

**“SHAPING THE DESTINY OF THE LEGAL PROFESSION
FOR SUCCESS IN A PLANETIST FUTURE”**

**Commentary on the Address to the Bar Association of Queensland/
Queensland Law Society Annual Symposium by Dr Peter Ellyard**

Some of you here may remember the film *Big Country*, a western whose stars included Burl Ives. A few of you may even remember his impressive girth. In the film he was a cowboy – and a villain. In real life, apart from his acting, he made money from singing folk music and country and western. It is only his example that has given me the courage to stand up here before all of you and call myself a cowboy.

On Dr Ellyard’s analysis, most barristers, apart, of course, from the successful mediators, could be described as cowboys. I am sure, however, that some of us did, and still may, aspire to be, if not cosmonauts, then at least astronauts.

There is a lot to contemplate in Dr Ellyard’s crystal ball. We have all been affected by globalisation, technological change and the increased recognition of ethnic diversity as part of an overarching global whole in his concept of tribalisation.

One contribution I would like to make to the debate about multi disciplinary practices is to raise the question whether firms should become one stop shops or, instead, equip themselves better to form temporary alliances for particular cases or projects? The former US Secretary of Labour, Robert Reich, in his book, *The Work of*

Nations : Preparing Ourselves for 21st Century Capitalism, saw the future of work more in the formation of such alliances. Is there really a future for conglomerate firms of consultants that cross the boundaries of all the disciplines that the law now touches? Would all those differing cultures meld? Or should lawyers stick to their knitting, forming alliances with other professionals only where needed?

I believe there is a real concern that lawyers' core values may be eroded if their firms are transformed into corporations whose only objective is to make money. This is a view shared by many American lawyers. They have, so far, resisted pressure to change their structures in that fashion. They are concerned that if they do have MDPs that they remain ethically sound and focussed on the profession's core values. We should be also.

Let me examine some other aspects of Dr Ellyard's brave new world. We can see that it is less than tempestuous. It has such creatures in it as those who believe in communitarianism, interdependence and conflict resolution through negotiation rather than confrontation. It eschews individualism and independence but fondly expects democracy rather than the autocracy he associates with the cowboy culture.

Now these are false dichotomies. And it is here that I find it most difficult to agree with Dr Ellyard. In disassociating individualism and independence from democracy and associating democracy only with communitarianism and interdependence he does democrats everywhere a disservice. One of the great strengths of a democracy

operating under the rule of law is its recognition of individual rights - rights that should not be at the mercy of a majority temporarily in power.

Let me remind you of some of the modern legal philosopher John Rawls' views on justice, expressed originally in *A Theory of Justice* (1971). His approach, at pp. 3-4, is that each person "possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests".

He went on to contrast his views with the utilitarian approach at p.31:

"Hence in justice as fairness one does not take men's propensities and inclinations as given, whatever they are, and then seek the best way to fulfil them. Rather, their desires and aspirations are restricted from the outset by the principles of justice which specify the boundaries that men's system of ends must respect. We can express this by saying that in justice as fairness the concept of right is prior to that of the good."

In my view democracy and social groups are unlikely to be as vigorous in a solely communitarian and interdependent society as in a society that also recognises individual rights and ensures that they can be protected against the tyranny of the

majority. An overemphasis on the power of the corporate state can lead down paths that Germany and Japan trod in the not so distant past. And I rather think that the current strength of the economies of the USA, UK, Ireland and Australia owes something to their strength in diversity rather than in any failure of Germany and Japan to capitalise on their allegedly more communitarian cultures to reform their financial sectors. May it not be instead that those countries have failed to take the necessary steps to change their economies because of a perceived need for a consensus view before thoroughly entrenched interests of the corporate State are affected?

Values such as freedom of the individual, equality before the law, certainty and predictability of judicial decisions, good faith, fairness, reasonableness and acting in good conscience permeate our legal system¹. Sometimes those values provoke what I suppose Dr Ellyard would describe as a communitarian response or an interdependent response. It has been said for generations, for example, that a good solicitor is one who keeps his clients out of court and settles their disputes if he or she can. That has always been true and will remain truthful. The facility with which those ends can be achieved has been improved by resort to more structured mediation by barristers and solicitors who are notably effective in those roles. That too will continue to be the case.

