



ST JOHN'S CATHEDRAL, BRISBANE
Sunday, 17 October 2004, 11am
"The law and faith"

The Hon P de Jersey AC

About four decades ago, the Judges of the Supreme Court of Queensland were rather starkly reminded they had feet of clay. In 1968, the old Supreme Courthouse was substantially destroyed by fire, as the result of an act of arson. The arsonist set fire to the building in the early hours of 1 September, leaving a note written in ink on the blotter of the Judge's Associate's desk in number one civil court. The note was pinned to the desk with a knife, apparently taken from a lunchbox in a nearby refrigerator. It read simply: "Judge not lest you be judged. Sinner." The Court of Criminal Appeal frequently used that courtroom, raising the query whether the arsonist may not have been an unsuccessful appellant.

However David Bertram Brooks, convicted by a jury of the arson on 27 November 1968, had a history of only comparatively minor past offending: he had not previously appeared before a Supreme or District Court. Brooks, 30, an unemployed alcoholic, was sentenced for his crime on 28 November. Mr Justice Hoare imposed six years imprisonment with, as it was then put, hard labour.

I mention that rather curious occurrence particularly for the text with which the arsonist sought to admonish the Judges: as he put it, "Judge not lest you be judged. Sinner." That was an imperfect rendition of Christ's warning delivered during the Sermon on the Mount. It is imperfect because the Gospel passages do not conclude with the word "sinner". Maybe Mr Brooks was a reader of



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Shakespeare, and was thinking of the line in Henry IV, part 2, "forbear to judge for we are sinners all."

As to the Gospels, Luke offers this version:

"Judge not, and ye shall not be judged: condemn not, and ye shall not be condemned: forgive, and ye shall be forgiven..."

I think the sense of the caution better emerges from Matthew's version:

"Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again."

We believe we are all to be judged. I understand Christ to be saying that insofar as we presume to make judgments in relation to our fellow man, and do so imperfectly, we can expect, from our ultimate judge, nothing more indulgent.

Christ respected the place of civil authority. He was not, I think, proscribing a judiciary: he was urging all who make judgments in relation to others, to be astute to make the right judgment.

The work of our secular judges is momentously significant. I instance especially the power to penalize people, particularly denying personal liberty through imprisonment: and a power to make decisions in relation to the welfare of children, particularly as to custody. The judicial oath requires Judges to deliver "justice according to law". That means that what a Judge determines is circumscribed by the law. The Judge cannot impose his or her own idiosyncratic notion of abstract justice.



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But in making decisions on matters like those – imprisonment, child welfare – the Judge nevertheless exercises a fair degree of discretion. The law, in short, does not often dictate the answer. In the first place, a Judge will often have to decide what were the factual circumstances of the case. The Judge may have to decide which of conflicting witnesses is telling the truth. The Judge will then reach a just decision, against the matrix of relevant legal principle.

But as I have suggested, the Judge usually confronts, at that stage, a reserve of possible solutions from which to select the just outcome. That is why a Judge must be not only learned in the law, but exhibit, also, the probity, common sense and compassion borne of substantial experience of life. And that takes me back to the biblical exhortation. Christ expects optimal performance from those who choose to make judgments in respect of their fellow men.

What of that framework of law? In the most immediate sense, Judges are absolutely constrained by the law. But the application of the law should, to a Christian lawyer, rarely become a source of moral discomfort. That is because, with fortunately few exceptions, the law in this civilized democracy, which reflects conventional notions of morality, thereby betrays the Christian inspiration basing those notions. The law of negligence is an obvious example. In his work "The Enforcement of Morals", the leading English Judge, Lord Devlin said that "no society has yet solved the problem of how to teach morality without religion". Defining the morality which bases current law depends on community values. Religion has proved to be a very "convenient" way of developing those values: and to the adherents, it is of course more than a matter of mere convenience.

