
TRANSCRIPT OF PROCEEDINGS

MEDICO-LEGAL SOCIETY OF VICTORIA

THE MELBOURNE CLUB

MELBOURNE

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"Musings on medicine, law and other things"

PRESENTED BY: The Honourable Justice Ian Callinan AC QC

1 MR MICHAEL GRONOW: Ladies and gentlemen, we are both fortunate
2 and honoured tonight to have the Honourable Justice Ian
3 Callinan here to speak to us. His Honour was originally
4 born in New South Wales and then raised in Brisbane. He
5 was admitted to the legal profession in 1960 and joined
6 the Queensland Bar in 1965. He rapidly became one of the
7 leading advocates, not only in Queensland but also in
8 Australia and with a huge and very broad practice of the
9 sort that probably almost no advocate would have these
10 days but encompassing areas as diverse as criminal law,
11 constitutional law, defamation, industrial relations and
12 commercial law, among other things. He became a QC in
13 1978 and was president of the Queensland Bar Association
14 from 1984 to 1987 and president of the Australian Bar
15 Association from 1984 to 1985.

16 He was then appointed to the High Court of Australia in 1998
17 and after he retired from the High Court in 2007 he has
18 conducted a number of Commissions of Inquiry including
19 one into the outbreak of equine influenza and also an
20 inquiry into Victoria's parole system. This year he has
21 been appointed an ad hoc judge of the International Court
22 of Justice in the case involving Timor and Australia on
23 nomination of Australia.

24 In addition to his very distinguished legal career he has also
25 been a member of the Council of the National Gallery of
26 Australia and also the author of a number of novels,
27 short stories and plays including a crime fiction novel
28 called "The Lawyer and the Libertine".

29 It is with great pleasure that we welcome him as our guest
30 speaker at tonight's dinner and we are all looking
31 forward to his speech.

1 JUSTICE CALLINAN: Thank you for that very generous
2 introduction. You have set the bar somewhat higher than
3 the speech can ascend to, I am afraid.
4 I confess that I have always found after dinner speeches
5 difficult. Like a theatre audience, the mood of the
6 listeners can be volatile and unpredictable. Lawyers, in
7 particular, can be a very critical audience. The dilemma
8 with them can be whether to speak early or late, whether
9 more or less alcohol will be conducive to tolerance. I
10 once heard a barrister's after dinner speech to a group
11 of lawyers and judges that almost wrecked the speaker's
12 career. He managed, single handedly, to offend every
13 section of the diners; juniors, silks, judges,
14 solicitors, women and men. He missed nobody.
15 One of the judges, a woman famous for her courtesy, broad
16 mindedness and sophistication, was baying for his blood.
17 I hope that does not happen to me tonight.
18 It is, I think, a hallmark of civilised society that two such
19 disparate professions can meet, converse and dine as
20 convivially as we are tonight. I remember listening to a
21 radio interview of Plácido Domingo. The interviewer
22 asked him if he had ever sung the perfect aria. The
23 great tenor thought for a few seconds before replying,
24 "No, I think I almost did once."
25 Doctors, on the other hand, can and do often, it is clear, make
26 the perfect operation or diagnosis. The patient thrives,
27 stays the same or fails, as the case may be. If the
28 patient survives then the result is incontestable. No
29 doubt there are many difficult cases in which a medical
30 practitioner cannot be certain, cases in respect of which
31 the best doctors may have different opinions, but by and

1 large medicine, which once was described as an art, has
2 become a science much enhanced by technology.

3 It admits, I think, of more indisputably correct decisions than
4 does the law. I do not doubt, however, that like the
5 best lawyers, the best doctors constantly self audit
6 after every case questioning whether they might have done
7 it differently or better.

8 At the time of my appointment to the High Court I had been in
9 practice as a barrister for 33 years and as a solicitor
10 for five years before. I had tried, I think I was the
11 last generation able to do so, to practice in several
12 fields of the law. When I became a judge there were
13 three matters that were at the forefront of my mind.
14 First, I thought that judging would, in terms of decision
15 making, be relatively easy. Secondly, the result, self-
16 evident therefore, would present itself in the same way
17 to the judges with whom I would be sitting. Thirdly, the
18 combination of the first would enable me to join in joint
19 reasons for judgment with my colleagues.

20 As you would all understand, the fewer and shorter the
21 judgments of the courts, the more certain the law will be
22 and the easier the task of students, the public and the
23 lawyers to know and understand it.

24 It did not take me long to realise that I had been too
25 optimistic. Cases that seemed clear to me one way were
26 sometimes equally clear the other way to one or more of
27 my colleagues. There were occasions when the court
28 divided four/three or when only five judges sat,
29 three/two. By the time that an appeal was decided in the
30 High Court as many as 11 judges may have made a decision
31 on it. Not a few cases in the High Court have been

1 decided, therefore, by a minority of the total number of
2 judges who have sat on it.

