

AUSTRALASIAN COLLEGE OF SURGEONS

ST MARY'S CATHEDRAL, SYDNEY, 14 MAY 2006

EXAMINING VALUES

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When judges and surgeons meet for professional purposes, the outcome is likely to be painful for one side or the other. But this ecumenical service is, I hope, neutral ground. It ought to be possible to speak of a common challenge which confronts the professions of medicine and law; the administration of justice and health care.

To people who identify progress with secularism and egalitarianism, the idea of a group of professional people gathering at a religious service must seem incongruous; perhaps even threatening. The learned professions are said to be elitist; and elite is a term of strong criticism except when applied to athletes.

The people who walked in the darkness have seen a great light. They have come to believe that the public interest will best be served if lawyers and medical practitioners behave like business people. G K Chesterton said that when people stop believing in God, the problem is

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not that they believe in nothing; it is that they believe in anything. The same could be said of people who stop believing in professions. For example, it is widely held that professional people may – in fact they should – promote their services by advertising. This, it is said, will make them more accessible to the public. In the past, the ethics of lawyers prevented them from advertising, except within strict limits. These rules were abolished by legislation. However, Parliament had a change of mind. It seems to have come as a surprise that when lawyers promote their services, the result is more litigation. Legislation was quickly enacted to re-impose restrictions on certain forms of advertising by personal injury lawyers. Presumably, widespread promotion of surgical services, at least for elective surgery, would put a strain on hospital resources. It would be entertaining to see surgeons engaged in unrestrained self-promotion.

Business people engage in advertising, and other practices we are now encouraged to imitate, for a purpose. The purpose is financial gain. The ultimate objective of being business-like is to make money. Nobody has explained why the public would be better off if lawyers and doctors decided that their principal objective ought to be to make money. Yet the constant pressure towards mercantilisation only makes sense if it is assumed that professional people and business people share the same ultimate goal.

If that is not accepted, an awkward question comes up. What is the difference between a business and a profession? If there is a

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difference, it can only be that professional people accept certain restraints on their capacity to pursue personal gain – restraints that go beyond the requirements of honesty and fair dealing that are accepted by decent people in any occupation. But what is the source of those restraints? Why should they be accepted by rational people? Why should a barrister submit to a rule that tells him or her that a barrister's overriding duty is to the court, not to the client? Why should a surgeon accept that there are some circumstances in which a request for services, for which a patient is willing to pay, must be declined?

The rules of professional practice, which impose restraints on the pursuit of self-interest, cannot be sustained merely by custom. This is an age that questions every rule and challenges every authority. Those questions and challenges cannot be met by an appeal to tradition. Tradition cuts no ice. Self-interest is clearly understood; but I am talking about restraints on the pursuit of enlightened self-interest. How can they be explained? They can be justified only in terms of values; and if the values are not shared, the justification carries no weight. It all comes back to values. That is the common challenge to our professions: to identify and maintain our values.

Today values are most prominently reflected when people talk of rights. There is nothing new about recognition of human rights. The French, more than 200 years ago, made a Declaration of Human Rights which contained many statements familiar to modern ears. When the American colonists, influenced by French opinion (and assisted by

French arms) achieved their independence of Britain, they also declared human rights and, by amendment, included a Bill of Rights in their Constitution. The assertion of human rights was, in large part, an assertion of the dignity and worth of the individual against the power of government: an assertion with which most people in our age are in sympathy. Whether people stop to think about the source of that dignity and worth is another matter. To the extent to which rights express individual freedom from the arbitrary or unjust exercise of public power, they have an enduring resonance in any liberal democracy, such as Australia. After the Second World War, an understanding of the misery which some nations had inflicted upon oppressed races or minorities led to an upsurge in formal declarations of human rights, expressed in language that reflects universally accepted values.

Acknowledgement of the need to recognise and respect human rights, based upon the dignity and worth of the individual – rights most likely to be threatened by the State or some other powerful authority – has had a profound influence on the form and substance of modern political debate.

Yet talk of rights may raise questions that need to be answered. Rights are commonly, sometimes deliberately, confused with interests. This may be done for a rhetorical purpose. The language of rights is a powerful rhetorical weapon. I may have a legitimate interest, but if I can persuade people that it is a right, then my claim to have it recognised is

greatly strengthened. To describe my interest as a right may be to play a trump card.

