TRANSCRIPT OF PROCEEDINGS

MEDICO-LEGAL SOCIETY OF VICTORIA

LAW AND MEDICINE
A MARRIAGE OF CONVENIENCE

BY

THE HONOURABLE JUSTICE MICHAEL DONALD KIRBY AC CMG

HEARD AT

THE MELBOURNE CLUB

36 COLLINS ST

FRIDAY 30 JULY 2004

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PRESIDENT: Good evening, ladies and gentlemen and welcome. Our host this evening, as usual, is Mr Geoff Gronow. Males must keep their coats on until notice from the Club itself and ladies, I'm not quite sure, but keep yourselves nice. The mobile phones must be switched off and the meeting will close and the dinner will close about eleven o'clock when the chairs start to go on the tables. So, dear members and guests, the response this evening to listen to Justice Michael Donald Kirby is overwhelming. We've had to split ourselves into two and, as most of you might know, there's a direct telecast through to the breakfast room. That was a better option than sending people's cheques back and saying "Sorry, we're oversubscribed", so I do hope that everybody enjoys themselves. Michael has offered to present himself to the Breakfast Room later on, so everybody will be able to have eye contact.

It gives me great pleasure and it is an honour and a privilege to introduce such an esteemed speaker, His Honour Justice Donald Kirby AC CMG. I did a Google search and that resulted in a "Googleplex" of a plethora of information and all this was related to His Honour. How a young man has packed so much into such a short span - I call him "young" because he's about the same age as I am and he's accomplished so much. I just hope that he lives for another 60 or 160 years and keeps up that input and perhaps with the possibility of medical advances in nano-technology and stem cell research this might be possible. I'm also indebted to our very kind and industrious legal secretary, Mr

Michael Wheelahan. He had a summary of His Honour's CV but it ran into three A4s and that would have taken up too much of the evening. A summary of His Honour's CV will be available.

A very brief CV though I gleaned from the High Court website, it runs as follows: "Michael Donald Kirby was appointed to the Court in February 1996. At the time of his appointment he was President of the New South Wales Court of Appeal, having been appointed to that office in September 1984. He was admitted to the New South Wales Bar in 1967. He was appointed a Deputy President of the Australian Conciliation and Arbitration Commission in 1975 at the tender age of 34/35. He served as the first Chairperson of the Australian Law Reform Commission from 1975 to 1984 and in 1983 he became a Judge of the Federal Court of Australia, serving on that Court until 1984.

He has held and still holds numerous national and international positions including on the Board of the CSIRO as President of the Court of Appeals at the Solomon Islands, as UN Special Representative in Cambodia and as President of the International Commission of Jurists. In 1991 he was appointed a Companion of the General Division of the Order of Australia, the highest award which can be given to any Australian citizen.

A brief outline of His Honour's topic this evening titled "The Law and Medicine - a Marriage of Convenience" was forwarded to me by the Judge's personal assistant, Janet Saleh, and it is as follows: "Justice Kirby will talk on the differing ways in which the law and medicine tend to approach issues of medical negligence

and the duties of medical practitioners to patients. However, he will expand his observations into the perspective arising from two current international activities in which he is involved. Each of these concerns important subjects of medical, legal and ethical relevance. One involves the project of UN Aids and the World Health Organisation to increase rapid testing of populations in developing countries to identify persons living with HIV who can be helped with new therapies, how can this succeed without effective laws against stigma and discrimination? As well, he will describe the work in which he is involved sharing a UNESCO group developing the first International Declaration on Bioethics. Justice Kirby promises a mind-stretching encounter".

So, without any further delay and under the threat of incurring the displeasure of the medical secretary if I talk too much, I take great pleasure in inviting His Honour Justice Michael Donald Kirby AC CMG to address us on the topic of "Law and Medicine - the Marriage of Convenience". Thank you.

JUSTICE KIRBY: Thank you very much, Mr President. And my thanks to you in the other room there. I've got my eyes on you. I'm going to be asking you some questions at the end of my address. So get all your curly questions ready. I'll be in there as soon as I finish these initial remarks.

ENCOUNTERS WITH MELBOURNE & POETRY

As you heard, I was first appointed to Federal judicial office back in the year 1974. It actually was the end of 1974. I remember

walking past this Club with Sir John Moore, who was the President of the Arbitration Commission and who stayed just opposite in this end of Melbourne. I recall looking into this room and seeing a glimpse of the chandeliers and the magnificent wood panelling. I remember imaging the place within. Now, at last, after 30 years I've been trusted to come in here. It more than fulfils a mere Sydneysider's expectations. Isn't it a wonderful place! It is a magnificent treasure. I oughtn't to have been kept out of it all this time.

I go every year to India and when I last went there on a series of lectures to talk to judges and lawyers about the tremendous challenge of HIV/AIDS in India, I was given at the end of the tour a book of the poems of Rabindranath Tagore.

If you ask yourself who were the great writers of poetry in the English language in the last century you might think of Auden or maybe T.S. Elliot, and perhaps W.B. Yeats would spring into your mind. Listen to Yeats:

> "Once out of nature I will never take,
> My bodily form from any natural thing;
> But such a form as Grecian goldsmiths make
> Of hammered gold and gold enamelling;
> To keep a drowsy emperor awake
> Or set upon a golden bough to sing
> To lords and ladies of Byzantium
> Of what is past, passing or to come".

Well, we will talk tonight about what is past, passing or to come.

But the theme of my talk tonight appeared in one of the poems of Tagore. The foreword to the book of poems was written by W.B.

Yeats himself. Each of these two poets won the Nobel Prize for Literature. And Yeats describes in his foreword how Tagore would send him a poem through the mail. He would open the letter in the upstairs compartment of the bus travelling through Dublin and burst into tears at the sheer power of this faraway poet's art. His first language was Bengali but he had so mastered the spirit of the English language. So listen just for a moment to a poet who would have been well known in this Club in times gone by, whose power of expression in the days of the Empire was well known and who can still "kick a punch".

"Have you not heard his silent steps?
He comes, comes, ever comes.
Every moment and every age,
Every day and every night
He comes, comes, ever comes;
Many a song have I sung in many a mood of mind,
But all their notes have always proclaimed
'He comes, comes, ever comes'.
In the fragrant days of sunny April
Through the forest path
He comes, comes ever comes.
In the rainy gloom of July nights
On the thundering chariot of clouds
He comes, comes, ever comes".

If we think of the century we have now entered there are great forces at work that come and ever come. It is about those forces that I want to speak tonight.

