DOCTORS' REFORM SOCIETY

JOINT EDITION : 'NEW DOCTOR' AND 'LEGAL SERVICE BULLETI

DINNER AT SYDNEY UNIVERSITY UNION

SATURDAY 17 MARCH 1984

MEDICINE, LAW AND ETHICS IN AUSTRALIA

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Chairman of the Australian Law Reform Commission
Chancellor of Macquarie University

ST PATRICK'S FEAST

I am delighted to be with you on St Patrick's Day and, indeed, on the eve of my own birthday. Had I been born a day earlier, I would have been 'Patrick' to the scandal of my Ulster family.

Strange things happen on the way to St Patrick's Day. I must admit that I was a little surprised, during the week, to hear news items that suggested that the Doctors' Reform Society had joined the Australian establishment.

Indeed, I was at first a little anxious about accepting an invitation to a dinner given by the Doctors' Reform Society, lest it be a too radical group for a judge to meet. But when, during the week, I heard news reports that the Doctors' Reform Society had denounced the industrial action currently being taken by the medical profession, criticised the 'hotheads' who are leading the medical profession and called for careful discussion with the Minister about grievances, I knew that the Doctors' Reform Society was, after all, a truly respectable, responsible and — dare I say it — establishment body. How the tables have turned!

I state at the outset the thesis I wish to advance for your consideration. It is that the rapid increase in the number of 'bioethical' issues facing doctors and lawyers requires major improvements in medical and legal education. In particular, the teaching of ethical studies to medical students is no longer a 'soft option' for a few hours in a five

year course but an 'imperative' necessitated by the rapid increase in the variety and complexity of medical ethics issues. Teaching of ethics in Australian medical and law schools is, I believe, generally inadequate. I do not suggest that education is the answer to all our ills. Nor do I suggest that it is easy to frame a course of education that provides guideposts for all of the difficult medico-legal questions now presented to our society. Certainly, I would oppose any endeavour, in secular institutions, to lay down a dogmatic morality : pretending that easy black and white answers are to be found for the questions that are confronting us. What I am saying is that our present educational attention to these questions is inadequate and that, at the very least, we should try to do better.

Doctors and lawyers in Australia are inevitably faced by an increasing number of difficult ethical problems. They have important legal and medical professional implications. In the past it was possible to resolve such problems by reference to a generally accepted Judeo-Christian morality, shared by judges, doctors and the community.

The problem today is that we appear to have lost our anchor. The community either does not share a stable, traditional morality or is indifferent to the teachings of the churches as to what that morality is. Furthermore, between the churches there are differences as to what that morality is. This week I read an Anglican review of in vitro fertilisation issues. The points made were often very different from the teachings of the Roman Catholic Church. Yet even within the Roman Catholic Church there are those who take a 'hard line' and those who consider that IVF, as between a married couple, reimplanting all fertilised embryo, is permissible. When the angels dispute, what are mere medical practitioners and hospital ethics committees to do? When there is no common morality, what principles are to guide our judges?

PRACTICAL CASES

It is quite wrong to consider that medico-legal issues are an exotic plant rarely confronting doctors, lawyers and judges in the course of their work. The subjects dealt with in the joint issue show the growing docket of acute subjects of common concern. Judges who think they can escape ethical quandaries presented by medical developments should read the Law Reports. Every week decisions are now being reported showing judges confronting problems of medical ethics. Take two recent cases from England and the United States:

. The Kentucky Supreme Court in the United States in 1983 decided that a man charged with assaulting his estranged wife and killing her 28-week-old foetus cannot be charged with 'criminal homicide' under Kentucky's Penal Code. The homicide statute did not define 'person'. However, it was held by the court that the common law rule should be maintained, limiting criminal homicide to the killing of one who has been born alive. The State of Kentucky had sought a ruling from the court 'in the light of modern medical advances and legal rulings in other contexts' that today a viable foetus should be deemed a 'person' for the purposes of the Kentucky murder statute. Two judges dissented. The majority adhered to the old common law principle. Hollis v Kentucky 33 Cr L 1005 (1983).

. In Britain in 1983 a woman brought an action against the Health Authority running the hospital in which she had undergone a sterilisation operation. It was established that clips which should have been placed on her fallopian tubes were incorrectly located. She fell pregnant. She suffered anxiety during the pregnancy for fear the drugs she had been taken against pain could have harmed the unborn child. A normal healthy boy was born. She claimed that her measure of damages should include the increased costs to the family finances that the unexpected pregnancy had caused. The court held that it was contrary to public policy and disruptive of family life and 'contrary to the sanctity of human life' that damages should be recoverable for the costs arising from 'the coming into the world of a healthy, normal child'. Accordingly her claim for the costs of the child's upbringing to the age of 16 and enlargement of the family home was held to be irrecoverable. Udale v Bloomsbury Area Health Authority (1983) 1 WLR 1098.