Some of the most sensitive issues now confronting the law, and medicine, are raised by interests promoted as rights. We need to be able to discern when that promotion is justified, and when it is not. Interests may be perfectly legitimate, but that does not make them rights.

My interest might be in conflict with someone else's interest. Politics and law exist to regulate such conflicts. But if my interest is inconsistent with somebody else's right, the right will prevail. Let me give a legal example of particular relevance to your profession. The community has an interest in access to health care. The government, representing the community, has an interest in making arrangements for such access. But the Australian Constitution, recognising the danger that government provision of health care services might interfere with the personal freedom of health care providers, states that the Federal Parliament, in enacting laws for the provision of health and services, may not impose civil conscription. The right of health care providers to personal freedom is given constitutional recognition and protection. There is an interest in obtaining health care, but there is no right to force doctors to provide it in a way that amounts to civil conscription. The protection is there because it is obvious that it may occur to a government that the most cost-effective way to provide access to health care is to conscript the services of doctors and nurses. So in that

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respect the Constitution subordinates the interests of consumers to doctor's rights to personal autonomy.

The same applies at a more particular level. I have a legitimate interest in a painless death. Some people, whose lives are unendurable, may have an interest in a premature death. But I have no right to demand that a doctor kill me, or assist me to kill myself. People may have interests of various kinds in relation to health and personal welfare which the law does not permit them to fulfil, or which institutional or personal ethics do not permit a doctor to fulfil.

What is the difference between an interest and a right? The answer is decided by values: legal, or moral, or professional. I have many interests that flow from my desire for personal happiness and fulfilment; but I have a much narrower range of rights. I have an interest in being healthy. I have a right to personal security. The law will punish, or award damages against, someone who infringes my right to life and safety. But the law defines my rights carefully, and it is cautious in the obligations it imposes on others in relation to my interests. The law and medicine share many values, of which the most fundamental is the value of human life. Respect for human life is a basic principle of certain laws and, in the medical profession, certain rules of professional conduct. If life were no more than a matter of individual interest, which can be given or taken away as a matter of personal choice; if it were a commodity that could be treated as worthless; if it were not inherently valuable, then the

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foundations of many of our laws and our professional ethics were disappear.

One of the great challenges confronting both professions is to recognise the difference between rights and interests, and to secure the values that make such recognition possible. Questioning values should not be resented. It should be encouraged. It reinforces our laws and our professional practices to understand why they exist, and the values that sustain them.

What is the source of the value which medicine and the law attach to life? For some people it is a conviction that humankind is created in the image and likeness of God; and that we are not our own property. For others, it is found in humanist, ethical principles. Whatever the basis of the value we attach to life, and whatever the basis of our other values – whatever the basis of what we call rights – we ought to test our own opinions and we should expect other people to explain theirs. If somebody asserts a right of a certain kind we should seek to understand why it is a right, and not just an interest. We should be ready to explain our own values and to question those of other people. We will never sustain our own standards unless we understand where they come from.

Let me give an example of a legal problem with medical significance. It is not an Australian problem so I can discuss it without embarrassment. It came before the European Court of Human Rights. For many years, going back at least to the time of St Vincent de Paul,

the French have had laws and arrangements to protect the anonymity of mothers who wished to have their children adopted. It was recently claimed that those laws were inconsistent with an adopted child's right to personal development which includes the knowledge of the child's parents. A closely divided court upheld the validity of the law. The case illustrates the difficult problems that can arise, legally and medically, in balancing conflicting rights and in testing the ultimate values on which those rights were based. The French law of anonymity was justified as a law to prevent or discourage abortion and infanticide. The fundamental value of human life was held to prevail over the value of personal development. People may have different opinions on the outcome. My point is that issues arise that force us to examine our values. We have to be ready to do that if the need arises.

Let me give another example, taken from a case recently decided by the Supreme Court of the United States. The issue in the case concerned a collision between Federal regulations about prescription drugs, and legislation of a particular State said to support a right to die in certain limited circumstances. The suggested right was limited to people who were terminally ill, although the justification for that limitation, if there is a right to die, is not clear. The law, in various ways, protects the right of life. Accepting a right of death raises novel and difficult problems. The implications for medical practice are enormous. And for both medicine and the law, the value that is attached to human life may be difficult to reconcile with the concept of a right to death.

Challenges to established values force us to re-examine the principles according to which we live. This is a good thing. Examination may reinforce those principles. If, in some respects, we accept change without abandoning our principles, then at least we will have done so understanding all the implications.