THE FUTURE OF LITIGATION -

LOOKING AHEAD TO THE NEXT CENTURY

OCCASIONAL ADDRESS TO GRADUATES

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by

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I should like to add my congratulations to those of you who are graduating today and to those of you who survived - supporters, members of the family and well wishers - the long journey towards graduation. It is 35 years since I graduated. The most I can wish you is that in utilising the degree you have received today, in following the profession of the law, you derive as much pleasure from it as I have.

There is a popular perception that the practice of law is dull and boring. Progression is in a well-settled rut. What I should like is to dispel that illusion by contemplating with you some of the challenges that lie ahead. You are entering upon the practice of a profession which by the turn of the century, in a mere nine years, will confront the eager, creative lawyer with any number of new challenges. Taking litigation as an example, let me survey with you a spectrum of disputes that may be awaiting determination in the year 2000.

First, a claim for compensation by the dependants of travellers on a space shuttle to the Moon which had been lost en route.

Second, an application for judicial review by the owner of an industrial establishment against a refusal to permit the installation of a nuclear furnace.

Third, a claim for relief against infringements of its multi-cultural heritage, guaranteed by the Australian Bill of Rights, by a group of persons, members of a small religious community from an Asian country.

Fourth, an application for judicial review by an elderly patient who had been refused a necessary but highly expensive organ transplant.

Fifth, a criminal charge against a rogue computer operator for manipulating a computer system in the course of which the inertial navigation systems of underwater passenger craft were dislocated involving heavy loss of life and property.

I have enumerated these examples, admittedly somewhat remote from our present everyday experience, simply to suggest that the natures of disputes falling for consideration are bound to be substantially different from those making up the staple fare of the courts' business at present. No doubt by the year 2000 the claims for compensation for injuries suffered in motor vehicle accidents will be resolved by agencies and means completely unlike the court proceedings of today. Similar change is bound to have come to claims arising out of industrial accidents and perhaps even in respect of injuries suffered from faults in products manufacture. I must admit that I threw in the first of

the examples given primarily to raise the question of how far no fault accident compensation will have progressed. Will the inevitable no fault liability for accidents have extended yet to inter-planetary travel?

Instead of the present-day focus on claims for damages for personal injuries, disputes will concern more the social rights of the citizen vis a vis the State and the rights of members of the community to have their social and physical environment protected from the effects of detrimental action, or inaction, both by the State and other members of the community. Such disputes will involve the tribunal considering them in the evaluation and determination of social issues which are to a large extent either expressly rejected by courts today as properly matters for determination or, if inescapable, determined without a full acknowledgement of their role in the decision-making process.

The fourth example in particular is intended to illustrate disputes which will throw up for consideration the kinds of issues with which Australian courts do not customarily grapple otherwise than perhaps in passing. The United States decisions that a patient in a hospital will not be permitted to reject the intake of food, that a child will be forced to submit to treatment which will prolong a life of agony and misery both for the child and the parents are forerunners of the range of issues

which society will require the courts or like agencies to resolve. Even in the United States today most of the right-to-die cases have focused on technical definitions of death and failed to grapple with the social and moral concepts which are fundamental to the decision made.

The magnitude of the problem can be seen in the dissenting judgment of Brennan J (with whom Marshall and Blackmun JJ agreed) in Cruzan v Director, Missouri Department of Health (1990) 111 L Ed. 2d 224, when he said (p273):-

> "As many as 10,000 patients are being maintained in persistent vegetative states in the United States, and the number is expected to increase significantly in the near future. See Cranford, supra n 2, at 27, 31. Medical technology, developed over the past 20 or so years, is often capable of resuscitating people after they have stopped breathing or their hearts have stopped beating. Some of those people are brought fully back to life. Two decades ago, those who were not and could not swallow and digest food, died. Intravenous solutions could not provide sufficient calories to maintain people for more than a short time. Today, various forms of artificial feeding have been developed that are able to keep people metabolically alive for years, even decades. See Spencer & Palmisano, Specialized Nutritional Support of Patients - A Hospital's Legal Duty?, 11 Quality Rev Bull 160, 160-161 (1985). In addition, in this century, chronic or degenerative ailments have replaced communicable diseases as the primary causes of death. See R. Weir, Abating Treatment with Critically Ill Patients 12-13 (1989); President's Commission 15-16. The 80% of Americans who die in hospitals are 'likely to meet their end . . . "in a sedated or comatose state; betubed nasally, abdominally and intravenously; and far more like manipulated objects than like moral subjects."' A fifth of all adults surviving to age 80 will suffer a progressive dementing disorder prior to death. See Cohen & Eisdorfer, Dementing Disorders, in The Practice of Geriatrics 194 (E. Calkins, P. Davis, & A, Ford eds 1986).
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> '[L]aw, equity and justice must not themselves quail and be helpless in the face of modern technological marvels

