THE RIGHTS AND DUTIES OF PARENTS AND DOCTORS IN RELATION TO THE EXAMINATION AND TREATMENT OF CHILDREN

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A Discussion at a meeting of the Medico-Legal Society held on Saturday, 10th September, 1960, at the British Medical Association Hall, Albert Street, East Melbourne.

DR. WILLIAMS:

THIS talk will be given to you as fellow members of the Medico-Legal Society and not as to a gathering of parents. If it were to parents the same facts would be presented with the seamy side to the inside.

A medical man accepts the responsibility for diagnosis and treatment of his patient, and hopes that his advice will be accepted but seldom does he insist. Sometimes with blood transfusion he must insist to save life—after all, it is just one step further in treatment to stopping haemorrhage, and if ever there was a clear cut form of a life-saving remedy it is blood transfusion.

On the 20th June, at one of our Hospitals a girl, C. H. aged 14 years, suffering from the after-effects of scarlet fever was bleeding internally into the bowel due to Henoch's purpura. Her haemoglobin was 56 per cent on admission to hospital and under observation it dropped steadily to 25 per cent. Her parents, and she herself were members of Jehovah Witnesses.

The parents refused consent for transfusion, also saying that the child would not wish it either. A minister of that faith with them said it was the parents' own decision and not on his advice they were taking this attitude, for he did not want to be held responsible. The medical superintendent sought the advice of the Chief Health Officer who was most helpful and it is understood that the matter was immediately communicated to high State Government members. Helpful legal advice was also forthcoming and the medical staff at the hospital felt that they had the blessing but not the legal protection to give the girl a transfusion provided it was recommended by an expert in transfusion. This was done and the blood was given. Perhaps you can imagine the anxious scene in a hospital noted for its readiness

to cope with medical emergencies and having the blood at hand, and the staff having to hold their hand until the very last—the Residents and nursing staff almost begging for action to be taken. The patient did very well following the blood transfusion. It was felt that as the parents could not be influenced by medical advice they had to be ignored, for if the child died, it was our responsibility and not theirs. The parents had a perfect right to remove the child from the hospital, but did not suggest this and when it was hinted that packed red cells would be given, the father thanked Dr. Forbes for an "honest statement". In this case they seemed relieved and grateful when the girl recovered.

The place of blood transfusion in the treatment of new-born infants who may be suffering from erythroblastosis foetalis or excess red blood corpuscle destruction, will now be considered.

If a baby *in utero* has inherited from the father a different blood group from that of the mother, the red blood corpuscles in the baby can set up a reaction in the mother's serum which in turn is passed back via the placental circulation to the baby, which may wreak havoc with the foetal blood. This reaction is related to the type of blood group concerned and most people are familiar with the blood groups A, B and O and occasionally these can be involved. The medico-legal blood groups used mostly in paternal cases are the M and N. Of greater importance for this discussion is the Rh or rhesus blood group discovered some 20 years ago by Wiener and Landstiener. They found that, if monkey or rhesus blood were injected into a rabbit and the serum from the rabbit used to test the blood corpuscles of humans, 85 per cent were positive and 15 per cent negative. Then followed brilliant work by Levine to show that many severe forms of jaundice and anaemia in new borns was due to incompatibility between mother and baby of this Rh blood group. This severe reaction seldom occurs in the first pregnancy and if it does occur in the second it may increase with subsequent pregnancies.

Fifteen per cent of women are Rh negative. There is a 12 per cent chance of all marriages being between Rh negative wives and Rh positive husbands. Most children at risk do not suffer from erythroblastosis, and in fact only 1:20 do so. There are 60,000 births a year in Victoria. Erythroblastosis foetalis occurs only in 1 in 200 of all births.

The child in such cases develops anaemia or jaundice or both, or may die before birth. Forty per cent will survive with-

out any treatment. Sixty per cent are severe enough to require treatment by exchange transfusion although half of these would survive with simple transfusion for late anaemia. Exchange transfusion, that is replacing most of the baby's blood with donor blood, is done to prevent severe anaemia and also to prevent the bile from the destroyed corpuscles reaching a high enough level to cause brain damage or kernicterus. Before exchange transfusions this condition was the cause of up to one tenth of the cases of cerebral palsy. Last year one thirtieth of the cases of cerebral palsy were due to it.

If the level of the bile in the blood reaches 20 units, kernicterus is likely. This can be prevented by exchange transfusion. The earlier the transfusion is done after birth the better. Showing the urgency sometimes, a few hours can make a great deal of difference.

It can be reliably stated therefore that exchange transfusion in severe cases of erythroblastosis is not only life-saving, it prevents cerebral palsy and other defects. 150 exchange transfusions are done at the Royal Women's Hospital each year. In addition to the condition just described, a similar type of jaundice and brain damage can occur in premature babies and many such cases are seen. At the Queen Victoria Hospital—the total exchange transfusions are about 360 annually. It is a safe procedure and the mortality during the exchange varies from nil in some hospitals to five per cent under more difficult conditions. The addition of serum albumen to the exchange blood developed in Melbourne by Dr. W. H. Kitchen has reduced the need for repeated exchange transfusions. There have been two cases of infants of Jehovah Witness parents being refused transfusion in the past twelve months who died. One was the subject of a well known court case, and the other occurred at the Royal Children's Hospital.

