TRANSCRIPT OF PROCEEDINGS

MEDICO-LEGAL SOCIETY OF VICTORIA

LAW AND MEDICINE

A MARRIAGE OF CONVENIENCE

BY

THE HONOURABLE JUSTICE MICHAEL DOUGLAS KIRBY AC CMG

HEARD AT

THE MELBOURNE CLUB

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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 Douglas 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 Douglas 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 Douglas 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 Douglas 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 you in the other room there, I've got my eyes on you and I'm going to be asking you some questions at the end of my address, so get all your curly questions ready and I'll be in there as soon as I finish these initial remarks.

As you heard, I was appointed first to Federal judicial office back in the year '74 it actually was, the end of '74, and I remember coming with Sir John Moore who was the President of the Arbitration Commission who stayed just opposite to this end of Melbourne and walking past this club and looking into this room and seeing a glimpse of the chandeliers and the magnificent wood and imaging the place within. Now, at last, after 30 years

I've been trusted to come in here and it fulfils all a mere Sydneysider's expectations. Isn't it a wonderful place! I mean it is a magnificent treasure and 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. Elliott, perhaps W.B. Yeats would spring into your mind.

> "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 about what is past, passing or to come.

But the theme of my talk tonight appeared in one of the poems of Tagore and there was a forward to the book of poems of W.B. Yeats himself because these two poets, each of them won the Nobel Prize for literature. And Yeats describes in his forward how Tagore would send him a poem through the mail and 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 poet whose first language was Bengali but who 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, 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 and it's 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, though I will mention those things. I am going to talk of the age we live in; the age when law and medicine must interrelate to a better world and the force of human rights and global responses to problems must "come, come, ever come".

I honour the people who have gone before in this lecture series. You know, if you were appointed as long ago as 1974, December '74 when I took my first O's, you know all these people. I mean I knew Sir John Nimmo, a wonderful man. I knew Sir George Lush, I knew Sir Oliver Gillard. Now Sir Oliver looked a little bit crusty but when I was appointed the first Chairman of the 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 Es La Baba. Sir Reginald Smithers - there was a 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 down 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 gathering. So, it's a wonderful honour for me to be with you tonight and 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 and at the end of these remarks I'll endeavour to answer them.

My talk, as the President has indicated, will really divide into three parts. First, I'm going to tell you of my life in the court, in the court where we are members of one of the constitutional courts that presides over one of the oldest constitutions in the world. The Australian Constitution, oddly though it may seem for our young country, is the sixth longest still serving Constitution in the world and 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 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 and 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 dignity of the individual and justice to

the individual have really changed, quite noticeably, the relationship between the doctors and their patients in a way that has been expounded by the High Court.

The first of these three cases was Rogers v. Whittaker. You will remember the case: Dr Christopher Rogers was an ophthalmic surgeon, Mrs Whittaker was a person who had suffered a direct blow to her eye at a young age, the blow had left her virtually blind in her left 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 and she told him that she wanted to make sure that it wouldn't have any dangers for the good eye and he told her of no dangers.

The operation was performed and she suffered a sympathetic ophthalmia which is a very rare condition. It's a condition that the statistics presented to the court said "presents itself in about one in 14,000 procedures", but Dr Rogers did not respond to the request of the patient and tell her of that danger. In fact, she was reduced after the operation 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 claim was rejected by the courts and it wasn't pressed in the High Court. But she also sued for negligence claiming that she should have been given the warning, having regard to the question that she raised and the concern she specifically indicated, about the risks of suffering an injury to her good eye.

The Judge at trial, Justice Campbell in the Supreme Court of New South Wales, upheld her claim. My old court,

the Court of Appeal of New South Wales upheld her claim and it came to the High Court of Australia. Now you can appreciate that very strong arguments were pressed - powerful arguments - arguments 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. But the High Court held that having regard to the fact that she had specifically asked, she should have been specifically told and that the duty nowadays was to be by the standard of what the patient actually asked or what the reasonable patient had an entitlement to know.

