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BURNETT CLUB, BUNDABERG

BUNDABERG, QUEENSLAND

ANNUAL CLUB DINNER, 21 APRIL 1982

LIFE, DEATH AND THE LAW

The Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission

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PUTTING IT IN CONTEXT

I am delighted to be invited to address your Annual Dinner. This is my first visit to Bundaberg for 20 years. Your Club must be one of the oldest in Australia. What a different world it was when J.S. Meiklejohn on 14 May 1897 summoned a meeting of Bundaberg gentlemen to the Grand Hotel to discuss the inauguration of the Club. You deserve congratulations upon the continuity of the existence of the Club, through the better part of a century whose watchword is change. Since the establishment of the Club many of Bundaberg's most distinguished citizens have been numbered amongst the Club's members. Many served with distinction in the two World Wars. It has been said recently that the vision and courage that led the pioneers of the first century of Australia's modern development out into the rough, unexplored territory of this country far outshines the achievements of the generations of our century. Yet it can be said that ours has not been an easy time. The rate of inflation from the first year of the 19th century to the last was less than 1%. This is a measure of the stability that previous centuries enjoyed and that has not been our lot. Ours is a century of war, depression, inflation, nuclear fission and, lately, the dilemmas of biological science.

It is precisely because of the challenge of change that the Federal Parliament and the State Parliaments of this country have established law reform commissions. The Chairman of the Queensland Law Reform Commission, Mr. Justice Andrews, heads a distinguished body whose previous Chairman was this State's present Chief Justice, Sir Walter Campbell. We in the Australian Law Reform Commission have had Queenslanders of great distinction amongst our Members. The first Queensland Commissioner appointed to the Australian Law Reform Commission was the then Mr. F.G. Brennan QC, at that time a member of the Queensland Bar. In fact, he was appointed on the very same day as Mr. John Cain, now Premier of Victoria. Mr. Brennan went on to become

Sir Gerard Brennan and is now a Justice of the High Court of Australia. He maintains his keen interest in the reform of the law. I understand that his family had many links with Bundaberg and its district.

Another 'Queenslander' appointed to the Law Reform Commission was our Governor-General, Sir Zelman Cowen. Now, I know that some people in a southern State would claim him as their own. But when he was appointed to the Commission, he was Vice-Chancellor of the University of Queensland. I know of his great affection for and many links with Queensland. He has a life-long, abiding interest in the reform of the law. I gather I succeed him as a speaker at your Annual Dinner.

One of our current Commissioners is the Honourable Mr. Justice Fitzgerald. He is the first Judge of the Federal Court of Australia resident in Queensland. He was appointed to the Commission from the Queensland Bar, as was Mr. Justice Brennan. Indeed, appointment to the Commission has become a perilous course for barristers. Mr. Justice Fitzgerald's appointment to the Bench followed within a matter of months his appointment to our Commission. I am glad to say he is continuing his interest in our work and membership of the Commission. You will see we have many associations with Queensland lawyers. Through our work on the reform of the law in matters of Federal concern in Australia, we seek out the views of Queenslanders. We have had a great deal of co-operation and assistance from colleagues in the Queensland administration. One of our reports, on human tissue transplants, was accepted in substance by the Queensland Government and Parliament. The legislation based on the report now forms the law of Queensland on this topic.

At the risk of provoking your President, Dr. Richard Marsden, and because it is a matter of universal concern : as much to the citizens of Bundaberg as the people of Sydney or Perth, it is about some of the issues of bioethics that I want to speak to you tonight. The Law Reform Commission became involved in a consideration of bioethical questions when the Federal Attorney-General gave us the reference on the law governing human tissue transplants. Bioethics may sound to you an exotic subject of little interest to the people of this northern city as they go about their daily lives. But I hope I can show that the issues of law and morality that are raised by a consideration of the new biology, are matters that should concern us all. A Club as distinguished and long-established as yours should spare a thought for the issues of the new biology. They are issues for our time.

