General Sir John Owen Oration
United Service Club
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"Judicial Leadership in Changing Times"

The Hon Paul de Jersey AC, Chief Justice of Queensland

I am very pleased to seek to honour the late General Sir John Fletcher Owen. Sir John was a distinguished leader – notably as our club's founder, and as Commandant of the Queensland Defence Force from 1892 to 1894. It was during that term, perceiving a need for a social venue at which officers could meet to discuss military matters, that he founded the Club. He is recorded as having been hard-working, energetic and tenacious.

It is fitting while honouring one fine leader, and speaking to a group of distinguished contemporary leaders, that leadership be my focus. I propose to speak a little tonight, if predictably, of the *judicial* arm of government – and particularly, novel aspects of the leadership role it fulfils in the 21st century world.

We judges provide a somewhat unusual example of community leadership: guardians of the rule of law, which is the pivot of democracy, though unelected. Working almost always under the potential glare of publicity, our level of public accountability is however pitched very high.

How do Judges resolve cases? In most cases, by applying existing law to the facts of the case at hand. But where novel facts require a ruling, the judge may have to extend existing legal principle. In times of rapid change, the courts increasingly have to resolve intricate and puzzling problems, and they are my focus tonight.

The "Tampa" case excited a lot of critical commentary. The events are fresh: the 26 August rescue of 433 boat people by the MV Tampa; the government's decision not to permit them to disembark on Christmas Island; the urgent commencement of proceedings in the Federal Court by the Victorian Council for Civil Liberties and a Melbourne solicitor, on the contention the people had been unlawfully detained; Justice North's 11 September ruling, invoking habeas corpus, that they be returned to Australia[1] - a ruling described in the press as "stunning"[2] – and not generally in the congratulatory sense; and the Full Court's overturning that ruling, on the basis the Commonwealth had simply been exercising constitutionally-conferred executive power.[3]

The Federal Court Judges restricted their consideration of this politically volatile issue to the *legality* of Commonwealth actions, leaving aside questions of policy.[4] Their published reasons show that. Nonetheless, they were trenchantly criticized for entertaining the matter at all. Critics argued the more appropriate course would have been to allow the dispute to be played out in the political forum, to be decided after public debate, rather than according to the opinions of an (unelected) few[5]: the case, they said, was brought without the request of the boat people themselves, and involved highly complex, ambiguous competing human rights, a question as much of

[1] *Victorian Council for Civil Liberties Inc v Minister for Immigration & Multicultural Affairs* [2001] FCA 1297
[2] Saunders, M and Crawford, B. 2001. "Take them back, court orders PM", *news.com.au*, 12 September 2001, www.news.com.au.
[3] *Ruddock v Vadarlis* [2001] FCA 1329 (18 September 2001)
[4] eg *ibid*, per French J at [204]
[5] Creyke, R. and McMillan, J. 2001. "No place for dispute in court", *The Australian*, 25 September 2001, p 13

individual opinion as law: and the case was instituted at a time when the arguments could effectively have been aired in the political forum.[6]

Declining to entertain a court case is rarely an option. Truly exceptional cases aside, the judge must make a decision when a case is brought – no matter how complex. The decision is to be made according to law. Formulating the law is indubitably the responsibility, not of the courts, but of the parliament. It is at least historically interesting to note, however, that the parliaments have occupied that territory for only about the last 150 years of human history: prior to that, the task fell to the courts.

But the development of some important areas of our law, even into recent eras, has in practice fallen almost exclusively to the judges. The law of negligence is the prime example. The jury's verdict in the recent case, favourably to the young man who dived into a canal at the Gold Coast, raised, if for a disturbing brief moment, the spectre of our passing down the American avenue of excessive liberality in the recovery of damages for personal injury. That plaintiff ultimately lost his case – on appeal.

Public policy, as perceived by judges informed by current philosophical views, has markedly influenced the development of the law of negligence. If the parliament were to consider the predominant, responsible public view to be that recovery has become too liberal, then parliament has the capacity to limit recovery; and the WorkCover and Motor Accident legislation in this State reflects some recent

[6] McGuinness, P. 2001. "Courts may be high, but that doesn't make them mighty", *Sydney Morning Herald*, 8

limitation. My point is that where public opinion is the appropriate determinant, it is better gauged by the parliament than by the courts, though on the important assumption that parliament will be properly informed by comprehensive debate – not by bureaucratic rubber-stamping or party-line divisions.

