Heydon (n 4) 106.
18 Heydon (n 4) 105.
19 Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century’s End (NYU Press, 1995) 106.
20 Ibid 114.
21 Ibid 110–14.
22 Reg Graycar, ‘The Gender of Judgments: An Introduction’ in Margaret Thornton (ed), Public and Private: Feminist Legal Debates (Oxford University Press, 1995) 262, 276–7.
particular fact at trial.\textsuperscript{23} For example, it seems unlikely that the assumption ‘cats can be kept as pets’\textsuperscript{24} if not in peculiar contention, would be a fruitful subject for scrutiny.

Yet this reasoning presupposes an identifiable boundary between common knowledge assumptions and the higher-level conclusions they ultimately support. Such a distinction defies logic and experience. Uncontroversial facts do not exist in an epistemological vacuum, divorced from the central questions of a judgment. This is so even when the parties themselves make assumptions about what is obviously true. In identifying notorious facts as ‘bound up’ with judicial determinations, Graycar recognises that they may be used to endorse adjudicative facts, or to form a factual background for a point in dispute. As Drummond summarises:

One could argue [notorious facts] at the appeal level even though the judge never acknowledged – nor may indeed have been aware – that these were the background assumptions which enabled him or her to come to a determination on the foreground.\textsuperscript{25}

Common knowledge is hence woven into the primary issues of a trial through an ongoing process of epistemological construction

The empire of common knowledge

Turning her attention to the function of notorious facts, Graycar next debated the premise that they are ‘incontestable’. She rejected the conception of notorious facts as objective ideas which judges impartially identify as the foundation for their reasoning:

While ‘common sense’ and ‘easy to believe’ facts may readily find their way into legal discourses, it may be that they do so at the expense of other ‘facts’ or ‘stories’ that, although they may be more hesitant or uncertain, may … have no less claim to credibility.\textsuperscript{26}

Implicit in this statement is that notorious facts reflect the worldview of those in power and ignore valid counter-narratives from those without it. Framed this way, ‘common’ is tantamount to ‘dominant’.

Many theorists have concerned themselves with the precise contours of this dominance. Mary Eberts has argued that common knowledge is actually male knowledge, and therefore the version of reality that has authority.\textsuperscript{27} Graycar, also concerned with gender, noted in 1995 that many notorious facts might be contestable when considered from the perspective of women, given the makeup of the judiciary was overwhelmingly male. Although she was writing with regard to the judiciary of her time, there is reason to believe the critique still bears relevance.\textsuperscript{28} Further, there is no reason to believe that enhanced gender parity will automatically uproot such deep-seated epistemological assumptions. The judgments of ‘some selected other non-men’\textsuperscript{29} may continue to mirror and entrench the male-dominated perspectives of the law as it stands.

The point is best emphasised with reference to case law. Graycar identified a string of cases where judges assumed as a notorious fact that domestic housework was increasingly shared by men and women.\textsuperscript{30} She then provided data to prove that such observations are false.\textsuperscript{31} Her argument demonstrated the uncertain ground upon which judicial assumptions are based, validating Delisle’s statement that ‘we need to recognise that “common sense and experience,” judicially noticed, may vary depending on the judges’ culture, gender, background, education, social origin and age.\textsuperscript{32} Reconsidering ‘indisputable’ facts as contingent upon an individual’s prism of experience profoundly compromises their credibility. When that prism is mapped onto axes of socio-political dominance, such facts can take on a tyrannical quality.

This research also has relevance for issues of race, most relevant in the Australian context with regard to treatment of Indigenous people in the law. What Ransley and Marchetti called ‘the hidden whiteness of Australian law’ can in my argument be rephrased as ‘the assumed whiteness of Australian law’\textsuperscript{33} Norms entrenched by judges very often supress valid epistemic counter-narratives of Indigenous Australians. In Cabrillo and Gunner v Commonwealth of Australia (2000) 174 ALR 99 two Stolen Generation children failed to convince the Federal Court that the officials involved in their removal had acted in disregard of their statutory duty. The judges relied on a thumbprint on a request form as evidence that Gunner’s mother had consented to his removal, despite oral evidence from witnesses which indicated otherwise. While this was partly a question of reliable documentary evidence, the assumptions informing that reliance should not be overlooked. In reaching their conclusion, the judges relied on several ‘common sense’ propositions: that an individual’s signature imparts consent, and that documentary evidence is more legitimate than oral histories.
While these statements might prove true in certain contexts, for certain groups, their veracity is not universal. Taken as an objective basis for a line of reasoning with regard to Indigenous people, they ignore co-existing realities. There is no common knowledge of the dispossessed, only of the possessing – the speaker not the silenced. In laundering dominant perspectives through a logic of notorious facts, many judges relegate equally valid forms and frames of knowledge to the status of the other.