This is not going to be a talk to the Medico-Legal Society similar

to the talk that Sir Owen Dixon gave in his time. My talk is not going to be specifically on the subject of the courts, although I will mention such things. I am going to talk of the age we live in. It is an age when law and medicine must interrelate and contribute to a better world. Ours is a world in which the force of human rights and global responses to problems must "come, come, ever come".

THE MEDICO LEGAL SOCIETY OF VICTORIA

I honour the people who have gone before in this lecture series. If you were appointed to public office as long ago as December 1974, when I took my first oaths of office, you know many of these people. I mean, I knew Sir John Nimmo, a wonderful man and fine judge . I knew Sir George Lush. I knew Sir Oliver Gillard. Sir Oliver looked a little bit crusty. But when I was appointed the first Chairman of the Australian Law Reform Commission, he couldn't have been more supportive. He was wonderful. I'll never forget him. He's alive in my memory. Sir Esra Barker. Sir Reginald Smithers - there was a special man. Sir John Norris, Sir Douglas Menzies, Sir Richard Eggleston, Justice R.K. Fullagar, Justice Xavier Connor, who was one of my successors in the Law Reform Commission. Right on to Sir Ninian Stephen, a recent lecturer in this series. This is a marvellous panoply of legal talent. And there are equally famous members of the medical procession who have addressed this distinguished Society. So, it's a great honour for me to be with

you tonight. I'm very grateful. And I want to have an interchange. I want you to think of all the questions you've always wanted to ask a Justice of the High Court of Australia. At the end of these remarks I'll endeavour to answer them.

My talk, as the President has indicated, will divide into three parts. First, I'm going to tell you of my life in the courts, specifically in the court that presides over one of the oldest constitutions in the world. The Australian Constitution, odd though it may seem for our young country, is the sixth longest still serving Constitution in the world. Blessed we have been that our story has been one without civil war, without revolution and that we have had strong and stable institutions. The High Court is one of those stable institutions. It decides the great cases of the country: cases concerning the Constitution; cases concerning the statute law and cases concerning the common law.

In the interface between law and medicine, the common law is at the fore. Three cases, two of them that occurred before my appointment to the High Court, illustrate the coming of a new era in the relationship between the patient and the doctor. It's an era in which, in a sense, the force of international human rights and the belief in the essential dignity of each individual and justice to the individual has come to play an important part. The law has changed, quite noticeably. The relationship between doctors and their patients has changed in a way that has been expounded by the High Court.

ROGERS v WHITTAKER & INFORMED CONSENT

The first of these three cases is *Rogers v. Whittaker*[1]. This was a case decided by the High Court in 1992. You will remember the case: Dr Christopher Rogers was an ophthalmic surgeon. Mrs Maree Whittaker was a person who had suffered a direct blow to her right eye at a young age. The blow had left her virtually blind in her right eye. But she had sight in the other eye and Dr Rogers recommended an operation which he said would profoundly improve not only her appearance but her sight. He performed the operation but before he did, she told him that she wanted to make sure that it wouldn't have any dangers for the good (left) eye. He reassured her that there were no dangers.

The operation was performed. Unfortunately, Mrs Whittaker suffered sympathetic ophthalmia. This is a very rare condition. It's a condition that the statistics tendered to the court said presents itself in about one in 14,000 procedures. Dr Rogers did not respond to the request of the patient and tell her of that danger. In fact, after the operation, Mrs Whittaker was reduced to a condition which left her with very little sight. She sued and she claimed, amongst other things, that the operation had been negligently performed.

That lastmentioned claim was rejected by the courts. It wasn't

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[1] (1992) 175 *Commonwealth Law Reports* 479.

pressed in the High Court. However, Mrs Whittaker also sued for negligence claiming that she should have been given a warning, having regard to the question that she raised and the concern she had specifically indicated, about the risks of suffering a loss of vision in her good eye.

The Judge at trial, Justice Campbell in the Supreme Court of New South Wales, upheld Mrs Whittaker's claim based on alleged negligence. The Court of Appeal of New South Wales also upheld Mrs Whittaker's claim. It then came on appeal to the High Court of Australia.

Now you can appreciate that very strong arguments were pressed based on legal policy but also on legal authority in England and elsewhere around the world suggesting that it was quite unreasonable to burden the doctor with liability for a one in 14,000 chance. However, the High Court held that, having regard to the fact that Mrs Whittaker had specifically asked, she should have been specifically told of the risk she faced so that she could make her own assessment of the risks. The court held that the duty nowadays was to be measured by the standard of what the patient actually asked or what the reasonable patient had an entitlement to know. It could not be measured only by reference to what other surgeons in Dr Roger's position might have done in such a case.

The case was therefore a rather special one. This was because of the conversation between surgeon and patient which was held to have occurred. The case thus fell into a category determined

by what the patient had actually asked and the finding, upholding negligence, was that in such circumstances, rare though it was, the patient should have been informed. Negligence was therefore sustained not by reference to the actual conduct of the surgery but by reference to the duty of the surgeon to warn the patient of the possibility of an adverse effect of the operation about which she had specifically asked.

CHAPPEL v HART AND PROPER WARNINGS

A second case came up in 1998, soon after I came to the High Court. This is the case of *Chappel v Hart*[2]. *Chappel v Hart* was in some ways a similar case. There, the patient, Mrs Beryl Hart, had had trouble with her throat. She told her thoracic surgeon, Dr Clive Chappel, that she didn't want to have an operation if she'd end up talking like Neville Wran. Even you Victorians may remember, that Neville Wran, the former Premier of New South Wales, had had an operation which involved injecting teflon into his larynx. Mrs Hart didn't like the sound of his voice after the operation. She didn't want to end up that way. Here too the patient, despite her questioning, wasn't told that there was a risk. Yet there was a risk that required three things to come together: (1) The puncturing of the oesophagus, (2) A release not just of bubbles of air but of bacteria; and (3) The creation of an infection.

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[2] (1998) 195 *Commonwealth Law Reports* 232.

Those three events came together after Dr Chappel's operation on Mrs Hart. She said, in effect, *Rogers v Whittaker* applies. I asked. I was not told. I should have been told. The law should uphold my entitlement to know.

Once again, the High Court rejected the claim that there had been any negligence on the part of Dr Chappel in the performance of the operation. However, Professor Benjamin was called as an expert witness. He had performed a very much larger number of operations of this kind than Dr Chappel. He had never had this complication.

Accordingly, Mrs Hart's case was based on the fact that she had effectively lost her voice, she had lost her vocation as a teacher and she had suffered pain and distress because she wasn't informed and she should have been.