CHILDREN, LIFE AND DEATH

The last week has seen the usual collection of instances, reported in the news media, of events raising the quandaries for law and morality posed by modern medicine. I take three instances only:

. Living with the New Biology. On Wednesday last, 14 April 1982, the Science Unit of the Australian Broadcasting Commission devoted a two-hour session to a radio conference on 'Living With The New Biology'. That remarkable broadcaster, Dr. Robyn Williams, invited me to take part with him in chairing the session. Collected in the radio studio in Melbourne were some of the most people in our country most relevant to the debate. They included Sir Gustav Nossal, the world-famous biologist, Professor Carl Wood, the pioneer of in vitro fertilisation and many others. Some of you may have heard the programme, for it was broadcast to all corners of the country. Just as powerful as the interventions of Mr. Barry Jones MP, the Shadow Minister for Science and Technology, and Mr. Russell Scott, the former Commissioner in charge of the human tissue transplants project, were the quiet and gentle statements of the parents of Australia's first test tube baby, Mr. and Mrs. Brennan. I walked out from the studio and there waiting with her grandmother, sleeping peacefully, was Pippin Brennan, the catalyst for all this controversy. The broadcast ranged widely. But it covered most carefully the legal, moral and medical issues that were posed for Australian society by the in vitro fertilisation technique. I shall come back to this issue.

. 'Starving' the Retarded Child. Then on Friday last came the news that a severely retarded infant in the United States had become the centre of a litigious storm which advanced to the Supreme Court. The child, known in the court records only as the infant Doe, was born so severely mentally retarded that the parents, whose names were not released, authorised doctors to withhold food. The Supreme Court of Indiana upheld the parents' right to do this. The County Deputy Prosecutor, Mr. L. Brodeur, flew to Washington to seek to contest this ruling before the Supreme Court of the United States. However, before the Supreme Court could consider the matter, the child died, just two weeks old.

. Abortion for a State Ward. On Monday this week, Mr. Justice Helsham in the New South Wales Supreme Court ordered that a girl, 13 weeks pregnant, should have an abortion. The girl's legal guardian, the Minister for Youth and Community Services of New South Wales, Mr. Kevin Stewart, had declined to approve the abortion in the case of the girl, a State ward. Mr. Stewart made no secret of his strong views on the abortion issue. A spokesman for the Marrickville Legal Centre said that Mr. Justice Helsham's decision was 'a great victory for all State wards in New South Wales'. They 'have been brought out of the Dark Ages by the decision', she said. But a spokesman for the Catholic Church in Sydney, Dr. John Hill, said that the circumstances of the case did not justify an abortion. In the case, two doctors, a private psychiatrist and the supervisor of the institution in which the girl resided, all recommended that her pregnancy be terminated because of the state of her health. She was in an institution for emotionally disturbed children. The Sydney Morning Herald editorial said:

> While appreciating and respecting the Minister's deeply held beliefs concerning abortion, decisions such as these should not be allowed to depend upon the particular moral views of whoever happens to be Minister at the time such incidents arise. ... A strong argument can be made for the establishment of an independent tribunal, consisting of several qualified people, to exercise the discretion presently residing with the Minister.[1]

THE PROBLEM OF GENETIC COUNSELLING

The cases I have mentioned raise very acute problems for society and its laws. Who should make the decisions? What principles should guide them? What should be done where medical evidence suggests that people are likely to have genetically abnormal children? What should be done when children are born grossly retarded or shockingly physically disabled? A very high proportion of people who seek genetic counselling are couples who have already produced an abnormal child or know of one in the family. Genetic counselling involves doctors telling such people:

- whether a pregnancy should be undertaken at all;
- whether ante-natal diagnosis of abnormality (such as by the procedure of amniocentesis) would be useful;
- whether alternatives such as artificial insemination by anonymous donor should be used to avoid the risk of passing on genetic defects.

