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“Public interest and public policy: unruly horses alike?”

Chief Justice Paul de Jersey AC

We proclaim service of the public as the distinguishing mark of a profession, what distinguishes a profession from equally respectable callings. One important manifestation of that for the lawyer is the predominance of the duty owed to the court and the administration of the law, predominant, that is, over the duty to uphold the interests of the client. But my offering an example leaves unanswered the difficult question, which is how one distils the content of the “public interest”. It is arguably odd that the essence of a profession should rest in a notion so inexact.

Desirably, public policy should reflect the public interest. The public interest should inform public policy which then leads to the crafting of laws which are consistent with and promote commonly held community values. Just as the public interest is an inexact concept, so likewise determining what values most people uphold or aspire to is difficult if not impossible. Of course some are clear: for example, that the intentional killing of a fellow human being is a heinous crime; that the sexual abuse of other persons is intolerable; that official corruption should be uncovered and punished. But in our increasingly diverse community, how could one discern any commonly held values in relation to issues so complicated and subtle as euthanasia, the provision of “safe” drug injection rooms, stem cell research, the treatment of illegal immigrants, capital punishment? One could not confidently assert a “community” position on many such issues in Australia, and internationally, as globalisation constricts the planet to a “village”, diversity in values nevertheless persists, as illustrated, for example, by divergent Western/Islamic treatment of women.

In 1824, in *Richardson v Mellish* 2 Bing 229, 252 an English Judge (Burrough J) expressed the metaphor often since repeated, when counselling against reliance on public policy, that

"...it is a very unruly horse, and when once you get astride it you never know where it will carry you...it is never argued at all but when other points fail."

If public policy is an unruly horse, then that ill-disposition also attends the public interest – or at least its ascertainment. And assuming one could with confidence distil what is in the public interest, and craft an appropriate public policy, how would one assuredly keep it up-to-date, for as Dixon J pointed out in *Stevens v Keogh* (1946) 72 CLR 1, 28:

"notions of public policy are not fixed but vary according to the state and development of society and conditions of life in a community."

With the rapid change besetting our contemporary society, those who undertake these tasks face considerable challenge.

Individual people develop values through exposure to a variety of influences, peers, family members, experience of the community, the media, community service organisations, churches, literature... But to develop laws to regulate society which appropriately reflect the public interest, we need obviously to be able to determine it reliably: to determine not just the individual view, but the view which at least a substantial majority of the people consider to be right. I have emphasized the difficulty of the task. Yet it must be undertaken. It would be impracticable to seek to canvass the public view by referendum whenever a significant issue were to arise. And so discerning and promoting the public interest falls largely to the legislative and judicial arms of government. They do however proceed quite differently.

The parliament carries the substantial burden, as is right, because should the people disagree with the judgment of their elected representatives, they may always invoke the sanction of the ballot box. Party political considerations necessarily limit the parliament's capacity to discern and implement public interest based policy with the confidence that it is what most of the people want; and conscience votes are rare. But the parliamentary system remains our primary determinant as to what should be considered in our interest, and it provides the best mechanism the community has been able to devise in that regard.

The courts of law are daily concerned, in some way or other, with questions of values, the public interest, public policy. When Judges exercise discretions, they carry out an evaluative process which involves an issue of ultimate fairness. Judges and juries regularly delineate the acceptability of aspects of human behaviour. They determine, for example, what is indecent for the purposes of the criminal law, by reference to what they regard as "contemporary...community standards" (*Crowe v Graham* (1967-8) 121 CLR 375, 399). They determine the level of damages to be awarded to an injured claimant, and thereby, as put by the High Court, "give weight to current general ideas of fairness and moderation" (*Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118, 125). More recently in *Coyne v Citizen Finance Ltd* (1990-1) 172 CLR 211, 240, McHugh J expressed the view that "by reason of its composition, a jury is ordinarily in a better position than a (Judge) to divine the community's view as to what is a reasonable award of damages in a defamation action". Judges and juries, by their findings, limit the scope of "fair comment" and other defences in defamation proceedings, by reference to what they see as reasonable community expectations. Public interest considerations may bear on determining whether a claimant for relief has sufficient interest in the subject matter, or "standing" (cf. *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551). Regularly in the criminal court, Judges invoke considerations of public policy in determining whether or not to admit incriminating evidence unlawfully obtained (*Ridgeway v R* (1995) 184 CLR 19). It sometimes falls to Judges to determine whether certain contracts are contrary to public policy and therefore void. As Isaacs J noted in *Wilkinson v Osborne* (1915) 21 CLR 89, 97, the court looks for "some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognize and enforce." But His Honour then warned: "The court is not a legislature: it cannot initiate the principle; it can only state or formulate it if it already exists." Striking down contracts on the basis they posit an unreasonable restraint of trade involves courts dealing with sometimes complicated issues of public policy, as recently illustrated by the High Court in *Peters (WA) Ltd v Petersville Ltd* (2000-2001) 205 CLR 126.