The argument to the contrary of Mrs Hart's claim was put: This is very rare. Professor Benjamin had conducted many operations. But so might Dr Chappel. This complication had arisen and it might just as easily have arisen in Professor Benjamin's surgical list. It might, indeed, have arisen in anybody's list. It was just one of those rare unfortunate developments. But Mrs Hart replied: Well, tell me about it so that I can make my own decision.

That is what the High Court, by majority, eventually said. There are very strong dissenting opinions from Justices McHugh and Hayne. I have to tell you that most of the law review articles on the case appear to have thought the dissenters got the better of

the argument over Justices Gaudron, Gummow and myself. It is often thus. But the majority was found in the High Court: three against two. So the patient succeeded. This was not because of negligence on the part of Dr Chappel in performing the operation. It was because of his failure to tell the patient of the risks of the operation when she specifically raised the point about Mr Wran and the teflon. Ironically enough, Mrs Hart subsequently had the procedure that injected the teflon. However, it didn't do much good in her case.

CATTANACH v MELCHIOR AND FULL ADVICE

The third case is *Cattanach v Melchior*[3]. This was a case decided in 2003. It was a case that attracted a lot of publicity. It concerned a tubal ligation performed by Dr Cattanach in Brisbane on a patient who had gone to him for sterilisation. She had already given birth to two children. Mrs Melchior and her husband decided that they didn't want more children. Dr Cattanach performed the operation. Once again, there was no finding of negligence in the performance of the procedure

However, when he performed the operation Dr Cattanach couldn't find one of the patient's fallopian tubes. The patient had had an accident in her teenage. However, the surgeon didn't tell

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3 (2003) 77 *Australian Law Journal Reports* 1312.

the patient of the fact that he hadn't closed one of the tubes. Had he told her, there were procedures that could have been taken to check against the risk that she might still conceive. Conceive she soon did. And so she sued the surgeon. At trial the finding, once again was that the doctor had failed to tell the patient of the risks so that she could make her own judgments. He was liable to her on that account for that element of negligence.

SHIFTING MORAL & LEGAL RESPONSIBILITY

Do you see the common thread that runs through these cases? The common thread is not the condemnation of the law of the performance of the medical procedures. Instead, the common thread is the finding by the law that the standard of disclosure and truthfulness and candour to the patient was not observed.

Those of my age and thereabouts will remember a time, both in practice of law and in medicine where, to a very large extent, the patient or the client left it to the professional: "What do you think, doctor. You do what you think is best". "What do you think, Mr Kirby, should I settle this case? I'll do whatever you recommend".

In the law I learned as an articled clerk that that wasn't good enough. You had to explain the risks and merits again. You had to go over it again - pros and cons. You had to shift, in a sense, the moral responsibility for the decision from yourself as the profession to the client. Essentially, that's what *Cattanach* and the earlier cases decided. *Cattanach* was a four/three decision.

None of these cases was easy. Their outcome is usually divided. There are always strong arguments for each point of view. Courts and other citizens disagree about them. The House of Lords before and since *Cattanach* has handed down divided decisions which reach a different conclusion from that reached by the High Court of Australia. These, therefore, are matters upon which very clever, very experienced, very principled people can reach completely different conclusions.

I know both from my reading and from coming to many meetings such as this in all parts of Australia and overseas how keenly, and sometimes bitterly, members of the medical profession feel about decisions of this kind. Cases about risks: one in 4,000, one in 300, a rare case and a claim for support for a child who should be regarded as a "great blessing" and should not be the subject of a claim for monetary damages.

So I know all these arguments. They were put to the High Court by counsel of the greatest ability. However, in the end, the heart of the differences over such cases is that the law now looks on these issues as a matter of upholding the principle of the right of the patient to be informed. The right to be informed of the decision so that the patient makes the decision. So as to ensure a shifting the moral burden of decision-making.

Of course, a professional can't tell a patient or a client in the time that's available all the details of an operation and its remote hazards. Let it be ten minutes, half an hour, two hours, you just can't communicate a lifetime's knowledge and wisdom,

experience and judgment to a non-expert. You can't do it. We know you can't do it. But you have to try as far as reasonably practicable. And when the question is asked about risks, professionals in today's world have to give the best information that they know. They must do this because the patient is concerned. The client is concerned. That's our professional duty. Nanny no longer knows best. It's a matter of shifting the responsibility of the ultimate decision to the patient or the client. Essentially, that is what the three cases I have described decide. If you ponder upon it, you may come to the conclusion that the decisions uphold the preferable principle. It is one that safeguards the autonomy of the individual and respects his or her human dignity and rights.

TOWARDS UNIVERSAL BIOETHICS

Now I want to shift gears. I want to tell you something about a very interesting development that I'm involved in concerning the drafting of a universal declaration on bioethics. It's a pretty daunting obligation to prepare a statement for the whole world on the subject of bioethics. I've been serving for the last few years in the International Bioethics Committee of UNESCO in Paris. An issue mentioned by the President in his introduction came up in our deliberations - embryonic stem cells. We sat around the table: scientists, lawyers, theologians, philosophers, people from industry, from various walks of life, from 54 countries. We attempted to work out what response we would give to such a

controversial issue.

It wasn't easy on embryonic stem cells. It wasn't easy for a pretty basic reason. The world divides on the fundamental question that's raised by the use of embryonic stem cells. Many of the Christian belief, specifically many in the Roman Catholic Church and the Greek and other Orthodox Churches, believe that there is one definite moment when human life begins. For them, it's the moment of conception. Therefore, for them, all human rights begin at that moment. There's no other moment that is sure and certain. That is why they hold that international law and international human rights have to protect the human embryo from that instant on.

This is very deeply believed, very deeply felt. If you've following debates in the United States of America, it's a very live issue there. So it is, perhaps to a lesser extent, in Australia. It's an issue in many countries.

In the IBC (International Bioethics Committee) we received the word from other people who regarded this view as erroneous. For example, there are some theologians in the Catholic Church that say "No, it's not that moment of conception. It's the moment when the primitive streak appears about 14 days later". Please bear in mind we're not talking about a baby in this debate. We're not talking about a foetus that has developed and grown. We're talking about a human embryo: something that is as big as a full stop on an A4 size page. This is truly tiny. But it may be a human life in potential given certain circumstances. After 14

days in the development of an embryo the first outline of what becomes the spine appears. That, say some theologians, is the moment of the beginning of life of human beings to which we should attach human rights and legal protections.