There are a lot of ethical problems here and most of them have to be faced by doctors, in the hospital or the surgery, with only the vaguest guidance from the law:

- Should disclosure of a genetic defect be made to the parents or the child? At what age does the child with a genetic disorder become a separate patient entitled to separate, private advice?
- What are the limits of disclosure to third parties? For example, should a doctor tell a prospective spouse of the risks of genetic abnormality?
- What is the extent of the doctor's duty of frankness about mental disorder or retardation in a baby? If the doctor paints too pessimistic a picture, will the child be rejected by its parents and placed in an institution with consequences even worse than the genetic abnormality itself?

- What is the duty of a doctor who himself disapproves of abortion to advise pregnant women, especially those of mature years, to have amniocentesis, to test against the risk that the child may be mentally retarded or suffer other grave disabilities?
- Should every woman, or every woman over a given age, be entitled as of right to the amniocentesis test? Just in economic terms, would this not be much cheaper than keeping a retarded child in institutions for many years?
- Does the State which will otherwise have to fund the support of grossly disabled people have a legitimate interest to encourage abortion in such cases or is this the slippery path to unacceptable eugenics?

The legal situation in respect of the birth of grossly retarded and malformed children is, in fact, only now being developed.

- Murder can include wilful failure to take necessary action. Yet the recent trial and acquittal in England of Dr. Leonard Arthur, who put a grossly retarded child in a corner and gave only sedatives until it died, shows how reluctant juries are to convict doctors in such circumstances.[2]
- Doctors sometimes admit to causing the death of a grossly handicapped baby by giving it an injection at birth.[3] There can be little doubt that such positive action amounts to homicide. But it may be hard to detect. Some moral philosophers say it is quicker and kinder than murder by neglect — leaving the child to die for want of nourishment, as was proposed in last week's order by the Indiana Supreme Court.
- In America, there is already flourishing litigation surrounding this topic. Women sue doctors to recover the cost of maintaining a retarded child, because the doctor failed to advise amniocentesis. Some of these claims have succeeded. Will this risk force even opponents of abortion in the medical profession to advise the need for counselling of this kind, especially among women over 30 or 35?
- In America, actions have even been brought successfully by children against their parents claiming 'wrongful pregnancy', 'wrongful birth' and in one case 'wrongful life'. In essence, the claim is that parents ought to have had the ante-natal tests and not submitted the child to such a life of woe. A similar case in Britain recently in the Court of Appeal failed. It was held that the common law of England did not recognise a cause of action against doctors for allowing the child to be born deformed.[4] Yet if a foetus is life and is owed duties by parents and doctors, are there ever cases where the mental retardation or physical disabilities are so gross that the birth should not be allowed to occur? If so, what are the precautions we would introduce against the misuse of the power to terminate life? Are we content to leave these decisions to be made by hospital committees or the unguided discretion of doctors on the spot?

DEATH BY DELIBERATE NEGLECT?

Community opinion about what should be done in cases such as I have mentioned is divided. So far as I am aware there has only been one detailed study of what doctors actually do. In 1973 Professor Alexander Campbell, who gave evidence for the defence in the trial of Dr. Leonard Arthur, was at the Yale University School of Medicine in America. With Dr. Raymond Duff he studied case histories of 299 babies who had died in the intensive care unit of the Yale-New Haven Hospital, to see what treatment they had been given. As a result of his reseach, he reported that in 43 cases (ie 14%):

> some treatments were withheld or stopped with the knowledge that early death and relief from suffering would result.[5]

In these cases, it was decided by a doctor that 43 babies should die. Of course, they did. The lack of treatment ensured that death was the inevitable outcome. They were babies who might have lived. But a decision was made that they should not. Whether the parents were brought into that decision, as were the parents in Indiana last week, is not clear. The fact is that someone, probably an expert pedaetrician, decided that the child should die.