It also sometimes falls to Judges to expand existing avenues for legal recovery, and policy considerations often inform that process. The best example concerns the duty of

care in tort. In *Perre v Apand Pty Ltd* (1999) 198 CLR 180, Gleeson CJ spoke of constraint "to keep the law of negligence within the bounds of common sense and practicality" (p 192), and Gaudron J directly addressed what she styled "policy considerations" (p 199).

The court process throws up unique cases which highlight the immensity of judicial responsibility. Sometimes Judges are criticized when they are perceived to have gauged the public interest wrongly, especially in areas of high social policy, such as indigenous rights and the field of anti-discrimination. Some critics feel uncomfortable that non-elected Judges should have the jurisdiction to make such decisions. The criticism is inevitable, and generally not well-founded.

The "Tampa" case excited a lot of critical commentary. It was, conversely, a case where the court applied the law, but was criticized for meddling in matters of policy. The events are reasonably fresh: the 26th August rescue last year 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 11th September ruling, invoking habeas corpus, that they be returned to Australia (*Victorian Counsel for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) FCA 1297) – a ruling described in the press as "stunning" 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 (*Ruddock v Vadarlis* (2001) FCA 1329).

The Federal Court Judges restricted their consideration of that politically volatile issue to the legality of Commonwealth actions, leaving aside questions of policy. Their published reasons show that. Nonetheless they were trenchantly criticized for entertaining the matter at all. The critics suggested 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 (Creyke, McMillan: "No place for dispute in court", *The Australian*, 25 September 2001, p 13): 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 individual opinion as law; and the case was instituted at a time when the arguments could effectively have been aired in the political forum (McGuinness: “Courts may be high, but that doesn’t make them mighty”, Sydney Morning Herald, p 8).

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 primary 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 rested with 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. Public policy, as perceived by Judges informed by current philosophical views, has markedly influenced the development of the law of negligence. If the parliament should consider the predominant, responsible public view to be that recovery has become too liberal, then parliament has the capacity to limit recovery, a process through which parliaments around the nation are currently proceeding. In my view where public opinion is the appropriate determinant, it is generally 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. The courts of law, with their established focus on fact finding and the application of precedent, are not generally well suited to determining difficult issues of public policy.

But history confirms the courts necessarily will continue to play a substantial role in this field. Last year, the Supreme Court of Queensland entertained two cases which dramatically raised issues of public interest and public policy. In May, Mr Justice Chesterman was called upon to decide whether an operation to separate Alyssa and Bethany Nolan would be lawful, notwithstanding it would certainly result in Bethany’s death. They were joined at the head, and shared bloodflow despite possessing separate brains. Bethany lacked kidneys and bladder, kept alive by Alyssa’s single kidney

removing waste from her bloodstream. Prior to 25th May, 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 11.00pm on 25th 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 11.00pm, the court made its order close to midnight. The Judge published his detailed reasons five days later.

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". 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 have to 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. The Judge was assisted by an English case decided in September the previous year (re A (2001) 2 WLR 480), which he followed in not deciding the case "by a comparison between the respective worth or value of the two lives". The girls' lives were of equal value, but as had been the case before the English Court of Appeal, "the operation was a decided advantage to one (twin without) a corresponding detriment to the other", where she was unable to sustain her own life and was soon to die. Accordingly, His Honour held that the operation was in the best interests of both girls. Having analysed relevant Criminal Code provisions, he also ruled that an operation which hastened Bethany's death would not amount to the crime of manslaughter.

The earlier English case concerned twin girls Jodie and Mary, joined at the pelvis. That starkly disturbing case aroused monumental public interest worldwide. A peculiarity of the case, where the primary Judge's ruling was upheld by three Judges of Appeal, was 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 favored by the English Judges", while saying he was not "wholly satisfied" by any of the legal reasons ("Law, Human Life and Ethical Dilemmas", the third Sir Gerard Brennan Lecture, Bond University, 3 March 2001). 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" (McGrath, Kreleger: "The Killing of Mary: have we crossed the rubicon?", *Journal of Law and Medicine*, Vol 8, pp 322-327).

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.

Mr Justice Chesterman decided yet another extraordinary case in the Supreme Court of Queensland in September 2002. 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 (re *Gray* (2001) 2 Qd R 35). The Judge heard the application, again out of hours, at 8.00pm on 27 September. Any removal of tissue had to occur by 10.00pm that same day. Prior to 10.00pm, he refused the application, publishing detailed reasons a fortnight later.

The Judge found the court had no jurisdiction to authorize such an action. He said:

"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. Many of these new possibilities bring with them a raft of ethical conundrums. The parliament is challenged to provide the courts with an adequate legislative framework.