3 Even when the judges of the court agree on the result, it is
4 not always possible to confine the judgment to a single
5 one. The reasoning can differ, sometimes a particular
6 judge may disagree with the pronouncement or an
7 implication in the proposed single judgment. A judge may
8 even have an aversion to the way in which a proposition
9 is expressed. Sometimes it is simpler and more courteous
10 to write one's own judgments and state reservations or
11 disagreements with parts of another. I do not think that
12 was wrong and I hope you will not regard it as self
13 indulgent to take this position.

14 In the United States the Supreme Court usually, but not
15 invariably, produces either a single concurring judgment
16 or one majority judgment and a single minority judgment.
17 I would hesitate to criticise the methods and practices
18 of that court but I am inclined to think that sometimes
19 that sort of approach exposes an uncomfortable, even
20 unsatisfactory compromise.

21 Intellectual concessions and compromises in the High Court do
22 often and should occur. This happens in pursuance of a
23 perceived public interest. I do believe that on the
24 whole we did try not to sacrifice respected, considered
25 opinions to bland and ultimately perhaps hypocritical
26 compromises.

27 I soon came to take the view that in difficult cases I needed
28 at least to draft my own judgment as part of the process
29 of trying to make the right decision. That did not mean
30 that I would not discard my draft and join in the
31 judgment of others on the court. Having however written

1 a draft, I felt in a much better position to decide the
2 case and whether another judgment did that more aptly.
3 Most of the judges of the High Court have taken the same
4 view as I did right from the inception of the court.

5 However desirable conformity might be, every litigant is
6 entitled to the independent and honest opinion of each
7 judge of the court. Sitting as a judge, especially an
8 appellate judge, teaches one just how nuance to facts and
9 circumstances can be. A famous American judge, Oliver
10 Wendell Holmes Junior, whose father, incidentally, was a
11 doctor and a good writer himself, said that the life of
12 the law was experience and not logic. Hardly anyone
13 could be better placed to make such a statement. He had
14 fought on the Unionist side in the American Civil War and
15 was wounded three times. He was a superb lawyer and a
16 fine writer with an open and searching mind.

17 That is, as I am sure, medical practitioners would agree, the
18 curious thing about life and experience. How much we
19 have of the latter, it is never enough. You would think
20 that no situation or set of symptoms could be novel, but
21 different situations for which we have to find a new and
22 different treatment do regularly turn up. Principle is
23 important but rarely can it be categorical. There will
24 always be the deserving exception or case. The
25 disciplines of the law and medicine are in some respects
26 very different. I suppose that there does have to be a
27 body of people to apply sanctions and to mould the law
28 but judgmentalism is not easy.

29 In the 10 years that I was a judge I think that perhaps the
30 hardest case I had to decide was one in which a
31 catastrophically disabled child sued, by her parent, a

1 doctor whose negligence denied her mother the opportunity
2 of which she said she would have availed herself to abort
3 the child rather than to carry her to term. In
4 consequence it was claimed in practice, not against the
5 doctor but the insurer, that damages should be paid in
6 effect to cover the lifetime expenses of the child. What
7 is the correct answer to that question? Does it must and
8 not depend to some extent on the moral values, religion
9 perhaps, the humanity or otherwise, the economic
10 rationality or the philosophy of the judge called upon to
11 answer the questions.

12 Is the question really a legal one? No answer can be entirely
13 and universally satisfactory. I still worry about the
14 one I gave. It was that no one should be permitted to
15 come to court to say, "I want and am entitled to damages
16 on the basis that but for somebody's negligence I would
17 not be alive to say anything."

18 Medical practitioners tend to most of their work in
19 laboratories, consulting rooms, hospital wards and
20 operating theatres. Lawyers, on the other hand,
21 particular barristers and judges, do most of theirs on a
22 very public stage. Ours is an adversary system.
23 Barristers are not only in a metaphorical and economic
24 sense in competition with one another, they actually
25 directly compete as adversaries. Competence in the court
26 room, their words and arguments, the weapons they wield.
27 It can be unforgiving work. A gaff in court at 11 a.m.
28 will be in full circulation in the Bar common room by
29 1.30 p.m. and very likely in the newspapers and perhaps
30 on television the next day.

31

1 As scathing, however, as fellow professionals can be they do
2 not, however, match the cruelty of the professional
3 critics of the art world. Reviewers tend to fall into
4 two classes, actual practitioners of the art and others.
5 Not infrequently, the others are failed practitioners.
6 They are often far more vicious than the former. I
7 personally have a rule that I will not review any book or
8 play unless I can say something good about it. Ralph
9 Waldo Emerson said that taking to pieces is the trade of
10 those that cannot construct.