Pursuing the subject of blood transfusion, it is so much a necessary part of medical and surgical management that some statistics may be of interest. At the Royal Children's Hospital ten pints of blood are used per day. One child, a haemophiliac, has had 120 transfusions to the age of 11 years. The Red Cross blood transfusion service supplies 52,000 pints of blood per year in Victoria. In the performance of hole-in-the-heart surgery as much as 15 pints of blood are needed in the heart-lung machine.

Any privilege would not be taken lightly by doctors if it

were possible occasionally to override parents objection to transfusion to save a child's life. It is every minor's right to live, even if the parents are prepared to sacrifice the life for religious principles, and doctors would welcome legislation on this matter. This is referred to in the *Medical Journal of Australia,* 1960, Vol. 1 pages 661 on April 23rd, and 891 on June 4th.

The theology of the subject is not within the scope of this discussion but from the *Age* of Friday, July 8th, it is quoted that "the Anglican Synod of Auckland decided that in Christian theology and thought there is nothing contrary to the will of God in the medical practice of blood transfusions".

Similar legislation to that in other States would be welcomed, but if that is not forthcoming perhaps we can design a medico-legal rescue squad to be available urgently for deliberation when the need arises.

The full rights of parents are respected by doctors in all other medical matters. If a child is admitted to Hospital they are encouraged to visit and in fact sometimes play a large part in treatment both in hospital and when the child returns home. Most parents are aware of their responsibilities too, particularly regarding immunization against infectious diseases. This is only done with parental consent. Parents readily seek medical aid if their children are sick enough to need it. Failure to do so, of course, constitutes neglect.

There are considerable powers regarding the isolation of children suffering from infectious diseases, chiefly designed to protect others. There have been no recent difficulties in management of such cases.

It may be pointed out that it is not uncommon for a doctor to be requested by a parent to carry out some procedure on their child which the doctor does not approve, and naturally he will either persuade the parent that the request is unwarranted or he will refuse to do it. If he does agree, of course he accepts all the responsibilities. Examples of this are the demand for tonsillectomy or some form of injection to prevent recurrent colds.

A visiting pathologist from New Zealand told me of a case in his experience of a child with diabetes who was in a coma and the parents refused to allow insulin injections. The objection was overcome by the local legal procedure similar to that operating in New South Wales.

It has happened that the doctor is asked to settle a family dispute on medical grounds. At this time of the year some

mothers may feel that a trip to the Gold Coast for themselves and the offspring is a good scheme, and father may not agree—we are expected to decide what is to be done when it is possible that the children would be just as well if they went for a sail on the Albert Park Lake. It is agreed by doctors, however, that each child is treated as an individual and also as a member of the family unit.

In the parlance of the tennis court most parents will find that care of their young will pass to their side of the net after a general question has been served to their doctor—it is hoped that this return of services will be directed with a top spin of reassurances and a full bounce of understanding.

For the welfare of children, parents take pride of place and the doctor's duty is clear, to prevent ill health and promote the best health by a skill which should be available to all.

MR. BALMFORD:

ANALYSIS of tonight's topic shows that it can be divided into eight heads. In considering the subject, I did sketch out what might fall under those various heads, and it was quite an interesting exercise. But I do not propose to deal with the subject in that way tonight.

There are a number of specialized rights and duties of both parents and doctors which it would be only wearisome to mention: provisions in the *Mental Deficiency Act,* the *Quarantine Act,* the *Venereal Diseases Act* and the *Infectious Diseases Regulations.*

Under the *Health Act* (S.28 (f)) district health officers are to perform such duties in connection with the medical inspection of and the promotion of the health of school children as are prescribed, but no duties have been prescribed. There is a power under the *Education Act* (S.82 (1)) to make regulations for the medical inspection of children attending State schools, but no regulations have been made. Medical examinations at State Schools are in fact only carried out when the parent has consented in writing.

In a general sense a parent has the right to decide whether or not to consult a doctor about his child, and to decide which doctor, and to decide whether or not the advice given is followed. In some cases he will be punished if he does not make the correct decision.

The doctor has a right to be paid for his advice, although he looks in the ordinary course to the father rather than the child. The father is liable for medical fees if he consults the doctor about the child, and no doubt he is equally liable if his wife does. The father is not liable if the child himself consults the doctor, but the child would ordinarily be liable in those circumstances even if he didn't have any money to pay.

One important point, and this is obvious enough, is that most, if not all, of the rights and duties of doctors in relation to the examination and treatment of adults apply equally in relation to children—for example the duty to exercise reasonable skill. One hopes that the duty of the doctor not to disclose information does not prevent him from telling the parent what is wrong with the child.