**The postmodernist critique of knowledge**

As noted, CLS theorists dealing with judicial notice tend not to adopt the terminology of postmodernism. Yet an understanding of postmodernist thought can deepen the analysis of theorists such as Graycar and provide a better understanding of the role of judicial notice.

**A brief account of postmodernism**

The school of postmodernism to which Crennan referred generally stems from structuralist philosophy. Structuralism emerged in the writings of French theorists such as Louis Althusser, Pierre Bourdieu and Jean-François Lyotard. Those theorists rejected Enlightenment assumptions that knowledge correlated in an objective fashion to the world around us. From different slants, they argued that all knowledge is dictated by a very narrow set of parameters which they defined as a ‘paradigm’ or ‘structure’. The pervasiveness of these structures was said to be such that individuals within them are not aware of the conditions which dictate their knowledge. In the words of Bourdieu, ‘every established order tends to produce the naturalisation of its own arbitrariness’.

Theorists such as Michel Foucault furthered this idea with regard to individual cognition, questioning the theory of a single underlying grammar explaining events. Foucault generally denied that we can obtain objective knowledge, because what we call knowledge is formed from the meaning-making resources of a particular culture, and different cultures can see the world in very different ways, all of which ‘work’ in their own terms. This ideology, sometimes referred to as ‘post-empiricist’, rejects an enlightenment assumption that the reverse is also true: just because judicial notice is not tyrannical, does not mean it should be naturalised. Theorists such as Bourdieu point to the all-encompassing nature of paradigms, which are impossible to recognise from within. Beyond even the ‘outsider’ perspectives identified by CLS theorists, epistemic blindspots exist which are yet to be recognised within our structure of legal reasoning. Unless those assumptions are questioned more rigorously, lacunae will remain out of sight and out of reach. In conceiving of all notorious facts as contestable, postmodernist thought reminds us that what is presently accepted as uncontroversial may be susceptible to valid critique in the future.

**Postmodernism and judicial notice**

It is not difficult to see how the work of Graycar and other CLS theorists is approved by this strain of postmodernist thought. Drummond echoes the core logic of structuralism when she states:

> While a court may be taking judicial notice implicitly of taken-for-granted matters … and may indeed take them as elements of the natural world, an outsider to the practice may quickly recognise how arbitrary and conventional those beliefs are. Cultures only appear from the point of view of an outsider. From the inside, they are simply the way that things are done.

The imperceptible structure within which an individual (or individual judge) exists dictates the conditions of their knowledge. With regard to authoritative decision makers, that knowledge is pressed upon the subject who receives it.

Yet given structuralism’s wider scope of inquiry, there is reason to believe it can also expand the criticisms outlined above. CLS scholars generally focus on marginalised groups, seeking to illuminate perspectives from outside of the dominant discourse. Given that the general tenets of structuralism reveal the arbitrary foundations of all knowledge, it seems reasonable that the principle of judicial notice can be assailed independent of any socio-political critique. In other words, those judicial assumptions can be criticised not simply because they are contradicted by non-dominant perspectives, but because their arbitrary nature necessarily privileges one perspective over others.

Drummond makes a version of this point when she states that ‘the fact that judicial notice is, at bedrock, arbitrary, does not mean that it is necessarily a display of force or an exercise in tyranny’ I agree, but propose that the reverse is also true; just because judicial notice is not tyrannical, does not mean it should be naturalised. Theorists such as Bourdieu point to the all-encompassing nature of paradigms, which are impossible to recognise from within. Beyond even the ‘outsider’ perspectives identified by CLS theorists, epistemic blindspots exist which are yet to be recognised within our structure of legal reasoning. Unless those assumptions are questioned more rigorously, lacunae will remain out of sight and out of reach. In conceiving of all notorious facts as contestable, postmodernist thought reminds us that what is presently accepted as uncontroversial may be susceptible to valid critique in the future.

**The future of judicial knowledge**

In arguing for the arbitrariness of knowledge, few postmodernists advocate a descent into undying scepticism. This is where Crennan’s conflation of suspicion and denunciation is crucial to untangle. In unveiling cultural

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34 Derek Attridge, Geoff Bennington and Robert Young (eds), *Post-Structuralism and the Question of History* (Cambridge University Press, 1989) 14–23.
35 Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977) 164.
36 Michel Foucault, *The Order of Things* (Pantheon Books, 1970).
37 J L Lemke, ‘Semiotics and the Deconstruction of Conceptual Learning’ (1994) 19(1) *Journal of Accelerative Learning and Teaching* 67, 68.
38 Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference* (Routledge, 1980) 114.
39 Drummond (n 25) 28.
40 Ibid 30.
constructions, my argument need not be taken as calling for their complete destruction — though, of course, it can. The recognition of arbitrariness need not be a process of unending iconoclasm. As Drummond puts it: ‘a student who constantly interrupted his history lessons with doubts as to whether the earth really existed would be raising doubts that are not germane to the discipline of history’.41 Likewise, the legal system would not benefit from a judge questioning, for example, the objectivity of the rules of grammar. What a postmodernist analysis of judicial knowledge can do is deprive notorious facts of their claim to being “indisputable”.