¹ See McHugh J's speech to the Australian Bar Association conference in London on 5 July 1998; <http://www.highcourt.gov.au/speeches/mchughj/london1.htm>

I have no doubt also that the forces of globalisation and technological change will result in profound changes to the legal systems within which we operate. National boundaries will become less important as instanced in dramatic fashion by the litigation involving General Pinochet of Chile in the House of Lords last year. Internet enabled e-commerce will lead to further harmonisation of international commercial and taxation laws and regimes for enforcement of them.

It may be that the federal system of government in Australia will undergo rapid change but Dr Ellyard may pardon my scepticism about the speed of any change when one considers the result of last year's referendum. There has to be not only a desire for change but agreement on the direction of change to satisfy the people of this stubborn democracy.

Let me go back then to what I said before about the importance of individualism and independence in the sustaining of democracy and the rule of law and illustrate what I wish to say by reference to 200 year old events and the role of the individual advocate rather than speculation about the amazing possibilities for our future.

What is the role of the advocate? David Pannick QC, a prominent English barrister, answers that question:

“[T]o ensure that in a legal system in which disputes are decided by rational debate, the viewpoints of those most affected are explained so that the court can properly decide where legal right lies. The advocate exemplifies the valuable principle that there is always another point of view, a different

perspective, a contrary argument, of which account should be taken before judgment is delivered.

...

[I]t is important to appreciate the substantial contribution to justice made by the advocate. The essential principles of advocacy - a duty to act for any client, irrespective of the merits of his cause; an obligation to speak out on his behalf without fear or favour; and a legal immunity from action for what is said in court - are central to equality under the law."

I believe there will continue to be a very important role for the advocate who, by the force of his or her arguments, promotes equality under the law by adhering to those principles.

Few of us have the skill to do that in the public arena as well as Thomas Erskine did in England two centuries ago. He was one of the greatest barristers of his or any time.

Panicked by the intellectual and political ferment created by the French Revolution, the British government instituted a series of prosecutions in the 1790s for sedition against proponents of human rights and parliamentary reform such as Tom Paine and Thomas Hardy. The public and jurors were initially unsympathetic to the accused. Erskine defended Paine brilliantly but unsuccessfully. Thomas Hardy and others were later charged with treason. Erskine defended them successfully for no fee and by the force of his advocacy swung public opinion around to understand that treason was strictly to plot against the King's life, not simply offend his government.

“I am not vindicating anything that can promote disorder in the country,” Erskine said, “but I am maintaining that the worst possible disorder that can fall upon a country is, when subjects are deprived of the sanction of clear and positive laws.” By doing so, as an individual, he was instrumental in maintaining the rule of law when the reign of terror in France could easily have caused a lasting, tyrannical over-reaction in Britain.

Now those were events that occurred in the midst of a world undergoing profound change, particularly in France and on the continent, but also in England. That country was in the early throes of the industrial revolution and was a society where ideas about the rights of man had been fuelled not only by events in France but also by the earlier revolution in America.

The critical thing to remember is that even in these days of profound change there are core human values. We should not lose sight of them. Justice is one of the most important of them. You will still be asked to assist in the administration of justice. You will do so by running cases where your client has been wronged, demands a remedy and is fobbed off by the opponent. They may include cases where a corporate state quite wrongly wishes to crush dissent or where a powerful corporation has ridden roughshod over your client’s rights or where an individual has done a grievous wrong to another.

They will not all be cases where the conflict can be resolved through negotiation. You will be able to use your imagination to assist your client to achieve his or her ends in a number of ways not just through litigation. Nevertheless you will still be required to stand there in support of some individual who may be lonely but who is right and deserves justice and who can only get it through the use of your skills as a lawyer.

The only circumstance I foresee where our services in active and vigorous defence of the ideal of justice for all would not be needed is if we truly achieve heaven on earth. Forgive me for being sceptical but I think that we have much further to go than the next 20 years before we achieve that end.

For an alternative view of our possible futures and to conclude as I began, cinematically, let me remind you of the French film director Luc Besson's prediction of conflict resolution strategies in the slightly more distant future, the 23rd century, in his recent film *The Fifth Element*. Those of you who are unfamiliar with the film may be encouraged in your expectations by the knowledge that its star is Bruce Willis. It is even more apposite because it depicts him as very much a cowboy but here as a cowboy on a spaceship. As you will see a group of aliens on the spaceship is holding a priest hostage and threatening to kill him ...

Perhaps the unifying moral, free of false dichotomies, is the old campaigner's saying:

“Trust in God – and keep your powder dry!”