presenting questions hitherto unthought of.' In re Quinlan, 70 NJ 10, 44, 355 A2d 647, 665, cert denied, 429 US 922, 50 L Ed 2d 289, 97 S Ct 319 (1976). The new medical technology can reclaim those who would have been irretrievably lost a few decades ago and restore them to active lives. For Nancy Cruzan, it failed, and for others with wasting incurable disease it may be doomed to failure. In these unfortunate situations, the bodies and preferences and memories of the victims do not escheat to the State; nor does our Constitution permit the State or any other government to commandeer them. No singularity of feeling exists upon which such a government might confidently rely as parens patriae. The President's Commission, after years of research, concluded:

> 'In few areas of health care are people's evaluations of their experiences so varied and uniquely personal as in their assessments of the nature and value of the processes associated with dying. For some, every moment of life is of inestimable value; for others, life without some desired level of mental or physical ability is worthless or burdensome. A moderate degree of suffering may be an important means of personal growth and religious experience to one person, but only frightening or despicable to another.' President's Commission 276.

Yet, Missouri and this Court have displaced Nancy's own assessment of the processes associated with dying. They have discarded evidence of her will, ignored her values, and deprived her of the right to a decision as closely approximating her own choice as humanly possible. They have done so disingenuously in her name, and openly in Missouri's own. That Missouri and this Court may truly be motivated only by concern for incompetent patients makes no matter. As one of our most prominent jurists warned us decades ago: 'Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficient. . . .The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.' Olmstead v United States, 277 US 438, 479, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) (Brandeis, J., dissenting)."

The ethical and philosophical issues which are thrown up by the cases will truly test the courts. The question is examined in a most thoughtful article by Professor Smith "Re-Thinking Euthanasia and Death with Dignity; A Transitional Challenge" (1990) 12 Adel. 2. R. 480.

A judgment which undertakes the exercise of comparative evaluation may be seen in Superintendent of Belchertown State School v Saikewicz 370 NE 2d 417. Mr. Saikewicz was a mentally retarded person suffering from leukaemia. The question the Court was called upon to decide was whether he was to be given chemotherapy in an attempt to prolong his life or whether he would be allowed to die. In fact, the reasons for judgment were given after he was allowed to die "without pain or discomfort" (ibid p.422). The appearances in the case are of some interest. As well as two State Assistant Attorneys General and a Specialist Assistant to the Attorney General, two lawyers described as Legal Interns appeared for the plaintiffs. Three Federal Assistant Attorneys General appeared as amicus curiae for the Civil Rights and Liberties Division of the Department of Attorney General, as well as other lawyers as amicus curiae for the Mental Health Legal Advisors Committee, the Massachussetts Association for Retarded Citizens Inc. and for the Developmental Disabilities Law Project of the University of Maryland Law School. In its unanimous judgment the Supreme Judicial Court of Massachusetts seemed to accept that "the law always lags behind the most advanced thinking in every area. It must wait until the theologians and the moral leaders and events have created some common ground, some consensus" (ibid p.423). The briefs filed by groups such as the amicus curiae must be instrumental in informing the Court of present day thinking and the extent of

consensus. For immediate purposes, I note the matters which the Court considered appropriate to weigh in the balance in coming to its conclusion. On the one hand, a citizen is entitled to be free of non-consensual invasion of bodily integrity. The Bill of Rights protects the right to privacy against unwanted infringement of bodily integrity. On the other side are the interests of the State. Firstly, there is the interest in the preservation of human life. The balancing exercise is that "the interest of the State in prolonging a life must be reconciled with the interest of an individual to reject the traumatic cost of that prolongation" (ibid p.425). The State has an interest in protecting third parties, particularly minor children. For this reason in Application of the President and Directors of Georgetown College Inc 331 F 2d 1000, the Court granted permission to perform a life-saving blood transfusion, which was contrary to the patient's wishes, by reason of religious beliefs, in order to avoid the effect of "abandonment" in the minor child of the patient. The State also has an interest in preventing suicide and in maintaining the ethical integrity of the medical profession. It was after balancing these competing interests and rights that the Court held that Mr. Saikewicz should be allowed to die.