What does this mean in practice? At one extreme, Miles and Sunstein have suggested a move away from the doctrine of judicial notice entirely, to a more ‘evidence-based’ model of decision-making whereby judges become more reliant on empirical foundations.42 This approach would better accommodate postmodernist doubts regarding untested judicial assumptions, and ensure that contestable facts which were laundered through judgments as common knowledge were made subject to scrutiny. Yet in requiring all judicial knowledge to be rigorously tested, this approach would undermine the essential administrative benefits of the doctrine and obstruct justice through costly delay. It is unreasonable to require that a judge should footnote assumptions such as ‘most children attend school’ when that assertion is not central to the case at hand.

A better approach is the perspective that emerges from theorists such as Graycar and Drummond. While neither make concrete recommendations, their research calls for a reconceptualisation of notorious facts from the status of ‘indisputable’ or ‘obvious’ to ‘rational assumptions’. This recharacterisation of notorious facts would, ideally, be more than linguistic. It would urge judges to reflect more deeply on their assumptions and how they are formed. This is similar to the ‘intuition-override’ model of judging proposed by Guthrie, Rachlinski and Wistrich, whereby judges are encouraged to use deliberative reasoning to ‘verify’ those more contentious assumptions upon which their reasoning is based.43 Deliberative thought cannot emancipate individuals from the conditions of their paradigm, but it can remedy more careless assumptions, and encourage an increased consciousness of the structure within which they are formed.

A recent — and rare — example of a Justice reflecting on the construction of judicial notice came in the case of Farkas v R [2014] NSWCCA 141. The Court of Criminal Appeal was asked to decide whether the trial judge erred in taking judicial notice of the standard range of methamphetamine’s ‘normal street purity’. Basten JA held that while the range was a matter of common knowledge, its centrality to the case meant that the trial judge should have identified an appropriate source of information:

[Un]less the fact that the information is uncontestable is itself a fact of which judicial notice can be taken, it is necessary in accordance with the basic principles of procedural fairness underlying the adversary system that notice of the intention to rely upon such information is given to the parties.44

Basten JA’s approach here was in part grounded in a more standard objection that the fact in question, while well-known, did not meet the accepted threshold of a notorious fact. Nevertheless, in encouraging reflection as to the nature of the assumption, it echoes something of the process encouraged by Graycar and Drummond. In self-identifying the potential shakiness of assumptions in borderline cases, the trial judge can allow for more informed critiques of their reasoning.

An analogous process is well-accepted in Canada in the context of sentencing Indigenous offenders. In 2012 the Supreme Court has held that judges ‘must’ take judicial notice of the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.45

This method arguably redevelops the doctrine, by turning it into a positive obligation for judges to consider. As with the process of verifying ‘rational assumptions’, this brings judicial notice under a sceptical light and mandates consideration. This process is unlikely to be followed in Australia: in Bugmy v The Queen (2013) 249 CLR 571 the High Court regarded the proposition that ‘judicial notice [be taken] of the systemic background of deprivation of Aboriginal offenders’ was ‘antithetical to individualised justice’.46 While these observations neither prevent nor discourage judicial officers from considering facts relevant to the individual case of sentencing, they sever that process from conceptions of judicial notice.

Conclusion

The necessity of a principle of judicial knowledge is self-evident. Yet Graycar, Drummond and other theorists expose its tyrannical capabilities when unchecked. This article has contextualised it in light of some postmodernist critiques of knowledge and demonstrated that there is benefit in reasonable scepticism towards all notorious facts. It has argued that judges may find doubt within many of their most ‘indisputable’ assumptions, even those not subject to active socio-political critique.

In assessing the role of judicial notice in a judge’s access to knowledge, notorious facts must first be brought from the background to the foreground. Judges must be encouraged to consider the prism through which they approach certain subjects. Only then can the law begin to

41 Ibid 24
42 Thomas J Miles and Cass R Sunstein, ‘The New Legal Realism’ (2008) 75(2) The University of Chicago Law Review 831.
43 Andrew J Wistrich, Jeffrey J Rachlinski and Chris Guthrie, ‘Heart vs Head: Do Judges Follow the Law or Follow Their Feelings?’ (2015) 93 Texas Law Review 855.
44 Farkas v R [2014] NSWCCA 141 [16] (Basten J). See also at [81]-[85] (Campbell J).
45 R v Ipeelee [2012] 1 SCR 433, 486 [87] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).
46 Bugmy v The Queen (2013) 249 CLR 571, 594 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
accommodate unspoken and unidentified perspectives, incrementally and over time.

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