

FORBES ROTARY CLUB, FORBES, NSW

Saturday, 5 July 1986

" 'DEFECTIVE BABY' CASES NEED LAW REFORM"

SUMMARY OF SPEECH BY JUSTICE KIRBY

EMBARGO: SATURDAY, 5 JULY, 1986 7.30 P.M.

SUBJECT: 'DEFECTIVE BABY' CASES NEED LAW REFORM, SAYS KIRBY
LAW UNCLEAR AND FAILS TO KEEP PACE WITH TECHNOLOGY,
SAYS JUDGES.

FORBES, NEW SOUTH WALES, SATURDAY

The former Chairman of the Australian Law Reform Commission, Justice Michael Kirby tonight told a dinner in Forbes, NSW that the law governing the duties of doctors dealing with grossly deformed and retarded neonates was unclear and in need of reform.

Justice Kirby, who is now the President of NSW Court of Appeal, was addressing a dinner of professional and business people organised by the Forbes Rotary Club.

The Judge's comments follow an order made last week in the Victorian Supreme Court by Justice Vincent requiring a Melbourne hospital to take all steps to keep a 9 day old handicapped baby alive. The child, suffering from spina pifida was made a ward of Court following an application by the grandfather who told the court that the baby had been sedated and denied nourishment for two or three days.

Justice Kirby said that he was not commenting on the particular case but on the general problem which it called to attention.

Impact of New Technology

Justice Kirby said:

"In earlier times, babies born with gross physical and mental disability would be "allowed to die". This was sometimes called "compassionate infanticide". Frequently, babies born without a brain or with such gross physical disabilities have conditions which, in nature, would shortly lead to their death anyway, without "heroic surgical intervention and the application of sophisticated technology. The new problems presented to the parents, doctors and our society come as a result of the development of remarkable technology and surgical skills which would, of course, be used to usher into life a normal child. The question is then posed as to whether such skills and technology should be used, and all stops pulled out, to ensure a similar rescue of the grossly disabled child.

Until recently, there is no doubt that "compassionate infanticide" continued to be a common practice in hospitals in England, Australia and the United States. But now, as a result of a series of court decisions and legislative moves, things are changing. Opinion surveys suggest general popular support for "compassionate infanticide". The question is therefore posed as to what the law is and what it should be on these topics. Where human life is at stake, where criminal prosecutions of health care workers may follow and where great costs to society are in issue, it is desirable that the law should be more clear than it is."

Areas of dispute

Justice Kirby said that as a result of a series of cases in England, including the successful defence of Dr. Leonard

Arthur on a charge of attempted murder of a neonate, the position of medical staff was unclear.

"In the past it was thought that it was up to the doctors and the parents to decide the fate of the child in these tragic cases. It has now been made clear that the law will, if necessary, intervene and the criterion is "the best interests of the child" not "the burden on the parents or on society".

By the same token, an important decision of the English Court of Appeal acknowledged that there would be cases where it was "entirely responsible" to allow a child to die. This decision drew a distinction between positive acts to kill the child (which would be murder) and the failure to apply medical resources which would just as surely led to death but which would not be legally culpable. The test suggested in that 1981 decision in England was whether "the life of this child is demonstrably going to be so awful that in effect the child must be condemned to die". Such a case would arise where "the future is so certain and where the life of the child is so bound to be full of pain and suffering that the Court might be driven to a different conclusion." Later decisions have suggested that this principle should not be construed too widely. It is not a principle binding on Australian courts. It was not even stated as a principle binding on English courts, being unnecessary for the actual decision in that case. Just the same, commentators have suggested that this acknowledged exception to the absolutist approach for the protection

of life whatever its quality, and however awful it may be, is more important than the primary rule which was enforced in that case. In a sense, it represents the first acknowledgement by a superior court that "life" may be something more than simply breathing and that if the quality of life is "so demonstrably awful" that it would be cruel to insist upon it, the Court will not impose that burden on the child itself, its parents, health workers and the public purse.

Recent discussion of this and other cases in legal literature have pointed to the uncertainties in the law on this subject. In Australia, those uncertainties are multiplied by the important differences in the law from State to State. One of the uncertainties arises from the rule that, in homicide, the Crown must prove that the act or omission of the accused caused the death alleged with the necessary criminal intent. In the case of defective neonates, other causes may exist than withholding treatment. Furthermore, proof of the intent may be difficult. And in the end, such cases would come before a jury of citizens, who might reflect the less absolutist stand than the law is prone to lay down. Opinion polls, and the equittal of Dr. Arthur by a jury in England, show the disinclination of society to insist upon rigid implementation of the law in these cases. By the same token, it would be desirable for the law to be clarified. It should not depend on the chance factor of the attitudes of particular hospitals and doctors. This is just another instance of new technology presenting our society with difficult ethical and legal

quandries. It seems preferable to me that the answers should be provided by Parliament, with the assistance of a law reform body which has consulted widely. Resort to such generalities as "demonstrably awful life" is plainly not good enough. And the insistence that a child born without a brain should be kept indefinitely on a ventilator because it otherwise has the features of human existence, may take the absolute respect of human life beyond the limits acceptable to society," Justice Kirby concluded.

Justice Kirby said that it was essential for Australian society to face up to these hard problems and not to put them in the "too hard tray".

NOTE ON SPEECH

The above speech will be delivered in Forbes. For further information contact Mr. Dominic Williams, solicitor, Forbes (068) 521099. The speech will be delivered at Lachlan House With No Steps, Rankin Street, Forbes. Justice Kirby's office is (02) 230 8202.