Similarly if, as sometimes claimed, there is public feeling that criminal sentencing levels are unduly lenient, then any review of the statutory framework falls of course to the parliament – to remove or reduce, for example, the raft of strong legislative admonitions – which necessarily constrain judges - that imprisonment is to be the response of very last resort. I stress I am not to be seen tonight as inviting any particular change in this sensitive area. My point is simply to emphasise, when judges are criticised, that they are obliged to apply the law and exercise discretions reviewable on appeal, and that the delineation of the law should fall, as at present, primarily to the people's elected representatives.

Having raised that subject, I should however restate my own view, that we do in this State have a well-developed sentencing regime, beneficial because it does not unduly fetter the judicial discretion. The appeal process operates as an effective safeguard against occasional error. As with all frameworks of such public significance, the prospect of refinement rightly persists. But our current sentencing model should not, in my view, be subjected to any major surgery: it serves us well – especially, as I say, for its being premised on the exercise of the comprehensively informed judicial discretion.

September 2001, accessed via www.smh.com.au; Creyke, R. and McMillan, J. 2001. "No place for dispute in

A large part of what I perceive to be the public's increasing interest in the Courts arises from the diverting character of some of the unusual cases thrown up by modern life. Passing from Tampa, let me illustrate further with two of our own.

You will remember the remarkably difficult case of the Nolan twins. In May this year, Mr. Justice Chesterman of our Supreme Court was called upon to decide whether an operation to separate Alyssa and Bethany would be lawful, notwithstanding it would certainly result in Bethany's death.[7]

They were joined at the head, and shared blood flow despite possessing separate brains. Bethany lacked kidneys and bladder, kept alive by Alyssa's single kidney removing waste from her bloodstream. Prior to May 25, it became clear Bethany's death was imminent, and that unless the twins could be separated, Alyssa would die soon after her sister. The parents consented to an operation to separate, but the State cautiously applied for an urgent order sanctioning the operation.

The application was brought before the court at 11pm on 25 May. The operation was scheduled to go ahead, should the court permit, at 6.30am the following day, and it did. This was truly emergent litigation: having been convened at 11pm, the Court made its order close to midnight. The Judge published his detailed reasons five days later.

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court", *The Australian*, 25 September 2001, p 13

The Court was approached first under its ancient "protective" jurisdiction, exercised "to protect the person and property of subjects, particularly children who are unable to look to their own interests"[8]. Was the operation in the girls' best interests? Also critical: would performing the operation amount to manslaughter under the *Criminal Code*? The surgeons were entitled to a protective declaration, if warranted.

Determining whether the operation was in the girls' best interests was taxing – the operation would hasten the death of one sister, but provide the other with her greatest chance of survival. Judges not infrequently deny people their liberty, and the decision to do so is invariably difficult and momentous. A ruling which accelerates a loss of human life is quite another thing. Mr. Justice Chesterman was assisted by an English case decided in September last year[9], which he followed in *not* deciding the case "by a comparison between the respective worth or value of the two lives."[10] The girls' lives were of equal value, but as had been the case before the English Court of Appeal, "the operation was of decided advantage to one [twin without] a *corresponding* detriment to the other"[11] where she was unable to sustain her own life, and was soon to die. Accordingly, His Honour held, as had the English Court of Appeal, that the operation was in the best interests of both girls.

His Honour then considered whether an operation which hastened Bethany's death would amount to the crime of manslaughter. He held it would not. Two provisions of the *Criminal Code* would protect the surgeons: one obliging them, having the care of

[7] *State of Queensland v Alyssa Nolan & Anor* [2001] QSC 174
[8] *ibid* at [7]
[9] *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480
[10] *State of Queensland v Nolan & Anor* at [14]

Alyssa, to operate to avoid danger to her; and the other more generally sanctioning reasonable operative procedures.

The Judge was fortunate to be able to reason to a resolution, from established law, albeit a resolution unpalatable in one tragic respect.