11 It is not to say that some critics have not written some very
12 funny lines, funnier sometimes than the comedies about
13 which they are writing. A critic of the New York Times
14 said of the novelist William Faulkner, "His words are
15 long and his sentences are from here and back to the
16 airport." Even T.S. Eliot could descend to vitriol. He
17 said of Henry James that he had so fine a mind that no
18 idea could ever violate it.

19 The theatre seems to attract the most acerbic of criticisms.
20 Indeed, the theatre can be a very exciting place but also
21 a very anxious place. I thought that if you wrote a play
22 and if it were accepted for production the author could
23 confidently see it on stage, undiluted and entirely in
24 the form that the author imagined it. Not so. Everyone
25 in any way connected with the production has a go at it;
26 the director, the minor players, the leads, of course,
27 the lighting designer, the producer, the stage designer,
28 the set builder, even on occasions I think the in-house
29 theatre cat.

30 Theatre is a collaborative activity, that is its charm. When
31 it comes together it can be magic. Good actors and

1 directors see meaning that sometimes the dramatist does
2 not know he is conveying and a company's actor will
3 sometimes transform and imbue the language with an
4 intensity that the writer alone could never have
5 achieved. Actors, however, are not always consistent,
6 nor are audiences. Every performance is difference.
7 Actors forget lines, even when they do not, they will
8 make them up. One night an audience will laugh when they
9 should, another night they will laugh when they should
10 not.

11 I have often been nervous before starting a hard court case.

12 Never have I been as nervous as on a first night of a
13 play that I have written. I have had good reviews and
14 bad ones. The bad night not quite as bad as Rex Reed's
15 of Tennessee Williams. He said, "If a swamp alligator
16 could talk it would sound like Tennessee Williams."

17 Another critic said of a musical in his review, at the
18 end of the review he said, "I have knocked everything in
19 this play except the chorus girls' knees, and here God
20 anticipated me."

21 Kenneth Tynan, the enfant terrible of English critics of the
22 post-war English theatre, and who had lauded kitchen sink
23 drama wrote of another musical, "It contains a number of
24 tunes one goes into the theatre humming." Bernard Levin,
25 reviewing for the Daily Express, described Flower Drum
26 Song as an American musical so bad that he longed for the
27 boy meets tractor theme of Soviet drama.

28 The story I like best about the theatre, however, is the one
29 about two old Shakespearean actors playing in a costume
30 drama in the provinces. They had a long lunch before the
31 matinee; it is a late matinee. Dressed as a prince,

1 halfway through his first soliloquy, one of them was
2 interrupted by a very irate member of the audience who
3 stood up and shouted, "Sir, you are drunk." The actor
4 replied, "If you think I am drunk, wait until you see the
5 Archbishop of Canterbury."

6 Thank you.

7 MR MICHAEL GRONOW: Ladies and gentlemen, Justice Callinan has
8 kindly agreed to take questions. Ian is wielding the
9 microphone, so get him to give you the microphone before
10 you ask your question.

11 MR STEPHEN MOLONEY: Mr Callinan, Stephen Moloney, Victorian
12 Bar. Thank you very much for your amusing and
13 entertaining address. I was contemplating this as we
14 were driving in; with the terrible events of the last few
15 days it is beyond the imagination of a local practitioner
16 to really contemplate what happens in the International
17 Court of Justice. The matter that you heard was an
18 important one for an emerging country and countries such
19 as Australia. Are you able to tell us how you regard the
20 capacity for such forums to civilise the world when we
21 have seven or eight nations around the world at the
22 moment which are at war with one another and within and
23 the tragic loss of life that you see arising from these
24 sorts of things.

25 It was about 10 years and three months ago in this room that
26 Sir Ninian Stephen spoke to us about the development of
27 the International War Crimes tribunals and I was
28 wondering if you could tell us a little bit about your
29 experience in the International Court.

30 JUSTICE CALLINAN: I can say a little bit about it. I can't
31 say too much because the proceedings are not concluded

1 yet and, in fact, I go back for the main hearing early in
2 September and the proceedings, the actual internal
3 proceedings of the court, are confidential. To answer
4 your question, it is a very, very difficult process.
5 There are 15 permanent members of the court and in each
6 case there is an ad hoc member appointed by the country
7 which is a party to the litigation, and that is why I am
8 sitting there, I have been appointed by Australia. You
9 could well understand that with 17 judges there, all from
10 different countries and from different cultures, then
11 obviously it is very difficult to get a result.