The general principle that a doctor must obtain the patient's consent before an operation was discussed in a paper presented to this Society last year by Sir Norman O'Bryan. Particular reference was made in that paper to the consents necessary in the case of operations on minors. I think I should summarize the conclusions reached by Sir Norman and, if I may, add a few examples.

(a) A child under fourteen would ordinarily be regarded as not capable of forming a sufficiently sound or reasoned judgment on the matter to give any real consent to operative treatment, and therefore the consent of the guardian is necessary.

(b) The consent of a child over seventeen would ordinarily be regarded as a real consent sufficient to protect the doctor, without the consent of the guardian.

(c) Between fourteen and seventeen, a child might be regarded as capable of giving a real consent, but the safe course would be to obtain the consent of both the child and the guardian.

(d) In a case of emergency, the doctor would be protected from the absence of consent if—

  (i) he cannot communicate with the person whose consent would ordinarily be sought, and

  (ii) he takes a reasonable course, in good faith, without negligence and in the interests of the patient.

(e) Where a parent whose consent is required specifically refuses to consent, the doctor acts at his peril.

My first two further examples are borrowed from the American Restatement of the Law of Tort (S.59).

1. A boy of seven consents to an operation, the serious character of which a child of his age could not appreciate; the surgeon performs the operation. The surgeon is liable to the boy.
2. A boy of seven is bitten by a mad dog. His guardian takes him to a physician who with the guardian's consent, but against the strenuous objections of the boy, cauterizes the wound. The physician is not liable to the boy.

The following examples are taken from cases decided in America:

3. A doctor performs a tonsillectomy on a child of 9½ without the parents' consent. He is liable (*Zoski* v. *Gaines* (1935) 260 N.W. 99).
4. A child of 11 is visiting its adult sister in another part of the country and she consents to the removal of its adenoids. The doctor is liable (Moss v. Rishworth (1920) 222 S.W. 225).
5. A boy of 15 is seriously injured and cannot give his consent; the parents are far away and there is no time to get their consent. The doctor is not liable. (*Luka* v. *Lowrie* (1912) 136 N.W. 1106).
6. A boy of 17 is seriously injured and gives his consent to an operation; the doctor tries to find the parents but can't. He is not liable. (*Jackovach* v. *Yocum* (1931) 237 N.W. 444).
7. A doctor takes the blood of a minor for purposes of transfusion without her parent's consent. He is liable (*Zaman* v. *Schultz* (1932) 19 Pa. D. & C. 309 as digested in 59 A L R 2d. 778)).

I should like to mention in greater detail the case of *Bonner* v. *Moran* (139 A L R 1366), decided by the United States Court of Appeals for the District of Columbia in December 1941.

Bonnor was a coloured boy of 15 living in Washington, D.C., with his mother, and attending junior high school. His aunt had a niece crippled by burns and she brought her to Washington and consulted a plastic surgeon who advised that a skin graft would help, provided the blood of the donor matched. The aunt persuaded Bonnor to go with her to the hospital for the purpose of having a blood test. His blood matched and the aunt tele-

phoned the plastic surgeon who came and performed an operation on the boy's side. The boy's mother was ill and knew nothing about all this. Later a tube of flesh was cut and formed from his armpit to his waist line and at the proper time one end of the tube was attached to his cousin. The result was unsatisfactory, because of improper circulation through the tube. Accordingly the tube was severed, after the boy had lost a considerable amount of blood and himself required transfusions. The tube of flesh was later removed and he was released from the hospital, after having been there for two months. He later sued the doctor for assault and battery.

The trial judge directed the jury that if they believed that the boy himself was capable of appreciating and did appreciate the nature and consequences of the operation and actually consented, or by his conduct impliedly consented, their verdict must be for the doctor.

The Court of Appeals directed a new trial, pointing out that this was a case of a surgical operation, for the benefit not of the person operated on but of another. The Court said that the operation was so involved in its technique as to require a mature mind to understand precisely what the boy was being asked to give. Accordingly consent of the parent was held to be necessary, although the Court said that from the doctor's standpoint the case was a hard one.

The duty of the doctor to obtain consent applies to examination, as well as to operations. Ordinarily, of course, consent will be implied from the conduct of the parent in presenting the child for examination.

In 1877 (*Agnew* v. *Jobson* 13 Cox's Criminal Cases 625), a girl of 18 was convicted in England of concealing the birth of an illegitimate child. The body had been found under a flagstone in the pantry of her parents' house after they had moved elsewhere. When investigations were being made, the police asked a doctor to examine her with a view to establishing whether she in fact had a child. He partly examined her against her wishes and then asked a magistrate for authority which the magistrate purported to give. When the doctor approached the girl for a second time, she confessed, but he still proceeded with his examination. She sued the doctor and judgment was given against him.

I turn now to consider the position of the parent.

At common law, it was quite clear that a parent was under a

duty to provide food and shelter for his child, but whether he was under a duty to provide medical attention is not so clear.