Insofar as courts from time to time extend the boundaries of legal recovery, they have tended to proceed incrementally, gradually, taking short steps rather than leaps. Such extensions have usually depended on the court's perception of the public interest. The best known example is *Donoghue v Stevenson* ((1932) AC 562) where the House of Lords in 1932 deemed the manufacturer of a bottle of soft drink, contaminated by the presence of a decomposing snail, liable to the ultimate consumer. Lord Atkin famously reasoned from the biblical admonition that we should love our neighbor, to the point where he answered the question: "Who, then, in law is my neighbor?" – setting in train, by reference to social policy, the path which the development of the law of negligence has followed over seven decades.

In this State, the Supreme Court recently extended the law of negligence through two important decisions: *Hancock v Nominal Defendant* (2002) 1Qd R 578, as to the liability of a negligent driver to the parent of the deceased victim of his driving, the parent learning of the death of the child on the following day and suffering psychiatric injury; and *Bowditch v McEwan* (2002) QCA 158, as to a mother's liability in negligence to her child injured during her pregnancy through an accident as she drove her motor vehicle. Each case involved reference to policy, substantial in the case of *Hancock*.

Judges are sworn to do justice "according to law", and that is a critically important limitation. The "law" to which the oath refers is the law enacted by the parliament, together with the Judge-made, or "common law". Adherence to the oath should mean the law is certain, predictable and consistent, that decisions are not dependent upon any idiosyncratic notions of the particular Judge hearing the case. Acknowledging that making the law is predominately the duty of the parliaments, Judges have been

circumspect about extending the common law, and especially in reliance on public policy, or a view of the public interest. In 1967, Kitto J reminded Judges of the need for that circumspection (*Rootes v Shelton* (1967) 116 CLR 383, 386-7). Referring to an intermediate appellate court's decision, he said:

"I think it is a mistake to suppose that the case is concerned with "changing social needs" or with "a proposed new field of liability in negligence...to describe the case in terms of "judicial policy" and "social expediency" is to introduce deleterious foreign matter into the waters of the common law – in which, after all, we have no more than riparian rights."

Consistently, even in discretionary situations, courts have, over the years, done their best to formulate guidelines as to the exercise of the discretion. Ideally, a lawyer advising a client, on the basis of facts truly represented, should be able, in his or her office, to advise the client of the likely result. But there will always be cases which raise novel twists, and then Judges will decide in accordance with the relevant established framework, embellished as necessary by the Judge's views drawn from what he or she regards as reasonable community expectation.

The most startling example of the daily exercise by courts of discretions allowing comparatively wide scope for individual determination is in the sentencing of criminal offenders. The parliament of this State has commendably respected the wisdom that appropriate results are best secured through the exercise of a comprehensively informed but generally unfettered judicial discretion. This is an area where Judges are acutely conscious of the need to gauge reasonable community expectations. The legislature has been prescriptive to the extent of imposing maximum penalties and, for example, listing considerations to which the sentencing Judge must have regard. But beyond that, it generally falls to the Judge to determine penalty, and he or she would hope thereby to reflect the public interest. Judges are sometimes criticized for undue leniency, where the passion of the moment blurs appreciation of the conscientiousness with which the Judge has approached the task. Judges cannot bend to every breeze that blows. As Brennan J said in *Dietrich v R* (1992) 177 CLR 292, 319, "contemporary values" which should relevantly inform the judicial process are not "the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian

community." But the question remaining unanswered is how those relevant values are to be gauged.

The iconic Sir Samuel Griffith, in *Deakin v Webb* (1904) 1 CLR 585, 625 graphically counselled how we should not proceed:

"I hope that the day will never come when this court will strain its ear to catch the breath of public opinion before coming to a decision in the exercise of its judicial functions. If it does so, it will be perhaps the practice, if ever there is a court weak enough, to adjourn the argument simply in order that public meetings may be held, leading articles written in the newspapers, and pressure brought to bear to compel the court to shirk its responsibility, and cast its duty upon another tribunal."

Those words are as apt, a century later, as they were at the inauguration of the High Court. Public policy is potentially an unruly horse, as is determining the public interest on which it is based.

Serving the public interest is the essence of professionalism. The public interest, and the public policy it desirably informs, are invoked by courts in their incremental development of the common law. In their evaluative judgments, courts daily address considerations of fairness and the public interest. While gauging the content of the "public interest" is, on some issues, and at some historical points, difficult, courts of law must obviously continue to do their best, and the people have the ultimate safeguard that should their elected representatives consider the courts have gone grievously wrong, there is always the possibility of legislative intervention. The people's unelected 'representatives' acknowledge that ultimate responsibility of those who need face the ballot box.