The case was therefore a rather special one because of the conversation which was held to have occurred and this therefore fell into the category of what the patient had actually asked and the finding upholding negligence was that in those circumstances, rare though it was, the patient should have been informed and that the negligence should be sustained.

A case came up in 1998, soon after I came to the court, (Rogers v. Whittaker being in 1992) called Chappel v. Hart. Chappel v. Hart was a rather similar case where the patient had had trouble with her throat and she told her doctor, Dr Chappel, that she didn't want to have an operation if she'd end up talking like Neville Wran. You may remember at that time, even you Victorians may remember, that Neville Wran had had an operation which involved injecting Teflon and she didn't like the sound of it and she didn't want to end up that way and she wasn't told that there was a risk. It was a risk that required three things to come together: the puncturing of the

oesophagus, the release not just of bubbles of air but of bacteria and the creation of an infection. Those three things came together. She said "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 Court rejected the claim that there was any negligence on the part of Dr Chappel in the performance of the operation, but Professor Benjamin was called and he had performed a very much larger number of operations of this kind and had never had this complication. So Mrs Hart's case was based on the fact that she had lost her voice, she had lost her vocation as a teacher and she had suffered loss because she wasn't informed and she should have been. The argument to the contrary was put: "This is very rare. Professor Benjamin had conducted 300, but so might Dr Chappel, and this complication had arisen and it might have arisen in Professor Benjamin's surgical list, it might have arisen in anybody's, it was just one of those rare unfortunate developments. Well, tell me about it so that I can make my own decision". And that's what the High Court, by majority, said. There are very strong dissenting opinions from McHugh and Hayne JJ and I have to tell you that most of the Law Review articles on it have thought they got the better of the argument over Gaudron, Gummow JJ and myself, but the magic majority was found three against two so the patient succeeded, not because of negligence on the part of Dr Chappel in performing the operation but because of the failure to tell the patient when she specifically raised the point about Mr Wran and the Teflon. Ironically enough, she subsequently had the procedure that injected

the Teflon but it didn't do any good in her case.

The third case is Catanach v. Melchior. This was a case decided in 2003. It was the case which got a lot of publicity concerning the tubal ligation performed by Dr Catanach in Brisbane on a patient who had gone to him for sterilisation. She had had two children, the family decided that they didn't want more children and Dr Catanach performed the operation and, once again, there was no finding of negligence in the performance of the procedure, but when he performed the operation he couldn't find one of the fallopian tubes. The patient had had an accident in her teenage, but he didn't tell her of that 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 and conceive she soon did. And so she sued the doctor and the finding, once again, at trial was that the doctor had failed to tell her of the risks so that she could make her own judgments.

Do you see the common thread through these cases? The common thread is not the condemnation of the law of the performance of the procedures. 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 about would remember a time both in practice and in law and both in 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". Well, in the law I learned as an articled

clerk that that wasn't good enough. You had to explain it again. You had to go over it again. You had to shift, in a sense, the moral responsibility of the decision from yourself to the client and, essentially, that's what Catanach decided. That was a four/three decision.

You see, ladies and gentlemen, none of these cases are easy. They're usually divided. There are always strong arguments for each point of view and courts disagree about them. The House of Lords before and since has handed down divided decisions which reach a different conclusion as the High Court of Australia. So these are matters upon which very clever, very experienced, very principled people can reach different conclusions.

I know both from reading and from coming to 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: one in 4,000, one in 300, a rare case and a claim for support for a child who should be a great blessing and should not be the subject of a claim for damages.

So I know all these arguments and they were put to us by counsel of the greatest ability, but I think in the end the heart of the difference is that the law looks on these issues as a matter of upholding the principle of the right of the patient to be informed, to be informed of the decision so that the patient makes the decision. As I have said, shifting the moral burden of decision-making. You can't tell a patient or a client in the time that's available. Let it be ten minutes, half an hour, two hours, you just can't communicate a lifetime's knowledge and wisdom, experience and judgment, you can't do it and

we know you can't do it, but you have to try and when the question is asked, professionals in today's world have to give the best information that they know because the patient is concerned, the client is concerned, that's our duty - Nanny no longer knows best, it's a matter of shifting the responsibility of ultimate decision to the patient or the client and that's essentially what the three cases decide.