One of the earliest cases I have found was *R.* v. *Middleship* in 1850 (5 Cox's Criminal Cases 275). In that case a seventeen year old girl gave birth to a child when on the seat of the privy and the baby was smothered in the soil. Erle J. said that if the jury thought she had the means and power of procuring assistance which might have saved the child's life, by neglecting to do so she would be guilty of manslaughter. The jury found her not guilty. One can hardly imagine that the mother in those circumstances would be very capable of determined action and in any case it is not clear whether the assistance that was needed was specifically medical.

Another English case was that of *Wagstaffe* in 1868 (10 Cox's Criminal Cases 530). There, a mother and father were charged with the manslaughter of their baby daughter by neglecting to provide proper medical attendance for her. The baby had pneumonia, although the parents thought her sickness was due to teething. The parents were members of a sect called "the Peculiar People" and thought it wrong to consult a doctor. They relied on a passage in the Epistle of St. James (Jas. v. 14-15)—

> "Is any sick among you? let him call for the elders of the church; and yet them pray over him, anointing him with oil in the name of the Lord: and the prayer of faith shall save the sick, and the Lord shall raise him up;"

They complied literally with this but did not call in a doctor, and the child died.

A surgeon gave evidence that a post-mortem examination showed acute inflammation of the lungs and said that in all probability life would have been saved if medical advice had been obtained early enough. He said that the child ought to have been leeched in the first instance and small doses of antimonial wine administered. He thought that the oil would do neither good nor harm.

Willes J. directed the jury that for a conviction three things had to be established:

1. that the parents were in charge of a child unable to care for itself;
2. that the parents had the means to procure medical assistance; and

3. that the parents were guilty of gross and culpable negligence not resorting to the means by lack of which it died.

The judge said that if the child had died of starvation, there would be no doubt that the parents would have been guilty of a gross and culpable neglect in not providing food. But he did not think that the case of not providing medical attention was the same. At different times doctors had different ideas for the treatment of the sick—and the references to leeching and antimonial wine give added point to that today. At any rate, he thought that the parents had done what they thought best for the child. The jury found them not guilty.

The third case dealing with the common law position that I want to refer to is a Victorian one, *R. v. Duffy,* in 1880 (6 V.L.R. (L) 430). There, a mother and a stepfather were charged with the manslaughter of a fourteen year old, who had clearly died from want of care when suffering from some disease of the hip. Both were found guilty, but the conviction of the stepfather was quashed. *Stawell C. J.* said that it was the duty of the mother to call in medical assistance, if necessary, and the duty of the stepfather to do so only if his attention was called to the circumstances. *Stephen J.* did not feel quite clear as to the *a priori* duty of the mother, in the case of a child over fourteen years of age.

The duty of the parent has been made clearer by statute. In England, this was done in July 1868, (31 and 32 Vict. c. 122 s.37) only five months after *Wagstaffe's Case,* the one about the Peculiar People already mentioned. It was specifically made an offence for a parent wilfully to neglect to provide medical aid where the child's health was likely to be seriously injured.

In 1875 (*R.* v. *Downes* 1 Q.B.D. 25), another member of the Peculiar People was charged with manslaughter in similar circumstances to Wagstaffe. *Coleridge C. J.* and *Bramwell B.* said that they had great doubt as to what the position would have been if there had been no statute, but as it was the Court of five judges had no difficulty in upholding the conviction.

Three more manslaughter cases, (*R.* v. *Morby* (1882) 8 Q.B.D. 571, *R.* v. *Cook* (1898) 62 J.P. 712, *R.* v. *Senior* (1899) 1 Q.B. 283) were reported in England before the end of the century, all similar in their facts and involving the Peculiar People. They depend for their interest on changes in the relevant legislation and do not call for particular comment here. Another case, *Oakey* v. *Jackson* in 1914 ((1914) 1 K.B. 216), was a prosecution, not for man-

slaughter, but for neglecting to provide adequate medical aid. The father had refused to allow an operation for adenoids to be performed on his child. A Divisional Court said that such a refusal did not necessarily amount to a wilful neglect causing injury to health and the matter was remitted to the justices to deal with the question in fact.

In Canada in 1903 (*R.* v. *Lewis* 13 Can, Abr. 320) a father who was a Christian Scientist refused to call in medical aid for his six year old son suffering from diphtheria. Evidence was given that treatment would have prolonged life and possibly saved it. The conviction of the father for manslaughter was sustained, in reliance on a provision in the Canadian Criminal Code making it an offence (where death resulted) to omit to provide necessaries "without reasonable excuse". These last words had not appeared in the English legislation, but the Court nevertheless held that conscientious scruples were not a defence.

A similar crop of cases occurred in the United States in the early years of this century (10 A L R 1137, 12 A L R 2d, 1047). Again, the Courts held that religious belief was not a lawful excuse, although because of particular statutory provisions, not all the accused were convicted. Two Queensland cases should be mentioned—*R.* v. *McDonald,* in 1904 (1904 S.R.Q. 151) where a man and his wife were convicted of the murder of the man's fourteen year old daughter by deliberate neglect of medical and other care, and *R.* v. *Smith* in 1908 (1908 Q.W.N.13) where a man and his wife were convicted of manslaughter of their child by neglect. Both these convictions were under the Queensland Criminal Code.