In the good old days it may have been possible to respond to problems of this kind by reference to lessons learned at Sunday School. Nowadays, something rather more sophisticated is required if decisions in such matters are not to depend upon the particular judge hearing the case, whether the doctor in question had an idiosyncratic view of morality or whether the patient was in a church or public hospital.

RELEASE FROM BRIDLES AND BLINKERS

Even the most superficial glance at medical literature and indeed the popular press indicates the burgeoning number of medico-legal issues requiring the assistance of ethical guidance. I refer, of course, to debates about such matters as :

- substitution of a 'quality of life' test for decisions on the removal of life support systems;
- ethical issues on the implantation of an artificial heart;
- the claim of history to the disclosure of medical details about famous people;
- the refusal of medical intervention in the case of children with major handicaps;
- vivisection of aborted foetuses in order to supply tissue specially useful for experimentation and transplantation;
- the right of severely handicapped patients to die, and in the event of gross disabilities, to have the assistance of medical staff to die if they so wish;
- the control of gene splices;
- advertising in the popular press for surrogate mother volunteers;
- the suggested extension of cloning from animals and plants to the human species;
- the possible development of hybridisation as between species, including human beings.

Some of these issues have already been faced by courts, particularly in the United States. Australia will not be immune from them. Medical practitioners especially have often to make extremely difficult decisions affecting life and death. Yet little emphasis is placed upon these questions in medical and legal education in Australia.

I am particularly glad to see this new joint production of New Doctor and the Legal Service Bulletin. Each journal is valuable in its own right. Each is normally readable and this is not a universal characteristic of professional literature. Each addresses issues of topical concern. Each places the professional in a social setting. Given the growing number of medico-legal issues of common concern, the time may come when a major publication of medicine, law and ethics will be established in this country. Such journals already exist in Britain and the United States. In the meantime, this joint issue is to be welcomed. We talk of 'universities' as if they were truly a place for a universe of disciplines. But university people in Australia know that our universities tend to be highly compartmentalised. Medical students rarely meet law students. Indeed, in some universities, the law students are actually banished from the campus in order to begin the process that will place them safely in their legal cocoon. There is altogether too little dialogue, on an intellectual level, between the disciplines. Now technology is forcing us together again — as in the ancient universities. The computer and its implications for society is bringing together the lawyer, the scientist and the engineer. Genetic

engineering and IVF are bringing together the doctor, the philosopher, the theologian and the lawyer. We should encourage this process. It will release us from the bridles and blinkers of our own narrow training and sheltered perspective in complex problems.

TEACHING ETHICS AT UNIVERSITIES

The particularly urgent problem, as it seems to me, is to step up the instruction in ethics for undergraduate medical students in Australia. Most medical faculties in Australia devote little time to teaching of medical ethics and then spend most of the time dealing with potential legal liabilities of doctors rather than discussing the framework for medical decisions having ethical implications. In the Law Reform Commission's 1977 inquiry, we were informed in all parts of Australia that medical education instruction on ethics was inadequate 'amounting to little more than one hour in the entire undergraduate curriculum'. There were notable exceptions on such vital matters as:

- information to terminal patients;
- dealing with the families of dying patients;
- decisions on operations in risky cases;
- the relevance of cost of treatment to some health care decisions.

The number and complexity of these decisions will increase as medical advances add to the prospects of patient survival. Such issues deserve public discussion between doctors, philosophers, theologians, lawyers and others. They should not be decided behind closed doors by hospital ethics committees which, like judges, might not reflect general community morality. Nor should they be decided on idiosyncratic grounds or by reference to asserted but unproved statements of 'public policy' or 'public interest'. Nor should they be hidden in vague and uninstructive generalities about the 'sanctity of human life'. The 1977 report of the Law Reform Commission on human tissue transplants called on the Deans of medical faculties throughout Australia to reconsider the adequacy of the present Australian university curricula on instruction of medical professionals in bioethical questions. Although major gains have been made on this issue in the United States in the past decade, the improvements in Australian medical training have been very limited. The law schools too lag behind. All too often legal training concentrates in Australia on the Statute of Uses and the Rule Against Perpetuities, whilst utterly ignoring the preparation of the judges and lawyers of the future for the new decisions of life and death that they will have to face.

CONGRATULATIONS

For these reasons I am particularly glad to see this joint venture. May we see more interdisciplinary studies between sociall conscious doctors and lawyers. I hope that philosophers, theologians and others will join the debate, to throw light upon dark corners. As Ian Kennedy said in his Reith Lectures, we are only in the generation turning the stones that formerly hid from public gaze complex, difficult and painful decisions acutely relevant to morality. Furthermore, new stones are being found and the problems being presented to our professions and to the community they serve seem cruelly numerous and perplexing.

I hope that we will prove adequate to meet these challenges. I congratulate New Doctor and the Legal Service Bulletin for this important contribution to our competency. I hope this will not be the last such endeavour. And this will surely not be my last speech calling for attention to these things.