"No", said the Jewish theologian. Judaism has traditionally taught that human life begins at the end of 30 days. Therefore, according to this approach, the primitive streak and the moment of conception are quite erroneous. That's much too early. Of course, it's a bit more difficult in the Jewish belief because they don't have quite the same hierarchical structure as many of the Christian churches tend to have. Therefore there isn't only one authoritative spokesman. As you might expect in Jewish circles, there are sometimes different spokesmen who put different points of view with equal ardour.

"No" say the Islamics. It's not 30 days at all. Ensoulment begins at the moment of the end of the first trimester".

"No, indeed" say the Hindus, "We take a very strong view on this. Life begins at birth". That used to be the common law rule. For Hindus, life begins after delivery. If the baby is stillborn it will simply be buried, the lower form of disposal of human remains in Hinduism. But if the baby is born and just for an instant breathes and then dies, it must be given all the ritual funeral rites belonging to a Hindu.

THE DIFFICULTY OF FINDING GLOBAL PRINCIPLES

And so, sitting at this table of the IBC, trying to find a rule for the

whole world and listening also to a few people, one of whom from Japan, said "All of this is nonsense. This is not ethics. This is religion". He took the view that religion was helpful but cannot be determinative on any of the issues of bioethics. For him, these were issues to be determined in a secular way by human morality, devised by humans. Concerns about the tiny fragment of life had, from his viewpoint, to be weighed in the balance against the hope that the use of embryonic stem cells can bring relief to spinal injuries, to Parkinson's disease, to myocardial infarction and in all of which, experimentally, the use of stem cells has to some extent shown promise.

When you sit at a world table trying to find common ground I have to tell you it's not easy. Now I'm chairing an international committee which is trying to produce a draft universal statement on bioethics in the space of six months. The committee is making heroic efforts, It is struggling to express principles which will be respectful of the basic ethics of the whole of humanity. I hope I have your sympathy.

One of the questions that's raised is whether there should be a so-called precautionary principle. That is to say, if there are very real risks and we don't quite know them all, we should show precaution before embarking on biological developments. In the world of massive technology should we proceed with caution. That's a very popular principle in Europe. But one of the persons who was at the last meeting, actually from Croatia, said "I wonder if the great scientific experimenters, Pasteur or Lister, would

have passed the precautionary principle. "Surely" he said "there must be an equation - an equation that balances the good that can be done with the risks that are at stake so that we get the risks and the good in proper harmony."

The work of the International Bioethics Committee of UNESCO on this issue is very important. Yet, when I tell many lawyers about it their eyes cloud over. I don't see your eyes clouding over. Not yet anyway. Maybe this is happening in the other room. But the IBC is the endeavour of humanity to respond to the remarkable developments of technology (and to do so in a way that gives real answers). That is the challenge. Because not to respond, to do nothing, to say nothing, to have no rules, to have no settled ethics, to have no laws, is to make a decision. If you have no rules, you withdraw from principled decision-making on such vexing questions. And there are many such questions. They range from the patenting of the genome, through the safety of genetically modified food, to beginning of life questions, such as I've mentioned, to end of life questions and euthanasia, to the issues of pharmacogenomics and so forth. There are so many questions that are now being presented by biological technology. This mere collection of 50 people has to try to find the solutions or the way to a methodology that will offer solutions.

THE GLOBAL DILEMMAS OF HIV/AIDS

The third and, in my opinion, the most pressing matter of which I speak, is one that I have saved to last. Last week I was at the

University of Pretoria in South Africa. I went there for the Centre for Human Rights and the Centre for the Study of AIDS in Africa. My hosts took me to the Chris Hani Baragwanath Hospital on the edge of Soweto, near Johannesburg. They said it was the biggest hospital in the Southern Hemisphere. Certainly, it was a huge hospital.

The doctors I saw at the hospital were mostly Afrikaans-speaking. They were people of the highest ability and integrity. They were struggling against an enormous epidemic. Sadly, in fighting it they have not had the leadership that we in Australia had when HIV AIDS came on the scene.

In the early '80s in Australia it was Neal Blewett and it was Peter Baume who led our initial response to HIV/AIDS. They are two princes of politicians - Labor and Liberal. When it came upon us, Neal Blewett, the Minister for Health called on Peter Baume. He said "Peter, this is bigger than us and it's bigger than politics and we've got to take some radical steps".

At that time, because of my sexuality, I knew a lot of people who were dying. In those days there was nothing much that medicine could really offer - palliatives - but no cure and no effective treatments. I sat at the bedside of lawyers and other friends whom I knew. They told me: "I'm going to beat this thing. I'm going to beat it by willpower". Well, they didn't beat it. One by one they died. It was a terrible time. In a sense, it mobilised me to be less concerned about my own little issues and to be more concerned about the issues of the thousands, and ultimately the

millions, who have been infected with HIV.

At that moment a wonderful international public servant, Jonathan Mann, was working in the Congo (then called Zaire). In the middle of an African thunderstorm, as he later described it, he told the then Director-General of WHO, Dr Mahler from Denmark, "There's a strange new condition. People lose a tremendous lot of weight. Their immune system crashes. They can't defend themselves or their body against this infection. They rapidly die". To his great credit, Mahler called Dr Mann back to Geneva within weeks. The world's response to HIV started. I was asked to serve on the initial Global Commission on AIDS. I served with the scientists who found the virus and with many other wonderful people.

Without the medications, what did the world have available to confront AIDS? Suddenly, remarkably, we found that law had a little role to play. This was because, at that time, without a vaccine and effective medications, the only way we could stop the spread of the virus was to get into the minds of people so that they would modify their behaviour; to cut down on the risk of infection. This was a big ask. I knew that as a judge. Judges have been trying for millennia to change human behaviour. Law is only partly effective in this regard. But that is what was done. You will remember what we did in Australia. We did some remarkable things and very quickly. The great national campaign of information. The availability of condoms. Spreading knowledge about the modes of transmission. Teaching in the

schools. Most extraordinary of all, the needle exchange program.

In the time when we were taking these urgent measures in Australia, the great communicator, Ronald Reagan, could not get those magic lips around "AIDS". For the first six years of the eight years of his presidency, he never mentioned AIDS. Fortunately, in Australia, on a bipartisan basis - and it has largely continued - we have tackled AIDS head on. We have done so honestly. The law has played a role. But how did the law have a part to play in the struggle? By reforming the law on homosexual offences, so you don't stigmatise and alienate people. This way you get information to them. You mobilise people and communities. Reforming the law on sex workers. Reforming the law on equal opportunity and protection against discrimination. In Australia we introduced an amazing raft of reforms in the law. The law became the supporter of public health at that time.