The Victorian Parliament did not turn to this problem until 1890 when an *Infant Life Protection Act* (Act No. 1198) was passed. Section 17 of the Bill made it an offence for a person wilfully to neglect to provide medical aid for any child in his care or custody and so on, along the lines of the English Act. An attempt was made in committee to delete the word "wilfully" which would have extended the offence, but this was rejected and the words "and without reasonable excuse" were added before the Bill was passed, which of course narrowed the offence.

The word "wilfully" was ultimately dropped from the section when it came to be incorporated in the *Children's Welfare Act,* 1954 and so a good deal of the text writers' criticism

(see Glanville Williams: *Criminal Law. The General Part* pp. 93, 115, 589) of the Peculiar People cases, as based on a faulty interpretation of that word, is no longer relevant in Victoria. But the expression "without reasonable excuse" was retained and as those words have never appeared in the English Act, the English cases themselves are not so directly in point.

I should perhaps read the full text of the Victorian provision which now stands as Sec. 71 of the 1958 Act:

"71. (1) Every person who—

(a) without reasonable excuse neglects to provide adequate and proper food nursing clothing medical aid or lodging for any child in his or her care or custody; or

(b) ill-treats, whether physically or mentally, or exposes any child or causes or procures any child to be so neglected ill-treated or exposed—

shall if such neglect ill-treatment or exposure has resulted or appears likely to result in causing bodily suffering or permanent or serious injury to the health of such child be liable to a penalty of not more than Two hundred pounds or to imprisonment for a term of not more than twelve months.

sanding that actual bodily suffering or permanent or serious injury to health or the likelihood of such suffering or injury to health was obviated by the action of another person."

It was because of a breach of the duty imposed by that section that Jehu was convicted of manslaughter in Melbourne in March 1960. Now the complaint against Jehu was not a failure to consult a doctor but a failure to take the advice the doctors gave him. He attempted to justify this in two ways: first, by saying that under his religious views man was required to abstain from blood (Acts XV.29) and that if he permitted the transfusion his child would not have the opportunity of the resurrection to which all Christians should be able to look forward, and second, by saying that he understood that the operation was a dangerous one. As to that, you will remember that in the case about adenoids which I mentioned, the Court held that it was a question of fact whether a refusal to accept medical advice is a neglect: in other words, there may be occasions when it is perfectly proper and reasonable to reject advice. Jehu said that

he had heard of hepatitis, cancer and malaria being transferred through the blood stream. His second and third children had had jaundice but had recovered, and his fourth child had not had jaundice at all. Jehu said that the doctors had not made it clear to him that this his fifth child was likely to die if the transfusion was not carried out. He himself believed it would survive, because of his experience with his previous children.

As to the question of religious belief, the jury were told that it was a factor for them to take into account in deciding whether Jehu's conduct was a gross and culpable neglect of his duty. Now that is not I think saying that religious belief could be a "reasonable excuse" under Section 71 of the *Children's Welfare Act*. Jehu was not charged under that section, but with manslaughter, and the judge directed the jury that for a conviction three things had to be proved:

1. the duty to permit the operation to be carried out;
2. a neglect to perform that duty of a gross and culpable kind; and
3. death resulting from or accelerated by that neglect.

The fact that the jury found Jehu guilty indicates that in his particular case they were satisfied on those three points. The fact that they were so satisfied is of some significance to the community because the decision received a good deal of publicity. Jehu himself was released on a bond, but the judge said that he wanted it to be clear that any future similar case would result in a sentence of imprisonment. But Dr. Stanley Williams has already described a similar case arising in June this year after the Jehu case, and it is evident that in this matter the criminal law is not acting as a deterrent. Jehu's counsel said that the only effect of the decision might be birth control.

In any case the application of the criminal law is not a solution to the problem and I want to turn to the other methods of dealing with it.

The first suggested procedure is to get the child admitted to the care of the Children's Welfare Department; this would apply only in the case of a child under fourteen. If it is shown that the child "is not provided with sufficient or proper . . . medical aid", the Children's Court is obliged to order its admission to the care of the Department. An application to the Court can be made by any member of the police force or by any person authorized. I understand from the Department that the only

persons authorized are one or two officials of the Society for the Prevention of Cruelty to Children.

Once the child is in the care of the Department, the Minister or an officer specially authorized by him may, notwithstanding the objection of a parent, consent to any surgical or other operation which he is advised by a legally qualified medical practitioner is necessary in the interests of the health or welfare of the child. (Section 74).

I understand that this procedure has never been attempted in Victoria in dealing with a case of this kind.

The vital question is whether the refusal of a parent to consent to a blood transfusion being performed on his child means that the child "is not provided with sufficient or proper . . . medical aid". The Director of Children's Welfare has expressed to me the view that the question is precarious, that the argument is weak. The question is I suppose one of fact, to be determined in each particular case upon the evidence given, including medical evidence as to what medical aid is "sufficient" or "proper". I myself would have thought that if the evidence was clear and strong an order ought to be made.