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

It wasn't easy in embryonic stem cells and it wasn't easy for a pretty basic reason. The world simply 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 Macedonian and other orthodox churches believe that there is one definite moment when human life begins, it's the moment of conception and therefore that all human rights begin at that moment and there's no other moment that is sure and certain - that's it and therefore the law and international human rights have to protect the

embryo from that instant on. This is very deeply believed, very deeply felt and if you're following debates in the United States of America, it's a very live issue there as it is, to a lesser extent I think, in Australia, but it's an issue in many countries.

Now, in the IBC (International Bioethics Committee) we got 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, we're not talking about a foetus that has developed and grown, we're talking about something that is as big as a full stop on an A4 size page. This is truly tiny and this is what we're talking about and after 14 days the first outline of what becomes the spine appears and that, say some theologians, is the moment of the beginning of life of human beings to which should attach human rights and legal entitlements.

"No", said the Jewish theologian. Judaism has traditionally taught that human life begins at the end of 30 days and therefore the primitive streak and the moment of conception are quite erroneous, that's much too early. Now, of course, it's a bit more difficult in the Jewish belief because they don't have quite the same hierarchical structure as the Christian churches tend to have, or some of them, and therefore there isn't only one 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 that at all.

Insoulment 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", which used to be the common law rule. Life begins at birth and 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 dies then it must be given all the ritual funeral rites of a Hindu.

And so we sitting at this table trying to find a rule for the whole world and listening also to a few people, one of them I know I think of from Japan, who said "All of this is nonsense. This is not ethics, this is religion" and he took the view that religion was helpful but not determinative of these issues. These were issues to be determined in a secular way by human morality, devised by humans and 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 the use of stem cells has to some extent shown promise.

So, when you sit at a world table trying to find common ground I have to tell you it's not easy and now I'm chairing the committee which is trying to produce in the space of six months, which is asking heroic efforts, 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, don't do it; in the world of massive technology

don't do it, and that's very popular in Europe. But one of the persons who was at the last meeting, actually from Croatia, said "I wonder if Pasteur 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 in the International Bioethics Committee on this issue is very important. When I tell many lawyers of it their eyes cloud over. I don't see your eyes clouding over, not yet anyway, maybe in the other room. But it is the endeavour of humanity to respond to the enormous developments of technology and to do so in a way that gives real answers, because not to respond, to do nothing, to say nothing, to have no rules, to have no ethics, to have no laws is to make a decision. If you have no rules you withdraw from the principled decision on such questions. And there are many such questions, 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. There are so many questions that are now being presented by technology and this mere collection of 50 people has to try to find the solutions.

The third and, in my opinion, the most pressing matter, is one that I'll mention now and last. Last week at this time 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. They took me to the Chris Harni Baragwanath Hospital on the edge of

Soweto. They said it was the biggest hospital in the southern hemisphere, a huge hospital. The doctors I saw were all Afrikaans but they were people of the highest ability and integrity and they were struggling against an enormous epidemic where they have not had the leadership that fortunately we in Australia had when HIV AIDS came along.

You remember when that happened in the early '90s. You remember in the early '80s it was Neil Blewett and it was Peter Baume. They are two princes of politicians. When it came upon us, Neil Blewett went and called on Peter Baume and 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. There was nothing that medicine could really offer - palliatives - but nothing. I sat at the bedside of lawyers whom I knew who said "I'm going to beat this thing. I'm going to beat it by willpower". Well, they didn't beat it and one by one they died. It was a terrible terrible time. And, 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, Jonathon Mann was working in the Congo (then called Zaire) and in the middle of an African thunderstorm, as he later described it, he told the then Director-General of WHO, Dr Marla from Denmark, he said "There's this 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 and they rapidly die" and to his great credit, Marla called Dr Mann back to Geneva within weeks and the world's response to HIV started and I was asked to serve on the initial Global Commission on AIDS with the scientists who found the virus and with many other wonderful people.