Now I want to tell you of what I learned in South Africa. There AIDS continues to present humanity with great challenges. The target just doesn't stand still. The big issue in South Africa is men will not talk about sex. The President will not talk about it. Nelson Mandela, now reproaches himself that, when he was President, he didn't talk about it. The consequence is that already four and a half million South Africans are infected with HIV, the virus that causes AIDS. This is not in a minority community. This has entered into the general heterosexual community. It's plateaued at a point where it's lifting off into the

whole of the community. That is true throughout all of sub-Sahara and Africa. It's a terrible predicament. One in four working South African adult males is thought to be infected, so it’s a huge predicament.

AN URGENT NEW AIDS DILEMMA

Now here is the puzzle. A new Director-General of WHO came into office last year. is name is Dr Lee. He's from the Republic of Korea. The first thing he did was to call for the statistics on the mortality rates of HIV AIDS. Three million a year, he was told. And in a very un-Korean gesture he slammed the papers down and said "This is totally unacceptable. We have anti-retroviral drugs. We have the means to prolong life and to help people from suffering. We've just got to get ARVs to people. If necessary, we've got to jump the barriers of stigma and shame and the feelings of guilt and self-criticism in order to get people the most fundamental of human rights: the right to live and the right to access to health care when it's critical.

This, then, is the problem for human rights. The problem is that human rights has, until now, insisted on informed consent of the kind that I've been telling you of in the cases in the High Court. There are cases of a similar kind throughout the world. The law has said that, before you take an HIV test you must know what it involves. You must know whether it gives you the real opportunity of access to the anti-retroviral drugs. You must know the risks of stigma and how to handle it. The problem is that to

do all that on a mass scale, in a population of a continent like Africa or South America or the Caribbean, is to make demands that the public health facilities simply cannot produce.

And so we now face a vital moment in the AIDS crisis, as the Bangkok Conference lately revealed. It is a moment when, in the view of many, AIDS is now, effectively, out of control in developing countries. We have to make critical decisions of how we get the ARVs, at affordable prices, to mass populations throughout the developing world. The United Nations has proclaimed the "3 x 5 policy": Three million people on ARVs by 2005. The world is way behind the target. In the meantime, in the Chris Hani Baragwanath Hospital, the worried mothers and their crying children and the men who don't come forward to sit on the benches there to wait for treatment, continue to multiply throughout Africa. The cases multiply. The intolerable suffering and death multiplies.

I am coming to a view that, at least in countries of the developing world, we just have to take some very radical steps. Some say "Don't release this epidemic back to the public heath authoritarians". Others say "Well, we haven't been doing well enough with the human rights-respecting approach. We now have to take some radical steps for the most fundamental right, the right to live".

THE PROFESSIONAL DUTY OF ENGAGEMENT WITH SOCIETY

So if I look at my life, it is a life of sitting in court, of deciding

cases, of deciding puzzles. All the cases that come to our court are puzzles. Virtually, all of them can be decided one way or the other. That's the nature of the case that gets to the High Court of Australia. And *Rogers v Whittaker*, *Chappel v Hart* and *Cattanach v Melchior* could all have been decided the other way. But what was coming, ever coming was the principle of defending the rights of the patient to have honestly and candidly answered questions that they ask and to have information that they reasonably need to know.

If I look at the issue of bioethics and at the challenges of HIV AIDS, it does give me a perspective. Some people say to me - law students - "Why are you always talking about international law? Why are you always talking about global human rights? This is something new in our law". And I am always talking about them: I do so because I see our law and our Constitution in our country in the context of these global developments. Australia in its great island is, in one sense, cut off. Yet we can't be entirely cut off, as I realised when I was in that hospital at Soweto last week.

So when I was asked to come to speak to this Society tonight I thought, well will I give you a learned discourse on some particular aspect of the law? Or will I give you a potpourri of issues from my life? Cases I've decided or known. Issues of international instruments that I'm now participating in. An enormous struggle for life against AIDS that I've been involved with since 1984.

I'm grateful to this Society for inviting my partner, Johan to come tonight. He would have liked to come but he's in Sydney looking after - as a volunteer - a patient who has HIV. His client is not at all well. Even the ARVs don't work forever. They don't work with everybody. And, in any case, the airfares are expensive for the Society. The prudent Dutchman in Johan resolved that I come alone. But it was a nice gesture. We both appreciated the fact that the Society invited us to come together. Maybe in the future we will.

Nowadays, I go along as a handbag with Johan to the meetings of Ankalis, as they're called. (It's an Aboriginal word for "friend"). It is truly marvellous in our country that there are lots of volunteers. I sit at the table with these fine people who help other citizens living with HIV and AIDS. Half of them are heterosexual. Half of them are homosexual. They're all just there working for people who are ill. That's the spirit that also binds us in this Society. We are people who are professionally trained to help others when they are down and need help. Professionalism is no longer just a local issue. These now are great world issues. I've given you a glimpse of some of the aspects of them that I've been involved in. Now, we have time for some questions. I'm going into the Breakfast Room because I'll have returned to Sydney before breakfast tomorrow morning. So I'm going to have a good look around there. Who knows when I'll be invited here again? I'm going to invite some questions. So you can think up some curly questions in this great Dining Room. We've got about half an

hour. I'll return for questions in due time. But, in the meantime, I'm going to our separated brethren and sisters in the Breakfast Room of this Club.

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Here we are in the other room. My word, this is such an intelligent-looking room. I am not reflecting on the intelligence in the Dining Room. Of course, I want to know if any of you have got questions or comments on what I've just said? Or anything else? Don't feel obliged to ask questions on what I've said. You might have some burning question or comment of your own.

THE PRESSURES OF MEDICAL NEGLIGENCE LITIGATION

QUESTION: Your Honour, I have a burning question. Thank you for being so illuminating in a lot of the issues that tie together and separate the legal and medical professions as you've done. I just want to say that, when doctors attend patients, they have a multitude of duties and requirements that a patient might have. Many of those requirements cannot all be met perfectly. However, the unfortunate adversarial litigation system focuses on whichever one suits them. Quite easily, as I see it, it finds that a fault.

JUSTICE KIRBY: You've said that you have lots of pressures in the medical profession and it's difficult to deal with all the issues in dealing with a patient. I understand this. The law understands it.