Modern Australia is shy about conceding the role of history, lest doing so disturb a rather comfortable complacency. Some, perhaps many, Australians revelling in the post-modern secularity of our 21st century nation, rebel against any



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acknowledgement of the beneficial contribution of historic ties and other influences. One of those influences is certainly that of Christian philosophy. Chief Justice Gleeson reminded us some years ago of the outrage when our first Prime Minister Edmund Barton, in 1902, visiting London, called on the Pope in Rome, provoking a petition of protests signed by 30,000 Australians. The modern shyness about the Christian acknowledgement is not a new thing.

Though now rarely acknowledged as such, because it would certainly be considered unfashionable, the Christian influence, very pronounced at, say, federation, shaped our laws and our morality. It still does so, although probably more subtly, and as I say, generally without acknowledgement. Ironically, probably were it not for the unabashed surge of fundamentalist faiths, one wonders whether secular Australia would, for example, still invite witnesses in courts to take oaths on the Holy Bible. It is reassuring to see Parliaments still beginning their sessions with Christian prayer. The immutable truths expressed in Christian form 2,000 years ago still guide us, however reluctant some may be to acknowledge that.

Hence my contention that modern day Australian lawyers, including Judges, should rarely be discomforted in seeking to do "justice" while nevertheless constrained by the framework of the law.

That aside, a substantial part of a Judge's work, and a substantial part of the supporting work of litigation lawyers, is of a discretionary character. This aspect of a lawyer's work extends to the advising which occurs in non-contentious affairs in lawyers' offices or chambers. In that area, the discretion vested in the Judge or lawyers is substantial. While it falls often to be exercised in accordance with well established legally chartered approaches, there is scope generally for the application of the individual's concept of what is honest, what is good, what is



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right. In most cases, the underpinnings of the particular lawyer's personal morality may well assume great significance.

I have personally found the Gospels enormously inspiring as I seek to go about my judging conscientiously. One need really go no further, but then there is also the powerful and often quoted advice from the prophet Micah:

“...what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?”

The humility urged by Micah, while often the most challenging goal for lawyers in particular, is a wonderful ideal – no doubt achievable with solid application; and one should not confuse “meek” with “weak”. The preamble to the Australian Constitution records the people's “humble” reliance on the blessing of almighty God.

The three qualities advanced by Micah, justice, mercy and humility, do helpfully encapsulate a modern lawyers desirable approach, frankly whether Christian or not. The display of those qualities was considered by Micah the sufficient offering of a faithful disciple of our Lord: rather than the very interesting, challenging collection of other qualities put to the prophet as possibilities: “burnt offerings with calves of a year old...thousands of rams...ten thousands of rivers of oil...(culminating with one's) first born”.

Let me move now to the legal profession more broadly, and to the orientation which the Christian lawyer would tend to favour.

The legal profession is, must be, primarily concerned with serving the public interest. That is indeed the necessary essence of any “profession”: what distinguishes a profession from other callings and the provision of services. Of



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the legal profession in particular, one notes that in the interests of the common good, the community has devised a set of rules, being the law, but described by one learned commentator as "merely the skeleton of the social order" (Dennis: "For the Common Good" (1990) Trial (September) 55, 56 quoting Dean Roscoe Pound). In other words, the law delineates the limits of socially acceptable behaviour. Over time, society's legal framework, even allowing for that limitation, has nevertheless become so extensive and complicated that it is incomprehensible to most people. Lawyers, specially trained to understand and apply the law, have become essential to ensure that the law operates to maintain social order, and they thereby advance the common good.

Judges apply law, and exercise discretions based on conventional notions of morality within any applicable legal framework. Lawyers assist them to do so. Non-litigators advise within the framework of the law. They likewise have scope to offer moral guidance to their clients. Christian lawyers seek to be alive to the stresses of 21st century Australian life: moral dilemmas, possibly subtle difficulties spawned by modern conditions. Faced with such issues, the lawyer does his or her best to assist the client to a morally defensible position.