At that time, without the medications, what did we have? Suddenly we found law had a little role to play because at that time without the vaccine and the medications the only way we could stop the spread of the virus was to get into the minds of people so that they modified their behaviour to cut down on the risk of infection. This was a big ask, I knew that as a judge. We'd been trying for millennia as judges to change human behaviour and it's only partly effective. But that is what was done and you will remember what we did in Australia, we did some remarkable things. The great national campaign of information, the availability of condoms, the knowledge about the modes of transmission, teaching in the schools and, most extraordinary of all, the needle exchange program.

In the time when we were taking these urgent measures, 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 it and, fortunately, in Australia on a bipartisan basis - and it's been largely continued - we have tackled it head on, honestly, and the law has played a role, reforming the law on homosexual offences so you don't stigmatise and alienate people, you get information

to them, you mobilise people. Reforming the law on sex workers. Reforming the law on equal opportunity and protection against discrimination. We did an amazing raft of things in the law and the law became the supporter of public health at that time.

Now I want to tell you of what I learned in South Africa, because AIDS continues to present you with new 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 he didn't talk about it. The consequence is that already four and a half million South Africans are infected. This is not in a minority community. This has got into the general heterosexual community and it's plateaued at a point where it's lifting off into the whole of the community and 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 big predicament.

Now here is the puzzle. When the new Director-General of WHO came into office last year, his name is Dr Lee, he's from 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. This is totally unacceptable. We have anti-retroviral drugs. We have the means to prolong life and to help people from suffering and we've just got to get it to people and, 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.

And this 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 and cases of a similar kind throughout the world, that before you take a 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 and the problem is that to do 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 facility simply cannot produce.

And so we now face a moment in the AIDS crisis, as the Bangkok Conference revealed where, in the view of many, AIDS is out of control and 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 on ARVs by 2005, but they're way behind the target. In the meantime, in the Chris Harni 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, they continue to multiply throughout Africa.

It's a real puzzle but I have to say that I'm 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" but others say "Well, we haven't been doing well enough with the rights respecting approach. We now have to take some radical steps for the most fundamental right, the right to live".

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. 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 Catanach 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 you 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". And I'm always talking about them 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 a sense, cut off and yet we can't be cut off, as I realised when I was in that hospital at Soweto last week.

So when I was asked to come 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, issues of international instruments that I'm now participating in and an enormous

struggle that I've been living with since 1984.

I'm grateful to this Society because my partner, Jan was invited to come tonight and he would have liked to come but he's back there in Sydney looking after - as a volunteer - a patient who has HIV and who's not at all well. Even the ARVs don't work forever and don't work with everybody. And, in any case, the airfares are expensive and we're not quite used to it yet, to come, but it was a nice gesture and I appreciated the fact that the Society invited us both.

It's a wonderful thing. I go along as a handbag to the Ankalis (as they're called), people who are - it's an Aboriginal word for "friend" - and it is truly marvellous in our country that there are lots of volunteers. I sit at the table and half of them are heterosexual and half of them are homosexual and they're all just there working for people who are ill. That's what binds us in this Society. We are people who are professionally trained to help people who are down and who need help. This is no longer just a local issue, these are great world issues and 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 and I'm going to go into the breakfast room because I'll be gone before breakfast tomorrow morning, so I'm going to have a good look around there and I'm going to ask some questions, so you can think up some curly questions here. We've got about half an hour and I'll ask you to come with questions but, in the meantime, I'm going in to our separated brethren and sisters.

Here we are in the other room. My word, this is

such an intelligent-looking room and 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 of your own.

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 and many of those requirements cannot all be met perfectly. However, the unfortunate adversarial litigation system focuses on whichever one suits them and quite easily, as I see it, finds that a fault - can everyone hear me?

JUSTICE KIRBY: No, in the other room, you've got to speak directly into the mic.

QUESTION: Okay, I beg your pardon. Shall I start again?

JUSTICE KIRBY: No, I think you've said that you have lots of pressures and it's difficult to deal with all the issues in dealing with a patient. I understand this.