QUESTION: Yes, well the centre of the fault found in medicine in the failure to reach a standard of duty of care. However, when

seeing a patient, often in a short space of time, there are a multitude of pressures and requirements which cannot all be satisfied perfectly. However, in retrospect, ten years later sometimes, one of those issues, which happens to be pertinent to an adverse outcome, is found wanting. All I'm trying to say is that it seems - well, there's a legal remedy to try and correct all the wrongs of the world by pitting one line of thinking. All I'm saying is the facts pertinent to a medical consultation or a volunteer trying to help someone in need are not able to enter the adversarial litigation courtroom. I think that is a great injustice even though it may be legal.

JUSTICE KIRBY: I understand that comment too. I know that your views are shared by many.

In the Netherlands, where they don't have our common law system, they've introduced a system in hospitals and elsewhere that permit communication between people who have complaints about the way they've been treated. Those who are responsible for the healthcare respond. They've found that, with that and quite modest arrangements for compensation promptly at the time, a lot of the problems go away.

The problem in our system is that we don't tend to nip things in the bud. We tend to deal with them, as you say, through the legal process. We do that in default of any other way to handle the problem effectively. People will not discuss matters. They're advised not to discuss matters. That leads to an adversarial standoff. Now I think we should be more imaginative and look to

other countries which have tackled the issue more directly.

A lawyer looks at a question such as you've mentioned in a different way. The doctor looks at medical negligence with a feeling of hurt that they are being charged with being careless. They know that they get up early. They work so hard. They do so much. That they feel this is very unfair. But the lawyer tends to have before him/her a person who has generally had a complication. That person is not well. Like Mrs Whittaker or Mrs Hart or Mrs Melchior, the patient has got a grievance. The lawyer often looks on the case as one of loss distribution. Of the provision of compensation for the person who can make out a legal claim. But it's very difficult to bridge that different perspectives. I've often thought that's the heart of a big difference that doctors take medical negligence very personally. They feel affronted by such claims. I think this is one of the problems that we have to address.

ZERO TOLERANCE & INEVITABLE IMPERFECTIONS

DR ZIMOVIC: John Zimovic. I was going to bring a whole package of questions I'd love to ask you and thanks for the invitation to ask them. What I want to talk to you about is very much what you've just said, is the fact that a medical person - a common medical person - we deal with the herd, so as we deal with the herd there will be casualties. What I'm frustrated about is we have in the hospital system the concept of hospital indicators which do not demand of us zero tolerance. So there is a threshold of less than

one per cent of infection rate. So what my frustration is, is why don't we address the issue and say "All right, this will happen. We know it will happen. Don't fool ourselves. Why don't we have a system available which copes with that" and then away it goes. It should say: There's no negligence, it's just the outcome of the way in which we work.

JUSTICE KIRBY: Isn't it interesting you should say that, because in my reasons in *Chappel v Hart* I said it was curious that there has been no evidence, statistical evidence of the number of penetrations of the oesophageal pouch and the beginning of the infection and so on. That we don't tend to have that sort of material before the courts as evidentiary material. So I agree with you, maybe we should.

DR ZIMOVIC: My frustration is that the law then has the wonderful opportunity of spending many many months and years deliberating over a case to then determine it will be penalty of so much and we say "Well, if we had that money available initially to treat the patient we would not have got the complication", but we don't have that money available for every case and so therefore there is a distribution of - or a lack of distribution of money accordingly to treat the herd at the most economic rate possible. Humanisation is an example.

But the thing I really wanted to ask you about (if you don't mind) is that you make the comment about stem cell research and everything else and we talk about when's the date of life into conception being one starting point. Why can't we just determine

that is the case and that it is a life that we're going to sort of take on board and sacrifice and that's the harsh reality and that we have to treat it with the respect that it has rather than pretend it doesn't really exist and therefore doesn't really matter what we do with it because it doesn't really exist. We're fooling ourselves, really, and I'm saying it's a big ask but they're the sort of hard decisions we have to make in this life just like, I believe, the Indians used to sort of run around one tree and then pretend it was going to be the totem pole but then turn around quickly and cut the other tree down so it wouldn't suffer.

JUSTICE KIRBY: No, I don't know about the Indian law. I bristle a little at the word "herd" because to you in your profession and to me in my profession, every individual is precious. We just have to keep that in our mind, as I'm sure you do. But in terms of saying "Well, just let's accept that this is a life we're going to terminate". Most of the religious beliefs don't accept that at all. They don't accept that they're terminating a life at all, because, unless you hold to the view of conception being the instant when human life begins then you have no problem with using embryonic stem cells. Therefore, they won't agree with you that that is terminating a life. Most of the world doesn't accept that opinion. So you can take that view in a Judeo-Christian country like Australia (perhaps now a Judeo-Islamic-Christian country) but you can't take that as the rule for the whole world. This is because there are Buddhists. There are Confucians. There are people of entirely different religious views. And no religious

views at all.

This is the problem for an international body. You've got to try to accommodate them all. I can tell you, ladies and gentlemen, "it's not easy. It's hard enough dealing with these issues in Australia without having to try to deal with them internationally. But that's the only world we live in. If we solve these problems in western countries sure as eggs (if that's the correct word to use) they will be doing some of these experiments in Outer Mongolia or Uzbekistan. That is just the nature of the world we're in today. Now one last question from the Breakfast Room.

THE CHALLENGES OF GLOBAL AIDS & GLOBAL TERRORISM

DR GREENBERG: Sir, Yvonne Greenberg, another humble doctor.

JUSTICE KIRBY: Are there no lawyers in this room?

DR GREENBERG: Humbled because your speech did, indeed, make me feel different about my own little trivial matters that I deal with. Had you had another half hour, could you have expanded on your wonderful thoughts about the 20 million children who are going to be HIV positive in the next ten years? The sort of things that Samuel Pizzar talks about sharing our wealth and our resources in a wider scale, not just with the HIV positive people but all the people that we currently call "terrorists" and whatever that are going to make our future and our children's future somewhat compromised.

JUSTICE KIRBY: If I had a half an hour more, if I had even 20 minutes more I would have lots more to tell you. I'd tell you about the

Bangkok Conference, about the so-called ABC strategy, (A is for abstinence and about a third of the American fund of $5 billion is going to be spent on promoting abstinence, which most informed people don't think is good value for dollar, that that is not something that really needs lot of money poured into it). There are lots of strategies to support abstinence anyway. But that is another issue.