Writing in the Lancet two years ago an anonymous British pedaetrician published a personal code of conduct. It was revealed that in cases of severe mental retardation, severe spina bifida and hydrocephalus (absence of brain):

> I assess babies with the more severe chromosome disorders ... and even straightforward Downs Syndrome. ... I offer the baby careful and loving nursing, water sufficient to satisfy thirst and increasing doses of sedative. A few days after the baby has died, I write offering a date for the parents to come and see me.[6]

Following the acquittal of Dr. Leonard Arthur, the BBC programme 'Panorama' conducted a public opinion poll in Britain on this topic. The poll showed that nearly one quarter of the population (23%) believed that a severely handicapped baby should be given a 'quick and painless death'. Less than half the people polled (46%) wanted to do everything possible to help such a baby live. Richard Lindley, writing in the Listener, commented:

> Whatever the logic of the dilemma, it is quite clear that doctors and the public do believe that it is right to see to it that in some circumstances, some severely handicapped babies die. It is clear too, from Panorama's polls, that both doctors and parents believe such decisions should be left to them, without interference from the social services or the law. And whatever logic or the law may say, the public is overwhelmingly sympathetic to those doctors bold enough to make 'a

> choice for death'. Asked 'Should a doctor be found guilty of murder if, with the parents' agreement, he sees to it that a severely handicapped baby dies? 86% of the people polled in Britain said 'No'.[7]

In all probability similar results would be found in an Australian poll on this subject. This is an area where the law and the public opinion appear to be dividing. The law on this subject is not entirely clear. Few are the prosecutions that are brought against doctors. The very controversies that surrounded the Leonard Arthur trial in England evidences this. The circumstances rarely become known. Proof of the requisite criminal intent is difficult. Conviction at the hands of a jury, dealing with such a painful case, is never sure. The decision to prosecute is exercised by sensitive Crown Prosecutors and may be reviewed by a politically elected Attorney-General.

But there is no doubt that the law of murder can include some deliberate omissions. For example the Crimes Act 1900 (NSW) includes, in the definition of 'murder', reference to criminal omissions:

> Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life or with intent to kill. ...

Can it really be said that a small newborn baby placed in a corner and given water, sedatives but no nourishment is not the deliberate subject of an omission causing death, done with intent to kill? I make no moral judgment. I simply draw attention to what the law says.

Similarly in Queensland, s.296 of the Criminal Code of Queensland provides:

> A person who does any act or makes any omission which hastens the death of another person who, when the act is done or the omission is made, is labouring under some disorder or disease arising from another cause, is deemed to have killed that other person.

Can it be said that those who do not provide, in a hospital skilled in child care, normal nourishment, in order to hasten death even of a severely and grossly retarded infant, are not bringing about the child's death in contravention of the statute? The doctor who fails to take ordinary (as distinct from extraordinary) measures to save his patient may be guilty of murder. If there were no intent, such an omission if deemed to be 'gross negligence' could constitute manslaughter.[8]

Commenting on this situation, the writer in the Listener urged:

> if working out these dilemmas ... is in violation of the law, we believe the law should be changed.

But how should it be changed? How can we provide for change which will be compatible with the normal respect for human life insisted upon in our legal system?

> If we're talking logically, we're in trouble here. If you legitimately kill off a handicapped baby (with the very best of intentions, of course) then why can't you do the same for poor old granny (so badly incapacitated by arthritis) or your daughter with below average intelligence?[9]

So far, we have been pleased to turn our back upon this problem. As a society we have tended simply to leave these hard decisions to the medical profession to sort out. But we have done so whilst adhering to the letter of a criminal law which may render members of the medical and para-medical professions criminally liable. Furthermore, we have failed to provide either the guidelines or the institutions which will ensure that decisions of such vital matters of life and death are made consistently and do not vary according to the moral perceptions of the hospital of admission or the doctors in charge of the case. The BBC Panorama programme to which I have referred, pointed out that the survival rate of spina bifida babies, who had not been given active treatment to sustain them, has changed over a short period of time, indicating a change in medical attitudes:

> From a low point of 16% [survival] in 1954, the proportion of these severely handicapped babies still alive on their first birthday rose to 56% in 1969. Then it began to fall again. Was there a sudden failure of medical technique or skill? Surely not. The explanation is that doctors who once had high hopes that they could make these children's lives worth living, now no longer believed that it was always true. And so they were once again seeing to it that more of these babies died. Wide regional variation in the survival rate seems further to confirm that it is the attitude of individual doctors which decides whether these severely handicapped babies live or die.[10]