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 and all I'm trying to say is that it seems - well, okay, 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 and I think that is a great injustice even though it may be legal.

JUSTICE KIRBY: I understand that comment and I know that your view is not only shared by you but by many. In fact, they've discovered 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 and those who are responsible for the healthcare and they've found that, with that and quite modest arrangements for compensation at the time, a lot of the problems go away.

Our 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 but we do that for default of any other way to do it and people will not discuss matters, they're advised not to discuss matters and that leads to the adversarial standoff. Now I think we should be more imaginative and look to other countries which have tackled the issue more correctly.

You see, 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 and they know that they get up early, they work so hard, they do so much and that they feel this is very unfair. But the lawyer tends to have before him/her a person who has generally had a complication, is not well and, like Mrs Whittaker or Mrs

Hart or Mrs Melchior, has got a grievance and the lawyer 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. I've often thought that's the heart of a big difference that doctors take medical negligence very personally and they feel affronted and I think this is one of the problems that we have to address. Now, anybody else in this highly intelligent room that has any questions?

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. 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 was 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 and I bristle a little at the word "herd" because to you in your profession and to me in my profession, every individual is

precious and 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 then you have no problem with using embryonic stem cells and therefore they won't agree with you that that is terminating a life. Most of the world doesn't believe that and so you can't - you can take that view in a Judeo-Christian country like Australia, a Judeo-Islamic-Christian country, but you can't take that as a whole world because there are Buddhists, there are Confucians and there are people of entirely different views. So this is the problem in an international body, that you've got to try to accommodate them all. I can tell you, ladies and gentlemen, "it ain't easy", 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 world we live in, because if we solve these problems in western countries sure as eggs, if that's the correct word to use, they will be doing these experiments in Outer Mongolia or Uzbekistan and that will just be the nature of the world we're in today. Now one last question from the breakfast room.

DR GREENBERG: Sir, Yvonne Greenberg, another humbled 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 ABC strategy, 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 that anyway.

But Kofi Annan, for the first time the Secretary-General of the United Nations went to the International AIDS Conference, it's never happened before in 20 years, and 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, but millions of people are suffering and dying for want of leadership from HIV AIDS and the time has come for more leadership from the world on this issue which, objectively speaking, 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 bucks into the struggle against HIV AIDS there would be fewer orphans. But it also needs more leadership and I have to

say Mr Mbeke has not given that leadership and we hope that he's changed his mind and that things are going to change because I cannot get out of my mind what you would see every day but what a judge doesn't see often and that is a mother with a look of sheer desperation on her face and a little child emaciated in a tiny bassinet without access to essential drugs. It's a terrible thought that is haunting me in my mind and it's a reason why Kofi Annan was right. Now I'm going back to the other room, but this is a most fabulous group of people and I'm going to come in here and have my dessert with you.

Now this is an equal opportunity function. We've got to have a few more questions from this room.

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.

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, because it's just possible that issues of this kind might one day come before me in court and the executive officer who's working with me in the UNESCO body which is drawing up the International Declaration is from the Netherlands, Professor Anton Harber, and 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 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 lasted for millennia 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 but to reduce the pain it is proper medical treatment and, 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 and that is something where once again technology really overtakes all the old reasoning and thoughts of the law.

So, I don't know how these issues will be dealt with. There are, of course, laws in America on "living wills" and maybe in Australia, I'm not sure, but I do know that many of the churches, most of the churches in Australia do not believe you have to struggle officiously to keep alive and also I believe that that is an argument

which in most of the criminal laws would be at least in the area of palliation an argument that the courts would uphold and understand, if you look at the cases as they come through.

But how we respect what Justice Rearnon 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, I believe, fudging. And sometimes it's not a bad thing to fudge difficult decisions, but I have to acknowledge as the brother of a sister who works in the oncology ward in Royal Prince Alfred Hospital as a nursing sister in Sydney, it puts tremendous burdens and pressures on the medical and nursing staff and, in a sense, we in society like to shift that moral burden to them because we find these decisions just too uncomfortable and painful. Isn't that true? Isn't that the way we deal with these issues? They're just too uncomfortable and painful. Now, another question.