The English case was, factually, remarkably similar. There, twin girls Jodie and Mary, were joined at the pelvis. If they remained conjoined, they would survive only a matter of months. An operation to separate would likely allow Jodie to survive, but certainly cause Mary's death. The operation would also be inconsistent with the parents' catholic beliefs, and they withheld consent. It fell to the doctors to seek a declaration that separation would be lawful.

The first Judge held the operation would be lawful, on the subtle basis Mary's death would be attributable not to the operation as a positive act causing death, but to her no longer receiving blood from Jodie. The anguished parents appealed.

The Court of Appeal agreed the operation would not be unlawful. But the three judges reasoned differently. One considered the operation would be lawful because it would involve the doctors acting in <u>defence</u> of Jodie, where Mary's reliance on her would otherwise be fatal to her. Another Judge put the operation within the realm of necessity –an act necessary to avoid "inevitable and irreparable evil", and <u>inflicting</u> an

[11] *Id*

evil not disproportionate to the evil avoided.[12] The third Judge emphasised the purpose would be to save Jodie's life, not end Mary's. Mary's death would result from her inability to survive independently of her sister.

That starkly disturbing case aroused monumental public interest worldwide. Many people no doubt found it odd that the four experienced Judges involved assigned different reasons for their common conclusion. Surely, many would argue, the law should be clear, predictable, agreed in by all – especially Judges.

Justice Kirby of our High Court has expressed "sympathy with the outcome favoured by the English judges", while saying he was not "wholly satisfied" by any of the legal reasons.[13] Elsewhere it has ungenerously been suggested that "instead of stating the law and then applying the particular facts, the judges arrived at their decision as to what the outcome should be and then desperately sought to find legal principles to support this position."[14]

The fairness of such a charge aside, where the legislature allows the law to remain silent in an area, the judges may be required to extend in order to cover the gap, and their respective approaches may differ: Judges act with independence. The relevant law in England appears not to have been as clear as ours.

[12] *Re A,* at 573
[13] Kirby, the Hon Justice M. 2001. "Law, Human Life and Ethical Dilemmas", Third *Sir Gerard Brennan Lecture,* Bond University, 3 March 2001.
[14] McGrath, G. and Kreleger, N. 2001. "The Killing of Mary: Have We Crossed the Rubicon?", *Journal of Law and Medicine,* vol 8(3), pp 322 - 327

Mr. Justice Chesterman decided yet another extraordinary case in our Supreme Court in September last year – his Honour was required to decide, again virtually at the last minute, whether a woman could remove a sample of her recently deceased husband's sperm for later artificial insemination.[15] The Judge heard the application, again out of hours, at 8pm on 27 September. Any removal of tissue had to occur by 10pm that same day. Prior to 10pm, he refused the application – publishing detailed reasons a fortnight later.

The Judge found the court had no jurisdiction to authorise such an action. He said[16]:

> "Artificial reproduction is part of rapidly changing and expanding medical technology. As science progresses the law will obviously face frequent challenges for which there may be no adequate precedent … Good sense and ordinary concepts of morality should be a sufficient guide for many of the problems that will arise. When they are not, the appropriate legal response should be provided by Parliament which can properly access a wide range of information and attitudes which can impact upon the formulation of law that should enjoy wide community support."

We live in an age of racing medical and scientific development. The rate of discovery fires the imagination. But most of these new possibilities bring with them a raft of ethical conundrums.

[15] *Re Gray* [2001] 2 QdR 35

Stem cells have been described as "the philosopher's stones of biology, magical objects…"[17], with "undoubted potential to deliver extraordinary new treatments."[18] Some condemn stem cell research as evil, involving the criminal destruction of potential life – tampering with God's eternal design.

Stem cells are "undifferentiated" bodily cells capable of developing, if miraculously, into any of the cells found in the human body. Until very recently they were thought to exist only in developing organisms, and stem cells were extracted for research from embryos – a procedure controversial for its necessarily leading to the destruction of potential human life. Typically, research has been conducted on unwanted embryos due for destruction in IVF clinics.

These cells are also remarkable for their ability repeatedly to reproduce. Researchers study "stem cell lines" – continually increasing pools of genetically identical cells. The dream is to harness the cells' potential to develop into specific body tissues, enabling their transplantation into human beings to cure degenerative conditions such as Parkinson's and Alzheimer's, blindness, cancer, multiple sclerosis.