The current broad challenge for all lawyers concerns the inaccessibility of justice. Access to justice is a human right of fundamental importance, of essential constitutional significance. There are countless members of the community who lack access to legal solutions, for lack of knowledge of their rights and resources to pursue them. Legal aid is endemically under-resourced by executive governments. I suspect technological advances are providing our greatest current hope of generally increasing access to justice. I refer particularly of course to the world-wide net, and the streamlining of court processes through modern technology.



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Lawyers will advance the common good if they are astute to ways of dealing with the very real problem of the inaccessibility of justice, and if they are prepared to lend their considerable weight to taking the necessary steps to improve it.

It is important generally for lawyers to lend their wisdom to the development of important social programs for the legal complexions. The treatment of intractable drug addicts is a good example.

It must not be thought that most lawyers' thoughts stop at the case immediately in hand. Lawyers are jurisprudentially educated to grapple with broader community issues. It is no accident that they frequently find themselves in positions of community leadership: school boards, Councils, community organizations – that is the result of recognition of the usefulness of their finely honed skills and their generally well-developed social consciences.

We must as professionals remember our duty to the public, and our capacity to make valuable contributions in addressing issues of immediate concern to the litigating public, especially in relation to accessibility of justice, but more generally also, in areas of major social policy. And even if the public reaction in other respects, for a time, appears unsympathetic.

The public orientation of conscientious modern lawyers recalls from me the words of J B Priestley's "Inspector":

"We don't live alone. We are members of one body. We are responsible for each other, and I tell you that the time will come soon when if men will not learn that lesson, then they will be taught it in fire and blood and anguish. We don't live alone."



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Sobering sentiments, although I acknowledge that the legal profession does in this country recognize public service as the root of professionalism, and that despite what sometimes seem the best endeavours of the popular press to persuade the people otherwise.

I have dwelt on the public orientation of the modern Christian lawyer. At the more personal level, the challenges remain fairly constant: not yielding to the cynicism which seems to attach to many of us in this area of human endeavour; upholding the highest standard of personal ethics notwithstanding the ravages of a trenchantly secular society; exuding balanced attitudes which, through their attractiveness to others, become exemplars; seeking to assist others wherever possible, especially through pro bono work and a willingness to carry clients financially through speculative arrangements – with inadequate publicly funded legal aid facing little prospect of relief; doing what one can, and in no merely token way, to assist the poor, the marginalized and the friendless. These would be viewed as reflecting the justice, mercy and humility to which Micah admonished the people of Jerusalem and Samaria: and which are equally compelling criteria today.

It helps, too, if Christian lawyers are prepared to share with others their particular approaches, especially as to the ethical twists thrown up by modern practice. Some few years ago saw the launch of a book entitled, "Living Faith in Public Life", published by Open Book Publishers, in which 52 Australians, including I might point out my counterpart the Chief Justice of South Australia, spoke of the influence on their daily work of their Christian faith. The then Governor-General Sir William Deane wrote the foreword to the book. It was refreshing to discern that degree of retreat from the more traditional, utter withholding of such essentially private experiences, experiences which when disclosed many undoubtedly find inspiring. Others will probably be helped by the discreet



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offerings illustrated by such books, rather than table thumping, unduly upfront presentations, albeit those may work in other arenas.

I have spoken for long enough. I began by relating the story of Mr Brooks, whose act of arson, I suggested, reminded the Judges rather starkly that they had feet of clay. It is important, obviously, for Judges to keep their feet on the ground, and a proper perspective on their place in the order of things. I recall the District Court Judge asking the housebreaker why he should not be imprisoned for his offence. The prisoner responded saying: "As the Lord is my judge, I did not do it", drawing the Judge's response: "He is not; I am; you did." That light note aside, may I now have the audacity to conclude this contribution, to a Christian gathering, by quoting the response, of all people, of Karl Marx, who, when asked for a final word for the sake of posterity said: "Last words are for fools who haven't said enough already": which I most certainly have!