In vivid contrast with this careful delineation of competing considerations and their evaluation in reaching a conclusion was the treatment of the dispute between Mrs. Del Zio and Columbia

University Presbyterian Hospital. She wished to undergo a voluntary in vitro fertilization procedure. Commenting on the ensuing legal proceedings a commentator in the American Bar Association Journal (1982) Vol.68 p.1094 at 1096 described the adjudicatory process thus:

> "During the trial the qualifications and scientific credentials of doctors who had agreed to perform the procedure became the subject of debate. Attention was focused not only on their past performance as researchers but also on particular technical decisions - the use of temperature charts to determine the time of ovulation and of test tubes rather than petri dishes for fertilization. Relatively little attention was paid to what some have seen as the basic issue of the case: the conflict between Mrs. Del Zio's desire to have a baby, even with the aid of controversial scientific techniques, and Columbia University's prior agreement with the federal government not to permit human experimentation without adequate review. The litigation reduced the ethical issues involved in in vitro fertilization to a debate about what constitutes competent clinical work".

Adverting to the fourth of my hypothetical disputes, how will a decision-maker in Australia in the year 2000 deal with the moral question whether it is ever permissible that life prolonging treatment should be refused where the citizen desires it? Is the State obliged to supply hospitals, doctors and other facilities to prolong a citizen's life by a mere matter of years? Is it permissible to take into account the social usefulness of the citizen and draw different conclusions in the case of another Einstein as against a prisoner who spends his days watching TV? To what extent, if at all, is it permissible

to take cost into account? If and when such questions are posed for decision, not only will it be necessary to identify the appropriate principles to guide the decision-maker but the nature and composition of the decision-making body will be of crucial importance as will the means by which the decision-maker will collect the material to guide its conclusions. As you know, a United States Court frequently has the assistance not only of amicus curiae who present wide-ranging community viewpoints, but also, of the so-called Bandeis brief. So called after an eminent judge of the United States, the documents are designed to draw the attention of the Court to social and community facts and circumstances which may be affected by the decision of the Court.

The nature of disputes will also call on the decision-maker to exercise judgment in respect of a wide range of technological questions of great complexity. Whilst no doubt the decision-maker in the year 2000 will be much more literate in the working of computers than we, as a general body of judges, are today, a problem such as the fifth dispute I have posed should fully extend even such forward-looking, socially aware, technically proficient tribunal. It will be necessary to understand not merely the day to day mechanical application of computers but also their operation in submarine craft as well as the navigational devices. The example of the dispute secondly given neatly illustrates the interaction of social and technological disciplines in the resolution of disputes.

If the type of issues in the examples given will indeed prove representative of the disputes that will arise for determination in the year 2000, a number of question are thrown up for consideration:

1. What methods of dispute resolution will need to be available?

2. What should be the composition and make-up of the dispute-resolving authority?

3. What should be the general nature of the procedure practised by the dispute-resolving authority?

4. What method should the dispute-resolving authority follow for the purpose of eliciting information and determining the facts?

5. What role, if any, should legal representatives play in the proceedings?

6. What should be the role of the State in the provision of financial assistance to the parties to enable them to participate effectively in the resolution of the dispute?

The purpose of this address will have been sufficiently served if the questions posed do correctly identify some of the questions calling for consideration and engender discussion as to the appropriate answers.

For a number of reasons the methods of dispute resolution practised in the year 2000 should represent an enlargement on the options presently available. The reasons include the ever-increasing number of disputes, the community requirement that disputes be resolved cheaply and expeditiously and the fact that much more sophisticated social and technical matters will be posed for determination.

The system of administration of justice presently in place will need to be re-orientated to a substantial extent to cope with the exigencies of the year 2000. You will alll have a role to play. It is your qualification to play a part that we are celebrating today.

Let me wish you the ultimate in the pursuit of any lawyer's life. I do hope that each and every one of you will have a great deal of pleasure and enjoyment. Even as you are harried and badgered by the demands of judges, clients, government departments, I hope you will enjoy the work you are doing.

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