For the first time the Secretary-General of the United Nations, Kofi Annan went to the International AIDS Conference. It's never happened before in 20 years. He turned up and he made a speech where he said "It's very important for the international community to respond to the issues of terrorism. Thousand of people are suffering as a result of global terrorism. Yet millions of people are suffering and dying for want of leadership over HIV AIDS. The time has come, he said, for more leadership in the world on this issue. Objectively speaking, it is a far greater challenge to the world than is terrorism, important though that is. If we'd only marshalled something of the energy, the determination and the dollars into the struggle against HIV/AIDS, there would probably be fewer orphans. HIV/AIDS needs more leadership. I have to say Mr Mbeke has not given that leadership in South Africa. We hope that he's changed his mind and that things are going to change. I cannot get out of my mind what you would see every day as a doctor but what a judge doesn't see so often. That is a mother with a look of sheer desperation on her face. A little child emaciated in a tiny bassinette without access

to essential drugs. It's a terrible thought that is haunting me in my mind. It's a reason why Kofi Annan was right. Now I'm going back to the Dining Room. This is a most fabulous group of people here in the Breakfast Room. I will come back in here and have my dessert with you later.

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This is an equal opportunity function. We've got to have a few more questions from the Dining Room.

EUTHANASIA, LIVING WILLS & END OF LIFE DECISIONS

DR SCHMIDT: Graeme Schmidt. Thank you for your talk Justice Kirby. it was great. I'm sorry you haven't worn your yellow jacket that you wore in Corfu.

JUSTICE KIRBY: I am in the Melbourne Club. I've taken 30 years to get into this place. There's no way I was going to get in here and be thrown out because I come dressed in yellow.

DR SCHMIDT: I'm involved in a program with colleagues called "Respecting Patient Choices" which is called other names in other states and overseas, like "Advanced Directives" and "Living Wills". The idea is that patients towards the end of their lives are encouraged to make plans as to what they want done and what they don't want done, particularly whether they don't want to have feeding tubes, intravenous feeding, cardio-pulmonary resuscitation and ventilators et cetera. Some people have referred to this as "legalised euthanasia". We don't believe this is so and we believe that the program is well worthwhile. I

wondered if you'd care to comment.

JUSTICE KIRBY: Well, I've got to tread with a little bit of care here. It's just possible that issues of this kind might one day come before me in court. The executive officer who's working with me in the UNESCO body which is drawing up the International Declaration is from the Netherlands, Professor Hans Galjaard. He has told me of the developments in the Netherlands which he asserts is disapproved of by most members of the medical profession. The reason they disapprove of the moves by law to move into the field of euthanasia - even with proper precautions and so on - is that they feel that it sends the wrong signal and a different signal from the signal that has been sent by law and society for millennia. This is the message of respecting and protecting human life.

But my reading in the field of AIDS where there have been books on the issue of "end of life decisions" suggests that, with the development of palliative care we've reached a point where it is known that some of the palliation will terminate the life. However, to reduce the pain is proper medical treatment. Of course, that therefore means that, with the technology of palliative care we have, as it were, confronted the issue of a knowing termination of life. That is something where, once again, technology really overtakes all the old reasoning and approaches of the law.

So, I don't know how these issues will be dealt with, if at all, in the IBC Declaration. There are laws in America on "living wills"

and maybe in Australia, I'm not sure. However, I do know that many of the churches, most of the churches in Australia, do not believe you have to struggle officiously to keep a person alive. Also I believe that in most of the criminal laws, in the area of palliative care, an argument exists that the courts would uphold and understand. If you look at the cases as they come through, the judges tend to recognise the realities of pain relief.

But how we respect what Justice Brennan in the United States Supreme Court said was the "ultimate right" of every individual, to decide when their life will finish, is an issue that our legal system is still fudging. Sometimes it's not a bad thing to fudge very difficult decisions. Yet I have to acknowledge as the brother of a sister who works in the oncology ward in Royal Prince Alfred Hospital in Sydney as a nursing sister, it puts tremendous burdens and pressures on the medical and nursing staff. In a sense, we in society like to shift that moral burden to them. We find these decisions just too uncomfortable and painful. Isn't that true? Isn't that the way we deal with some of these issues? They're just too uncomfortable and painful. Another question.

SHIFTING RESPONSIBILITY & SHARING RESPONSIBILITY

MS JOCKEL: Maria Jockel from Gadens Lawyers. I wanted to ask you a question which is perhaps very close to my heart. Given your very extensive experience in a judicial capacity, I would ask you to comment on a trend that I see increasingly in our society and that is to limit people's rights on the basis of commercial or

economic rationales. I'm thinking of it in two ways. First, in the area of medical negligence, capping people's rights to claims, whole of body claims, limiting common law negligence rights et cetera and in the area of immigration law, where I practise, the right of access to the courts, the right of review, limiting time, privative clauses and ousting certain groups of people from being able to, indeed, have access to the courts and more recently for us lawyers to be subject to vexatious - allegations that we're vexatious if we bring certain claims to the courts or, indeed, be personally liable for the costs. I know it's a fairly broad question but it seems to me that we are also impacting on our rights in a very affluent and supposedly democratic system of law.

JUSTICE KIRBY: That's a fair question. As you've recognised, it is also a fairly broad question, because it's not a matter of dealing with all of the issues that you raise globally. For example, I can well understand the enactment by an elected parliament of a law providing that a person's entitlement for injuries, however profound, that have been suffered in recreational activities which they have voluntarily entered is something that the recreational character and the election to participate in them should be taken into account in limiting the access to damages for any injuries that follows. That's very hard on the person who is then profoundly injured, as often they are in recreational injuries.

But I can understand that parliament would say "We just can't afford to give out these huge verdicts in these cases. People have to accept a responsibility for their own safety, a greater

responsibility". Nevertheless, you're right to put your finger on the capping and the limitations. It's very important to point out, as I think I did in a decision, that the urgency to impose such caps in a Western Australia case was political. It arose in order to reduce the costs of the green slip, in order, in the motor vehicle field, in a sense, to shift the burden of the compensation dollar and the compensation entitlement from the community of motor drivers effectively to the person who was injured. This is something that has happened in every State. To a very large extent it has to be said in this field it's happened because governments have felt under pressure (or thought it was politically desirable) to limit the amount that people could recover.

The net result of that is that you shift the burden of loss to the accident victim. If the victim can truly prove negligence and truly prove that somebody was really at fault there is a question, I believe, as to whether the losses that follow ought to be shared by those who drive motor cars or are otherwise responsible in order to share the risks as a community would. But that seems to be a somewhat old-fashioned and out of date idea.

