LIFE AND DEATH IN PRIVATE LAW

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Foreword

An assumption readily made by a lawyer is that life has a beginning and an end. A theologian or philosopher, focused on the meaning of life, may beg to differ. Perspective is important.

Another assumption of lawyers, perhaps more widely shared, is that life has a middle between a beginning and an end, however blurred boundaries may be in a particular case. With the prolongation of life, supported by modern medicine, a person unable to manage his or her own affairs because of a loss of mental capacity is commonly thought to suffer a form of "living death" which calls for another person (often called a guardian), within a legal framework, to manage "the person" (body) and "the estate" (property) of the incapable person.

Increasingly, the lives of every person in a modern state are managed, more or less, from cradle to grave, by somebody other than themselves: often a public authority or a large corporation. Simple illustrations of this are requirements that births, deaths and marriages be registered; that drivers be licensed; and that recipients of public medical benefits carry an identification card. In this environment, public regulation of private lives increasingly engages with the specific events of birth (eg *inter vivos* fertilisation, surrogacy, birth control measures, abortion) and death (suicide, euthanasia), providing health care and engaging public institutions such as hospitals and publicly licensed professionals such as doctors, nurses and pharmacists. The law (represented by the State) routinely seeks to regulate social conduct by means of a blanket prohibition qualified by a revocable grant of permission, subject to conditions, in the form of a "licence" issued by a government agency.

For a lawyer "birth" and "death" often present themselves in the form of a process, not a single event. A lawyer officiating as such is rarely present at the point of birth or death, even in the execution of a "death bed will". Medical professionals are more

commonly on hand at critical times. It is the fate of a lawyer's client to celebrate a birth or mourn a death. Yet lawyers are often called upon to assist management of a process associated with birth or death before or after the event. By their intervention, and that of the courts, in the periphery of a birth or death, their major role may be indirectly to supervise the medical profession by holding hospitals and staff to account for breaches of duty of care.

The process of birth might, for example, commence with a surrogacy agreement or an IVF contract in anticipation of a birth. It might not end until arrangements are in place for the custody or adoption of a baby child.

The process of death might, for example, begin when a person, in anticipation of incapacity preceding death, executes (by whatever name known) an enduring power of attorney, an enduring guardianship appointment and a will. It might not end until a court has issued a grant of probate or administration in a deceased estate, the estate has been fully administered and distributed, and any time for claims to be made against the estate has expired. If cryonics becomes a popular practice the administration of a deceased estate might never end.

A quirk of the law may be that "rights" of an unborn person are not recognised even during the process of birth unless they may have an interest in property which requires an order that their interests be represented in an equity suit about property. Any inconsistency of approach finds its explanation in the purposive operation of law in each case.

A lawyer's life is dominated by rules, boundaries and the characterisation of facts and circumstances for a purpose served by law even though "law" defies any all-purpose abstract definition. It shares that elusive quality with the bookends of life. Its meaning often depends upon the procedural framework for dispute resolution and problem solving of the particular society it serves.

A common, flexible paradigm within which "law" is found and applied in a private law setting is, at least implicitly, that of an autonomous individual living, and dying, in community. "The individual" and "the community" are interdependent. It is difficult to

conceive, or to give practical meaning, to one without the other. At different times and in different places society might strike a different balance between them, and at different times in one person's lifetime the balance might shift. Shakespeare's *Seven Ages of Man* illustrates the point.

Respect for the law requires that it be accepted by the community it serves and be applied with discretion as opinions within the community ebb and flow as, inevitably, they do. A temptation for those who have strong personal views about the province of birth and death in their community is to seek to entrench their particular views in "law", whether by constitutional amendment, legislation or judicial fiat. This can be counter-productive as the persuasive enthusiasm of reformers hardens in coercion of the unpersuaded. Entrenchment of a contested "private right" (especially if contested on "moral" grounds) may be an invitation to civil disorder. The USA's experiences of civil war (over a contested private right to ownership of slaves), prohibition (over a person's contested right to consume alcohol) and abortion (over a woman's contested right to abortion "on demand") provide historical examples.

In legal practice the paradigm of the "autonomous" individual is a genuflection in the direction of a need to recognise that some individuals lack capacity to conform to social norms or to manage their own affairs in the middle to late term of their lives.