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 and, as you've recognised, it is a fairly broad question, because it's not a matter of dealing with all of the issues globally. For example, I can well understand the enactment by an elected parliament that a person's entitlement for injuries, however profound, that have been suffered in recreational activities that they have voluntarily entered is something that the recreational character and the election to participate in them is something that is to be taken into account in limiting the access 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 and people have to take a responsibility for their own safety, a greater responsibility". But you're right to put your finger on the capping and the limitations and it's very important to point out, as I think I did in a case, that the urgency to do this in the Western Australia case was political in order to reduce 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 to the

person who was injured. This is something that has happened in every state and to a very large extent I think 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. But the net result of that is that you shift the burden to the victim and if the victim can truly prove negligence and truly prove that somebody was really at fault there is a question, I think, as to whether that ought to be shared by those who are in that profession or in that business or drive motor cars in order to share the risks as a community would. But that seems to be a somewhat old-fashioned and out of date idea.

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 decided by the founders and it was something they added to the American Article III, our Chapter III, the judicial part of the Constitution, and it's s.75(5) and it says - and they don't have this in America and they don't have it in Canada, it's something unique to Australia - 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 - escalator - and the High Court can either deal with it itself or send it to another court and can issue writs to stop the person from doing it.

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 Russell v. Pusch. I don't think that could

have happened, because every person who takes Commonwealth gold is accountable in the High Court for complying with the law and acting within jurisdiction. So that's, in a sense, a protection and it was upheld in the case of Plaintiff S157 in 2003 in respect of refugees. It cannot be excluded by parliament because it's in the Constitution and the right of access is direct to the High Court and it gives the seven Justices of the High Court a great responsibility, respectful of parliament and its democratic accountability and entitlements but nonetheless upholding the fundamentals.

It's actually quite interesting: politicians and parliaments and executive governments tend to think in three-year spans. It's the nature of the democratic - and it's not a bad thing, ladies and gentlemen - it is democratic accountability, it's just part of the nature of democracy. We're seeing it played out in the United States at this very moment and we'll see it played out in this country, in due course. So it's an understandable thing that judges march to a different drum. We keep our eye on a longer haul and I think one of the greatest decisions of the High Court was the Communist Party case. These 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, that you fight people's ideas, in effect, with ideas and 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 it to be. That was a tremendously brave decision and it's very important that our courts, and especially the High Court, should continue

in that great tradition. It defended our liberty. And as Justice McHugh said the other day "I have to tell you, in Florence" - as he said - "in Florence our life in Australia in liberty would have been quite different without it". Now we have one more minute for one more question.

MS TALMICH: I'm Louise Talmich, and 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 them actually - were they honourable enough to admit that they had actually neglected to tell these patients this or was it you taking or the lawyer taking the word for the patient that they had asked it and it wasn't answered and 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 and in fact it's commented on in the cases. What happened was the patient said it and I think in the first two cases the doctors denied it, but the judge who heard the case - and you have to have somebody to decide things, you can't just go on "I did it. You didn't do it. I didn't. You didn't do it", you have to have somebody who decides it, that's just the nature of the system and the judges, with due acknowledgment of the scepticism that was required because of the self-interest of the patient to say this, nonetheless accepted the patient, so that by the time the case has got to the appellate court that was a matter decided on the basis of - we call it in the law - of credibility assessment and therefore that was not

contested and so when it came up on the appeals that issue had been tucked away and was forgotten and so the cases were fought on the basis that this had been said, and there were some objective facts. I mean 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 very contemporary at the time with Neville Wran's condition, so that the judges found it and it wasn't contested when it got up, but don't think judges just accept it because people say it, because judges know that that is in the interest of the patient and therefore that doesn't necessarily mean that it's true.

I think you've been a wonderful audience and I'm very privileged at last to have entered this room and to have been in the very centre of "the Melbourne establishment" and I can't wait to tell my father on Sunday night over the sausages. Thank you very much.

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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