12 But all of that having been said, obviously an International
13 Court of Justice, like an International Criminal Court,
14 is something that we must have. We will be frequently
15 frustrated by the inability of such courts to produce the
16 same sorts of results as our own courts do and as some of
17 the other courts of the great democracies do but
18 nonetheless we are much better with these institutions
19 than we are without them. For example, sitting on the
20 court at present: the president of the court is a Slovak
21 and a very clever man but he freely confesses that he was
22 a member of the Communist Party during the Cold War;
23 there is a Russian member of the court; there is a
24 Chinese member of the court; there is a Moroccan member
25 of the court; there is a Mexican member of the court.
26 Each person who comes to the court I think inevitably
27 brings a different approach to it.

28 One thing that struck me is the difference in judicial and
29 legal method. Nearly all the judges of the court are
30 either academics or who have specialised in public
31 international law or who have been ambassadors, in some

1 cases for their own countries, in various other countries
2 in the world. They have all basically been lawyers who
3 have been involved in a civil law type of system. There
4 are a lot more civil law countries than there are common
5 law countries and there is no doubt about it, the
6 approach is completely different. I do not think the
7 common law method is by any means flawless, but I do
8 think it is more methodical and it is more principled.

9 People trained in the common law method have a very strict
10 process of looking for the facts, deciding the facts,
11 testing the facts, really trying very hard to find what
12 the real facts are and then to identify the legal
13 principle and to apply that principle to the facts.

14 It does not seem to happen in the same way with civilian
15 lawyers. The facts and the law are all mixed up, as it
16 were, and they are looking for a just result. I am not
17 suggesting that they are not, but they do not go about it
18 in certainly employing the same method as people trained
19 in the common law do.

20 It was interesting, we have had an interlocutory hearing and
21 the four anglophone judges, including myself, all wrote
22 dissenting judgments and agreed in dissent on everything
23 except one point. So the United States judge, the United
24 Kingdom judge, the New Zealand judge and myself in the
25 interlocutory proceedings did not agree with the civilian
26 lawyers. That perhaps says it all.

27 But do we need these institutions? Yes, we do. Will they be
28 imperfect? Yes, probably very imperfect but even so we
29 have to keep on working on them and hoping that they will
30 improve. Enforcement is the problem, of course. The
31 decisions of the International Court have to be reported

1 to the Security Council. In theory, I suppose, it was
2 imagined that the Security Council would then mobilise an
3 army for countries that were not complying with the order
4 and would take whatever enforcement steps are necessary,
5 but that rarely happens.

6 I think the big achievements of the International Court of
7 Justice in the last 15 years have been really to prevent
8 some wars that might otherwise have broken out. For
9 example, the ownership of the temples in South-East Asia
10 has been a festering sore and on several occasions the
11 decisions of the International Court have brought warfare
12 on the borders to a stop. There have been a number of
13 cases in South America also where they have been able to
14 make effective orders and achieve results.

15 I am sorry, I have spoken for too long about it but it was a
16 long question

17 MR MICHAEL GRONOW: Are there any further questions?

18 QUESTION: Thank you, Your Honour. What advice would you give
19 to a first year lawyer or first year doctor embarking on
20 their career, particularly in circumstances when the
21 pressure is for them to specialise, as compared to your
22 generalist career?

23 JUSTICE CALLINAN: I think the advice I would give is although
24 ultimately you will probably be obliged to specialise,
25 avoid it for as long as possible. It has become
26 increasingly difficult and I am sure the medical
27 practitioners have that experience, too.

28 QUESTION: Thanks very much for your very interesting talk and
29 discussion. I am a lowly physician but I just wanted to
30 ask you more about your life as a writer and a
31 playwright. I just wondered what challenges you found,

1 obviously going from a writing style where as a judge you
2 are obviously operating on fact and very factual and
3 logical writing style to therefore going to an author
4 where you have to be quite creative and entertaining and
5 whether you found any challenges going from one
6 discipline to the other.

7 JUSTICE CALLINAN: They quite obviously require quite different
8 approaches. It is important not to get the two mixed up,
9 I think. You probably know that Somerset Maugham was a
10 doctor before he became a writer. He apparently never
11 registered but he was fully qualified and always thought
12 that his medical training was of great assistance to him
13 as a writer. Lots of lawyers have become writers. It is
14 not uncommon but obviously it is completely different but
15 you get some stories from the law. I have never used
16 anything directly but I suppose physicians hear some
17 pretty interesting tales, too.

18 MR MICHAEL GRONOW: I would now like to call upon our newly
19 elected legal vice-president, Dr Elaine Fabris, to give a
20 vote of thanks to our speaker.

21 DR ELAINE FABRIS: Thank you very much, Your Honour, for what
22 was a fascinating and entertaining talk tonight. It was
23 full of unique insights about how judges of our highest
24 court approach their very difficult task, how the roles
25 of doctors and lawyers are similar and ways in which they
26 are different, which is especially pertinent to members
27 of this Society, and great insights into the life or the
28 way playwrights think.

29 On behalf of the Society I want to thank you again and offer
30 you a token of our appreciation.

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