A subsidiary question, but a very important one, is whether the wheels can be made to turn fast enough. First of all, you have to get a policeman to make the application. Then you have to get the Court to convene. This may not be difficult on weekdays as there are usually two Courts sitting in Melbourne, but at the weekend it would not be so easy. Section 23 of the *Children's Court Act* enables a matter to be brought before a justice out of sessions or a special magistrate acting ministerially out of Court, but the same section requires him to adjourn the matter to the next practicable sittings of the Court. If the parent of the child can be found, he must be advised to attend the hearing and he might well be granted an adjournment if he sought one. When the hearing comes on, the evidence has to be given and the Court must be persuaded to make an order. Then the Minister or some person specially authorized by him—and I am not sure what "specially" means in this context—has to consent to the transfusion.

All in all, it could be a lengthy process and in the meantime the chances of a successful operation would almost certainly be reduced. However it is a procedure which has been employed in transfusion cases involving Jehovah's Witnesses in New South

Wales and in Illinois. The New South Wales case (33 A.L.J. 386) was earlier this year and was dealt with under provisions almost identical with the Victorian ones, the magistrate holding a special sitting at the hospital. The Illinois case was in 1952 and is fully reported (*People ex. rel. Wallace* v. *Labrenz* 30 A L R 2d. 1132) and it appears that the local court hearing took place eight days after the birth of the child and that a successful transfusion was administered on the same day. It was argued in the Supreme Court of Illinois that the parents had merely exercised their right to avoid the risk of a proposed hazardous operation. The short answer to that, said the Court, was that the facts disclosed no such perilous undertaking and they quoted from a United States Supreme Court decision (*Prince's Case,* 321 U.S. 170): "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."

The Court also held that there was no violation of the constitutional right of freedom of religion. Fortunately there is no restriction of that kind affecting Victorian legislation.

I now turn to the second suggested procedure, and that is special legislation.

The New South Wales Parliament has already passed an Act (*Public Health Amendment Act,* 1960) which was assented to on 19th April 1960 and I believe a Queensland Act is in course of passage at the moment. The New South Wales provision is a long one, and I will read a paraphrase of it:

"39B. (1) A doctor may perform the operation of transfusion of human blood upon a minor without the consent of the parents or surviving parent or any other person legally entitled to consent if:

(a) that person when requested so to do has not consented, or after such search and inquiry as is reasonably practicable in the emergency cannot be found; and

(b) the doctor and at least one other doctor have agreed—

(i) upon the condition from which the minor is suffering, and

(ii) that the operation is a reasonable and proper one to be performed for that condition; and

(iii) that the operation is essential in order to save the life of the minor; and

(c) the doctor has had previous experience in performing the operation of transfusion of human blood and before commencing has assured himself that the blood to be transfused is compatible with that of the minor.

(2) Where an operation of this nature has been performed on a minor without consent and the requirements and conditions of this section have been complied with the operation shall be deemed to have been performed with the consent which would otherwise have been required.

(3) The powers conferred on a doctor by this section shall be in addition to and not in derogation of any other powers."

You will have noticed that the doctor is only free to perform the transfusion without consent when he and another doctor have agreed "that such an operation is essential in order to save the life." Dr. Williams has informed me that at the stage the jaundice condition is detected it is very often impossible to tell whether, if no transfusion is administered, the child will die, or whether it will live but suffer brain damage or whether it will recover. In those circumstances, it seems to me that the New South Wales doctor may be unable to rely on the legislation because he cannot say the transfusion is essential in order to save the life—although he may very well regard a transfusion as the proper course in order to ensure that the life is saved.

I have seen a draft print of a Victorian Bill to achieve the same result. This has not been introduced into Parliament and I do not think it is known whether it will ever be. The draft I have seen is confined to the case of children under fourteen, so Dr. Williams would not have been able to rely on it in his case last June, if it had then been law.

The final point I wish to raise is whether it is desirable to have legislation of this kind.

Lawyers are traditionally opponents of interference with the rights of the individual and by temperament scrutinize very closely any attempts to impose the views of one person or group on others. This they can no doubt afford to do, because they long

ago perfected very powerful machinery for enforcing their own views on conduct—Her Majesty's Courts of Law. Should Parliament place so much power in the hands of one or two individual doctors, however well-intentioned they may be? One can readily imagine how distressing it is to see suffering, and perhaps death, which could be reduced or averted entirely with the application of a skill used successfully in the past. The foolishness and ignorance of laymen is well known to all professional people and one can sympathize with the view that if a layman will not agree to what ought to be done, the law should allow it to be done nevertheless. In most cases, the professional man is right, but he will not be right in all cases. The answer to that, I suppose, is that legislation along the lines contemplated is not a license to the doctor to be negligent, and if he is negligent he or his insurance company will have to pay.

The justification for legislation is no doubt that the State is entitled to require its citizens to conform to standards of conduct which the majority of them regard as proper. But a view generally held by the community is not necessarily sound, although it is usual, and perhaps reasonable, to suppose so. Whether the community does consider the attitude of the Jehovah's Witnesses to transfusions to be improper is something I don't pretend to know.