A major difficulty for a judge dealing with the affairs of a person who (by reason of incapacity or death) is unable to manage his or her affairs is in deciding who may have standing to be heard or to whom notice of proceedings should be given. In short, this involves identification of the individual and his or her community and consultation with proximate community members in management of the individual's affairs. In dealing with a living person management of the person and the estate must generally be seen holistically, and the welfare of the incapable person is the paramount consideration. Interested parties are those significant others who may assist the court with information about the best interests of an incapable person. Disposal of a dead body is in a class of its own as a court looks to respect known wishes of the deceased, to consult significant others experiencing grief, and to have regard to the public interest in whatever arrangements are made. After death and disposal of a body, in the

absence of children or other dependents in need of protective care, interested parties are those concerned with the due administration of an estate or an interest in property.

The focus of law encountered at and about the time of a birth, death and incapacity must be on respect for the dignity (worth) of an individual person. There are times of vulnerability for every person at birth and sooner or later thereafter. A failure to recognise that vulnerability in one person, or many, may place at risk others, or all of us, whose time has yet to come. In the interests of a free, open and safe society a veil of protective care may need to be thrown over the vulnerable. This must be done in prudent consultation with their significant others, including but not limited to, "family" (however defined). To privilege "community" over the individual at those times potentially places everybody at risk.

The secular and divine are not easily disentangled in the practice of law governing life and death. As always, in practice, the text, context and purpose of law must be consulted in dealing with an individual case. Whatever views one might have about controversial questions such as abortion or euthanasia, the starting point for legal analysis in a secular system for the administration of law must be an appreciation that each life is precious and worthy of respect, not readily to be diminished or denied. Any other starting point in the practical administration of law may place too much power in the hands of a judge and (especially if administered without empathy or arbitrarily) undermine the integrity of a legal system.

If, as some philosophers imagine, "God" (however conceived) is truly "dead" and "self" is paramount against all competing interests, without constraints (other than standards imposed by "law") external to "self", the sense of community upon which self itself depends and the legal system that services individuals in community are both at risk of a breakdown. The effective administration of law requires a flexible balance, with tolerant give and take, between both the "individual" and "the community".

One of the blurred boundaries commonly encountered by lawyers is the distinction between "public" and "private" law. There is much to be said for this distinction as a working rule of practice. However, it is not always helpful. Perhaps the clearest illustration of this, in the middle term of life, is when the law encounters "insanity" in

the context of a criminal trial or upon an exercise of guardianship jurisdiction. The law may seek to protect the mentally ill from self-harm, and to protect others, if necessary by institutional confinement.

In a managed society "public" and "private" forms of law coalesce. An example of this coalescence is the intrusion of private "fiduciary law" reasoning in supervision of public officials, perhaps extending to protection of the interests of a vulnerable person at the time of contemplation of a process of "voluntary assisted dying" (euthanasia). Legislation authorising VAD embodies concepts drawn from the law of trusts, equity and the guardianship jurisdiction of courts about the need for fully informed consent and protections against undue influence and conflicts between interest and duty.

Whatever polemicists might say, on one side of a debate or another, there is generally an individual interest and a public interest in the management of a life before, during and after birth, as there is in the shadow of death, at the time of death, and in the aftermath.

There are often two ways of thinking encountered by a judge called upon to intervene in lives affected by the trauma of a birth or death. One peers through a prism of competing claims of right and correlative obligations, whether personal or proprietary in nature. The other looks to management of people, property and relationships: identifying a problem and associated risks, potential solutions and prudent paths to action. They are commonly reflected in different styles of advocacy.

Both mindsets might appeal to "rules" that bind, or "principles" that guide, decision-makers. Ultimately, they are both governed by a purpose served by the law and that of the jurisdiction of any court or tribunal entrusted with authority to administer law.

Difficult problems and controversial solutions in the realm of a birth or a death are generally, by nature, such as to engage the conscience of each person directly affected and that person's community. When difficult choices must be made the law, at its best, endeavours to allow all concerned respect, space for reflection and opportunities for material support. Where the burden of a decision can be

constructively shared between affected persons or interests judges generally lean towards that objective.

A striking feature of legal practice involving dispute resolution and problem-solving in management of the affairs of a vulnerable person is that experience teaches that cases are routinely fact-sensitive, wisdom resides in no one person and prudence is required in the management of risk, uncertainty and the profound.

Importance therefore attaches to serious conversations about rights and obligations, foreseeable risks and prudential management.

The essays in this book cover a wide range of problems encountered at the intersection of law, birth, death and incapacity in several jurisdictions. The book offers insight into how lawyers deal with practical problems. It recognises that answers to questions often produce further questions in need of answers. It is much to be commended for its topicality, breadth of learning and academic rigor.

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