The usual solution of English-speaking people to problems, even hard problems such as I have mentioned, is to search for rules and to establish institutional machinery to implement those rules. It has not been the way of our legal system to leave decisions of life and death to the unstructured discretion even of a highly trained profession, such as the medical profession. Where matters of life and death are concerned, it has been usual to define the criteria by which the decisions will be made. Washing our hands of society's legitimate interest in the problem, and leaving it entirely to the parents involved, may be understandable. But it neglects society's duty to every human creature, including a small child who cannot speak for itself. On the other hand, leaving it to the medical profession, to individual doctors, to hospital committees meeting in secret, and to unpublished, unknown, varying rules of personal morality and professional opinion, is equally unsatisfactory. Where such important decisions are involved, society owes it to the medical profession to give better guidance. Of course, I fully realise that it will be difficult to get agreement about the principles that should provide the guidance. On matters such as abortion and death of infants, whether newly born or in utero, our society is deeply divided. But it is hardly a satisfactory solution to ignore the problem, to leave the letter of the law as it is, and to depend upon the unguided discretion of particular doctors, parents or Ministers of the Crown. As one writer put it in the most recent issue of the Australian Law Journal:

> [O]nce the foetus had become a live human being, [it] had all the rights belonging to a human being including, of course, the pre-eminent right not to be killed by neglect. I have no objection to infanticide — provided it is sanctioned by Parliament.[11]

The events of recent days tend to indicate that the time cannot be far off when Australian society will have to face these very hard questions. The first necessity of the Rule of Law is that there should be rules. There should be guidance for the community, for parents in this sore predicament and for the medical and hospital staffs involved. So far, we are not giving much guidance. As a society, we tend to turn away from these painful issues.

IN VITRO FERTILISATION

Let me before resuming my seat refer to the other issue I have mentioned, namely the law and in vitro fertilisation. The first test tube baby was Louis Brown born in July 1978. Since her birth, a steadily growing number of such babies have been born, many of them in Australia. We are amongst the leaders of the technology and this is a matter of pride. The pictures of the smiling parents and their offspring evoke natural human sympathy — especially because of the struggle these people have had to enjoy the pleasures and responsibilities of parenthood and family life.

In vitro fertilisation is a set of techniques which involves using human sperm and human eggs. It allows conception to take place outside the human body, on a piece of glass — hence 'in vitro'. A couple of weeks ago the Victorian Attorney-General announced the establishment of an interdisciplinary committee to examine legal and social implications of the technique. The Chairman of the committee is my colleague, Professor

Louis Waller, the Victorian Law Reform Commissioner. Though the inquiry is a Victorian one, the problem is national, indeed international. The IVF technology has now spread to the Royal North Shore Hospital of Sydney. In New South Wales, the Minister for Youth and Community Services, Mr. Stewart, has announced the appointment of a committee headed by Mr. Russell Scott, to inquire into the legal and social issues of in vitro fertilisation in that State. These issues go well beyond our country. They affect humanity.

According to public opinion polls, the majority of Australian people support the in vitro program. Some ask : who could possibly oppose the technique that simply overcomes a physical obstruction and may bring parenthood to more than 30,000 couples? It is now increasingly realised that there are problems to be addressed:

- Some commentators, particularly those starting from a traditional religious point of view, are absolutely opposed to the new techniques:
  - They are seen as 'laboratory procreation' — a dehumanised, unnatural manufacture of man as if he were a mere product : the elevation of the scientist to God-like power. This, roughly, is the reason that led Pope Pius XII to condemn the technique as absolutely illicit.
  - Other opponents point out that IVF requires masturbation to produce the sperm. It is said that this admittedly widespread practice is evil. In the absence of married love at the time of conception, it is thought that no good can come of it.
  - Other opponents fear the process of freezing of the human embryo — a technique utilised because of the wastage of embryos in the process of fertilisation — will all too readily lead on to experimentation with embryos and foetuses. The spectre of the foetal farm, developed to provide tissue for the relief of adult diseases, is one that horrifies some observers, but not others.
  - If embryos are frozen and not needed for future use, should they be discarded or would this act involve killing a form of human life?
  - Other opponents of the whole program simply say that, whatever your religion, there are better things to be done with the scarce medical dollars that would bring help to more fellow citizens. According to these people, this is an exotic, extremely expensive program benefitting relatively few.
- Even amongst those who positively support the IVF technology, there is now an increasing recognition of the need to consider particular social and legal consequences. Take the following, for example:
  - Should IVF be available only to married couples or also to single people, such as, say, a lesbian woman who wanted a child?
  - Should we permit surrogates, ie if a woman cannot carry a baby full-term, should her sister be permitted to do so? If so, who is the true mother? Who, if either of them, has the say in abortion decisions?

- .. What happens to the law of incest? Could a daughter carry the child of her parents?
- .. Should parents be able to chose the gender of the embryo they select?
- .. Should it be lawful to retain a frozen human embryo for hundreds of years as is said to be technologically possible? If so, what is to happen to the distribution of property? Is the child's identity one of our generation or the generation into which he is born?
- .. In the case of frozen embryos, what is to happen on the death or divorce of the donors?

These may sound exotic questions. Looking at the smiling babies we may prefer to put them out of our minds. But unless we provide the answers and the laws, we may be delivering our society to the Brave New World which Huxley wrote about 50 years ago this year.

CONCLUSIONS

There are many other matters we could explore in this twilight area between the law and advancing medical science. We could explore the issues of genetic engineering. We could examine the questions of human tissue transplantation, the definition of death, the right of young siblings to donate their organs and tissues and the use of tissues from autopsies for general social purposes. We could examine the so-called 'living will' by which people forbid extraordinary medical means of preserving life in terminal conditions. We could examine consent to medical treatment and the issue of clinical trials. The whole issue of the law governing euthanasia may some day need exploration.

The problem of our legal system in coping with the scientific and technological discoveries, particularly in the medical area where human life is at stake, is a serious one. Slow-moving legal institutions tend to find it hard to catch up. Instruments such as the Law Reform Commission are sometimes called into activity to help Parliament cope with the pressures of change. The issues such as I have mentioned are not questions only for the medical or other health care professions. They are questions for a sensitive society concerned to ensure survival of the Rule of Law, the provision of guidance to our medical scientists and the attention by society of intractable problems which will not go away. Because these problems are painful, technical, complicated, sensitive and controversial, we must find instruments to help our Parliaments cope with them. The law reform bodies of Australia exist to provide that assistance by consultation with the best experts in the country and by closely heeding the community's voice before laws are proposed to Parliament. It was in the hope of alerting to you to some of the most difficult issues of law reform that face us in Australia today and to the opportunity of law reform bodies to provide some of the answers. that I accepted your invitation to visit Bundaberg

FOOTNOTES

1. Sydney Morning Herald, 20 April 1982, 6.

2. Trial of Dr. Leonard Arthur -- discussed *The Lancet* 1981; 2, 1101-2, and (1982) 56 *ALJ* 141.

3. See eg Dr. P. Huntingford, Melbourne *Herald*, 20 March.

4. *McKay* v. *Essex Area Health Authority & Anor*, *Times Law Report*, 20 February 1982, 21. See discussion in *The Lancet* 1982, 1 : 691-2. See also S.C. Hayes and R. Hayes, *Mental Health Law Policy and Administration*, 1982, 44. The US case is *Park* v. *Chessin*, 46 NY 2d 401 (1978). See editorial comment, *The Lancet*.

5. In R. Lindley, Handicapped Babies, *The Listener* (BBC), 12 November 1981, Vol. 106 No. 2735, 558, 559.

6. ibid, 559.

7. id.

8. See (1982) 56 *ALJ* 141 where this view is expressed.

9. id., 558.

10. id., 559 (emphasis added).

11. (1982) 56 *ALJ* 141.