Freedom is something we all say we believe in, something that most of us think that we have in Australia, but from the practical point of view liberty may be no more than the liberty to do what the majority thinks appropriate—the majority in a particular country and at a particular time. But on the whole it seems to me that the liberty of the individual to do what he likes for himself does not include a liberty to decide the fate of someone else. In Rome, the father had full power over his child and could put it to death if he thought fit, but that surely interferes too much with the liberty of the child.

Then there is the theological question. The magazine "Awake" (8th July, 1960) puts it this way: "The vital issue from a Christian view-point was not whether a parent had the right to refuse a blood transfusion for his child when the doctors say it needs one, but can a Christian wilfully violate the laws of God because a life is at stake?" If you allow their beliefs to be genuinely held, this attitude is a logical one.

But the biblical passages on which the Witnesses rely do not

convey to me the meaning which they assign to them. "Abstain from blood", I would have thought, is an injunction to abstain from shedding blood, or else the prescribing of ritual in the killing of meat, and on either view is nothing to do with blood transfusions. But they take the literal meaning and apply it at large. So with the Peculiar People: "the prayer of faith shall save the sick", and to call in a doctor shows a lack of faith in God. But when *Willes J.* pointed out (*R.* v. *Senior,* supra) that Jesus said "They that are whole need not a physician; but they that are sick" (Luke v. 31), the answer was that the sickness alluded to was sin and that the physician was our Lord Himself. In saying that, they deserted the literal interpretation and adopted the allegorical.

The conflict between religious doctrine and the State is not a new one. The Roman State punished the early Christians by death because they would not offer any incense to Caesar; religious belief was no defence. The odd man out can only console himself by saying that he is suffering for righteousness' sake, and can only improve his lot by converting those who persecute him or by setting up a new community as the Pilgrim Fathers did. The law cannot allow a man to place himself outside the law merely by adopting a new doctrine, even if he believes that it is divinely inspired.

The theological issue and the question of the tyranny of the majority are far from easy, but if the Society is going to discuss this problem I do not think they ought to be ignored. At any rate, it does seem to me to be better to force a transfusion on a parent's child than to imprison the parent because he will not agree to the transfusion. He may despair because he believes his child has lost the hope of the resurrection, but at least he can say it is not his fault.

DR. GOODMAN wondered why more was not made in the Jehu case of the fact that no medical witness could make a definite statement as to the recovery or death of the child, if a transfusion was given. He pointed out that similar problems could arise, and in his experience had arisen, with anti-toxins and sulpha drugs.

DR. G. WEIGALL asked what would be the position with a child between 16 and 21, where the child consented and the parent refused consent.

DR. M. WHITESIDE asked whether, bearing in mind the possibility that a child would die even with the transfusion, a doctor would run any real risk in proceeding without consent.

DR. VERSO asked what was the position with intending blood donors between 16 and 21, where the parent did not refuse consent, but was not available to be asked.

JUDGE NORRIS, replying to Dr. Whiteside, said the doctor would in practice incur no civil liability in respect of the child. If the child recovered, no damage had been suffered. If the child died, then the medical evidence would show that it would have died in any event, and again no damage would be suffered. As to criminal liability, the doctor may well have committed a technical assault, but he could not imagine any Court imposing any penalty. It seemed to him worthwhile for the doctor to take the risk in such a case.

DR. MARTIN said that all the Biblical references used in these matters seemed to concern diet. He asked whether anyone could say whether their ultimate origin lay in diet or the putting down of blood rites.

DR. KELLY said that the prosecution of Jehu was indiscreet, for although found guilty, the jury knew that in Jehu's own conscience, he was not guilty.

DR. ROBERT SOUTHBY asked what Dr. Williams would do, if flatly refused consent to necessary urgent surgical treatment. What was the responsibility of the doctor, and the parents, in such a case.

DR. SHANNON said that in such a case Dr. Cunningham Dax or some similarly qualified person should be authorized to make an order that the parents are of unsound mind.

MR. J. FELTHAM said that two sets of persons fell to be protected. The doctor wished to do something which he and the mass of the community considered necessary. He ought not to be forced to commit even a technical assault. The parents also fell to be protected, and ought not to be forced into a conflict between the criminal law and their own consciences. Surely there was a case for legislation, to take the matter out of the decision of the parents, and into the hands of the doctor.

MR. A. L. TURNER thought it unnecessary to give too much protection to the doctors. After all, there were practically no reported cases of litigation against doctors in respect of such

matters. As a matter of practice the doctor could go ahead with immunity, so long as he acted reasonably.

MR. WHITNEY KING wondered whether a doctor who accepted the parent's refusal was, by failing to stop the parent committing a crime, himself committing an offence. Could the technical assault on the child be excused because it was preventing the parent committing a crime?

MR. PETER BALMFORD: Mr. President, there have been a number of questions and I will deal rapidly with one or two of them, and I am afraid I leave the others untouched, as usual. Dr. Weigall raised the question of the difference between the Australian situation and the English situation, by statute, on the question of consent. So far as I know, there is no difference. As to the question raised by Dr. Whiteside, as to the real liability of the doctor, Judge Norris rightly said it was technical assault.