But how far should this go? What conditions might be eradicated? Do we include points of social as well as medical differentiation? What is to be characterised as abnormal, unacceptable? Who decides? To what extent should we contemplate, let alone facilitate, the eradication of human differences? A prospect of eventual uniformity does not enthral!

[16] *Ibid* at 42

Researchers have responded to the outcry against embryo destruction by emphasising the rights of the living. Per University of Pennsylvania bioethicist Arthur Caplan: "We should respect every embryo, but I'm not going to look at a person in a wheelchair and say, 'Sorry, you have to stay in that wheelchair for the rest of your life because of my belief that the frozen embryos in my liquid nitrogen might have become life.'"[19]
I think most of us would sympathise with that view. But are we unleashing something which, while curative, may also terrorize?

Ethical considerations are further clouded where stem cell therapies would potentially be rejected by transplantees' bodies, as foreign material – as occurs in organ transplant cases. Researchers have suggested an astonishing and highly debatable solution – therapeutic cloning. Create the clone of a patient, and harvest the stem cells of the clone. They will be genetically identical to the patient's own cells, so the body will accept them. Related grave moral questions have inspired passionate argument,[20] radical reaction: witness an American company's reportedly supplying copyright protection over celebrities' DNA to prevent any risk of their being cloned by adoring fans,[21] and there have been strong legislative responses.

These expanding fields – minefields of ethical considerations – challenge governments, many of which have banned cloning, for example. It falls to executive government to safeguard the people's interests. The Queensland Executive has

[17] Easterbrook, G. 1999. "Medical Evolution", *The New Republic*, 1 March 1999, pp 20 - 25
[18] Beale, B and Bartlett, P. 2001. "One cell swoop", *The Bulletin*, 28 August 2001, pp 20 - 24
[19] quoted in Easterbrook, G, 1999, p 23
[20] see for example Kass, LR, 1997. "The Wisdom of Repugnance", *The New Republic*, 2 June 1997, pp 17 – 26;

responded, introducing on September 1 a Code of Ethical Practice for Biotechnology and other initiatives which conform with national approaches.

A uniform national approach is obviously desirable. The prospect of a patient's "forum shopping" from State to State, even nation to nation, is offensive. Developing a framework properly reflecting both public and scientific values is not straightforward, but must be attempted. As well put by one commentator (Paul Ramsay):

> "A man of frivolous conscience announces that there are ethical quandaries ahead that we must urgently consider before the future catches up with us. By this he often means that we need to devise new ethics that will provide the rationalisation for doing in the future what men are bound to do because of new actions and interventions science will have made possible. In contrast a man of serious conscience means to say in raising urgent ethical questions that there may be some things that men should never do. The good things that men do can be made complete only by the things they refuse to do."[22]

Or as Edmund Burke said, at an earlier time, "it is sufficient for the triumph of evil that good men should do nothing".

The impact of these arresting medical advances, their wonderful potential for good, their terrifying capacity for evil, remains to be seen. My point tonight is that novel

[21] Smith, SJ. 2001. "Whose body is it anyway?", *The Times*, 4 September 2001, accessed via www.thetimes.co.uk

questions of legal rights and duties will undoubtedly command court consideration. If such new fields are given at least "framework" legislative treatment, your (unelected) judges will be able to provide optimal judicial leadership, which I would regard as leadership most aptly reflecting broad "community values" – assuming they may be accurately discerned: and that itself can be a matter of great difficulty.

I conclude with the question often asked, should Judges make law? The answer is in my view clearly "no": that falls to the legislature, the people's elected representatives, so that if the people disapprove of the laws so made, they have the remedy of the ballot box. Accordingly, so far as practicable, the Parliament should seek to cover, by legislation, the multiple scenarios thrown up by current and forseeable developments. But it is fanciful to think all can, in this dramatically developing society, be foreseen.

In any ultimately esoteric situation, our courts will continue to show leadership, by responsible extension of the common law. Those who are inclined to be critical of the courts will I hope recognise that: with increasing frequency, the courts grapple with imbroglios which leaders of the era of Sir John Owen would have considered beyond even the most vivid imagination! Be reassured your judiciary will continue to do their level best!

[22] Paul Ramsay quoted in Kass, L. 1997. P 26