REFUGEES & ACCOUNTABILITY TO THE LAW

JUSTICE KIRBY: Now on refugees, you will understand that I have to tread with the greatest of care on such a subject. But we do have in our Constitution a wonderful provision. It was adopted by the founders. It was something they added to the American

Article III that otherwise they largely copied. In Chapter III of our Constitution, the judicial part of the Constitution, in s.75(v) it says that if any individual claims that an "officer of the Commonwealth" has been acting beyond power - I simplify it a bit - then they can go straight to the High Court. There is effectively a judicial escalator. The High Court can either deal with it itself immediately or send the case to another court. But if the case is made out, our court can issue writs to stop the person from doing what is unlawful or require that person to do what the law commands.

I don't believe that we could have had in Australia, under the Australian flag, the problem that bedevilled the United States of America in Guantanamo Bay until the decision in *Rasul v Bush*[4]. I don't believe that could have happened, because every person who takes Commonwealth money is accountable in the High Court for complying with the law and acting within jurisdiction. So that's, in a sense, a protection. It was upheld in the case of *Plaintiff S157 v The Commonwealth*[5] in 2003 in respect of refugees. The provision cannot be excluded by parliament because it's in the Constitution. It guarantees the right of access to the courts, including direct access to the High Court. It gives the seven Justices of the High Court a great responsibility,

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[4] 542 *United States Reports* 1 (2004); 72 *US Law Week* 4576 (2004). See also *Padilla v Rumsfeld* 124 S Ct R 2711 at 2735 (2004).

[5] (2003) 211 *Commonwealth Law Reports* 476.

respectful of parliament and its democratic accountability and entitlements, but nonetheless upholding the fundamentals of the law and the Constitution.

It's actually quite interesting. Politicians and parliaments and executive governments tend to think in three-year spans. It's the nature of democratic accountability - and it's not a bad thing. It's part of the nature of democracy. We're seeing it played out in the United States at this very moment. We'll see it played out in this country, in due course.

However, what you have to understand is that judges march to a different drum. We keep our eye on a longer time frame. One of the greatest decisions of the High Court of Australia was the *Communist Party Case*[6]. There six of the seven Justices, including Sir Owen Dixon leading them, decided in 1951, in the midst of all the fear and all the scare of the terrorists of those days (the communists) in effect that you fight people's ideas with ideas. That you can deal with them and punish them for what they do. But not for what they think, however bizarre and foolish you may think their beliefs to be. That was a tremendously brave decision in 1951. It's very important that our courts, and especially the High Court, should continue in that great tradition. The Court defended our liberties as Australians. And as Justice McHugh said recently in a paper delivered to a legal conference

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[6] *Australian Communist Party v The Commonwealth* (1951) 83 *Commonwealth Law Reports* 1.

in Florence: our life in Australia, our liberty, would have been quite different but for the *Communist Party Case* decision[7]. Now we have time for one more question.

MS TALMICH: I'm Louise Talmich. I just wanted to ask you something probably very simple because I'm not a barrister or a medico. I was just a bit curious about when you first started talking about the doctors with the litigation regarding the eye - well, all three of the cases actually - were they honourable enough to admit that they had actually neglected to tell these patients this? Or was it a case of the lawyer taking the word of the patient that they had asked for advice on the risks? If that's the case, I think a lot of us are worried about litigation going a little bit crazy, what happens then?

JUSTICE KIRBY: That's a good question. In fact it's commented on in the cases. What happened was that, in the first two cases, the doctors denied that the patient had asked about the risks. However, the judge who heard the case decided that such a question had been asked. Now, that is the nature of the legal system. The judges, with due acknowledgment of the scepticism that is required because of the self-interest of the patient to give her evidence, nonetheless accepted the patient. So, by the time the case has reached the appellate court, that was a matter

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[7] M H McHugh, "The Strengths of the Weakest Arm", unpublished paper, 2 July 2004, cited in *Al Kateb v Godwin* (2004) 208 *Australian Law Reports* 124.

decided on the basis of - we call it in the law - credibility assessment. Therefore, that was not an issue that was contested in the High Court. So when it came up on the appeals that issue at least had been tucked away. The earlier battle over what was said to the doctor was forgotten. So the cases were fought on the basis that this had indeed been said. There were some objective facts that supported each of the patient's complaints. One would not be surprised that a person with a loss of sight in one eye would be worried about the other eye. Blindness is such a terrifying thing. And the Teflon comment was contemporary at the time with Neville Wran's condition. So the judges found that the advice had been sought. However, please don't think judges just accept such complaints simply because people say they made them. Judges know that that is in the interest of the patient to make such a claim. Therefore, that doesn't necessarily mean that it's true. Mostly judges didn't come down in the last shower.

Well you've been a wonderful audience. I'm very privileged, at last, to have entered this Club and to have been in the very centre of "the Melbourne establishment" and in your company I can't wait to tell my father about it on Sunday night over the sausages. Thank you very much for a lively encounter.

EXPRESSION OF THANKS

JUSTICE CURTAIN: Members of the Society and guests, when I was asked to give the vote of thanks to His Honour on the occasion of

his address to the Society tonight I had put in place a discreet enquiry of His Honour as to the breadth and detail of the address that he'd be giving to us tonight and, in due time, a reply came in the following terms: "I will speak on three themes: the different way lawyers and doctors look at medico-negligence cases, the crisis in HIV AIDS with no real access to anti-retroviral drugs in the developing world and what the world community can do about this and the challenge of ethics in new technology, the genome embryonic stem cells and patented drugs. I hope this helps Judge Curtain".

Daunted by this reply, I had recourse to the Internet and to the website of the High Court page and there perused a number of His Honour's speeches and it came as no surprise to me, and it wouldn't to any of you that, indeed, His Honour is a prolific speechwriter and social commentator. I did not appreciate that his addresses had included one entitled "Breast feeding - Breast Substitutes and the Law", which his website has recounted he delivered to an astonished audience in Harare, and his own entry in "The World's most Boring Lecture Competition", which I hasten to say, although the website didn't say so, I've no doubt he did not win.

What was apparent from a perusal of some of his speeches is that His Honour is a man who firmly believes in the duty of educated people to continue to educate themselves and to engage in informed debate on the great issues which confront us and that's what His Honour has done tonight, addressing us in

such a personable and erudite manner.

There is no doubt, Your Honour, that tonight there are 230 members of this Society here and there's no doubt that tonight will be a shining night in the annals of the esteemed history of this Society. I have no doubt that each of the 230 members have come here tonight no doubt to hear and see you and to learn, to embark upon and discharge that duty of self-education. I have no doubt, Your Honour, that they will go away satisfied that they have seen a man of great dignity, principle and a great humanitarian. May I, on behalf of the Society, warmly thank you for your generosity in addressing us tonight.

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