Judge Norris asked just what had happened in these American cases. Well, I gave them as examples of the proposition which Sir Norman O'Bryan had raised and brought forward last year as expressing his considered view, although it was not wholly based on actually decided cases. In the examples that I gave, two were hypothetical. In two of them, the doctor was not liable. In the three where I said that the doctor was liable, the situation was this, that if the child had consented, the parent sometimes afterwards sued on behalf of the child or on his behalf, saying that because he, the parent, had not consented then he, the doctor, had committed an assault. In some cases where the doctor had the consent neither of the parent nor the child, it was the child who brought the proceedings. The cases which I mentioned were all Civil cases, and the general situation was that if something had gone wrong with what the doctor did, he would have been held liable. Never in Victoria have substantial damages been awarded. Well, you can say to that, "All right, so the doctor would have been liable anyway, never mind the lack of consent, never mind the technical assault, if the doctor does not carry out his job properly, then, on ordinary principles he is going to be liable". But the mere fact that the child has died as a result of what the doctor did is not necessarily evidence that what the doctor did is not an exercise of proper and reasonable skill. In the other cases, where the doctor had operated without consent of the parents or perhaps of the child either and nothing had gone wrong with the operation, the

damages which were recovered were not just derisive damages but nominal damages.

In answer to the question about taking blood from people just under 21 at the Blood Bank, the case to which I referred was an American case, where it was held that the doctor was liable for that. Well now, there again, I cannot see that any real damage is suffered, so that I do not think the doctor need fear a large sum of money being awarded against him if he takes blood from an 18-year-old without the consent of the parent. But, technically, it is an offence, and technically, no doubt, some small damages could be awarded.

On the Biblical question, I think Doctor Martin is quite right—not so much diet in origin, though—I suppose you could say diet in the end. Of the passages which are quoted from the Bible—and there are 12 or 15 in one of the pamphlets I read—one or two are from Leviticus, one from Genesis, one from Ezekiel, one from Psalms and half a dozen from The Acts. The Leviticus ones are all prescribing ritual in the course of the killing, to abstain from things strangled, in other words; what I perhaps would loosely sum up in the words, "correct Kosher killing". The other kind, the occasions where "abstain from blood" is mentioned, are in The Acts, where they are mixed up with a number of other things. The views of the technical experts I have consulted on that are that there are two manuscript versions of that particular part of The Acts and they vary one from the other. The ordinary Authorized Version used by the Jehovah's Witnesses is usually thought to be the incorrect one. If you leave out the ones which are doubtful, the context makes it quite clear, I think, in The Acts, that "abstain from blood" means "abstain from bloodshed".

Dr. Southby raises the question as to what is the doctor's position if he is faced with an emergency situation where the parent refuses consent. I can only say that the position of the doctor is that he acts at his peril, and the position of the parent is that he does run the risk, and I would say after the Jehu case, runs the risk of being punished for not consenting. Mr. Turner made what seemed to me to be a very proper observation on the reported cases, and, if I may say so, I entirely agree with what he said.

DR. WILLIAMS: All the curly ones were directed towards Mr. Balmford, and he has answered them straight and true. There

were a couple of things I would like to answer and I will do my best to answer the ones that were directed particularly to myself. On this question of theology, I would not like to really join great issue, and I would just like to quote something which you all may have read in the "Age" on July 8. It is quoted that the Anglican Synod of the Auckland diocese said that "In Christian theology and thought, there is nothing contrary to the will of God in the medical practice of blood transfusions."

I would like to reply to Dr. Kelly that I fully respect the beliefs of the Jehovah's Witnesses people. Of course one respects people's beliefs in these things. I am fully sympathtic to those beliefs. I suppose there are very few who could be so deep and earnest in such a belief to stand by in deep emotion and allow their child to die. It is a demonstration that they do firmly believe. I do not respect their attitude towards me on a Saturday afternoon in my own garden, in trying to convert me, and issuing us with all these pamphlets directed towards us to try and swing us away from what we believe is the right practice. However, that is their attitude, and I do respect their points of view.

In this meeting it seems that we have Judge Norris's blessing to do the right thing for these children. In the case of a child with the acute appendicitis, I think we should try and get it operated on by some subterfuge, even if we cannot do it legally. I would like to thank everyone who has shown their interest in these things and Judge Norris again for an indication that we have a sort of blessing and a kind of protection in this matter. I do feel myself I would like to see it in the law. I know some people will do the right thing and take a bit of a risk, but it scares me a bit that one has to take a risk, to do the right thing. It is generally realized that a lot of a doctor's work is built up on having confidence in yourself and your judgment. If you have got to stand by and say—is this going to involve me in a battle in the witness-box?, and start to waver in your confidence, you might waver in your judgment. Then it is the children who will suffer.

Reference should be made to the Victorian *Medical (Blood Transfusion) Act*, 1960 (No. 6689, Addendum q.v.), which operated from 13th December 1960.