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WOMEN WHO WANT TO BE WOMEN

LIFE AND THE LAW SEMINAR

MERCY MATERNITY HOSPITAL, MELBOURNE, VICTORIA

SATURDAY, 7 AUGUST, 1982

IN VITRO FERTILIZATION : REMEMBER GALILEO

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

THE TRIAL OF GALILEO

I congratulate Mrs. Babette Francis and the organisers of this Seminar. It is timely. It is useful. It has not avoided hard issues or controversy. This is not an occasion, nor is in vitro fertilization (IVF) a subject, upon which one can expect a chorus of unanimity. It is a subject for thoughtful debate and discussion.

My task is to talk of the law and IVF. It is hard to do this, because so far there is very little law that directly affects the fertilization technique. There is no enacted law in Australia specific to it. Committees have been established to help in the development of new law. I am sure that the record of the seminar will be useful to those Committees.

Many of the critics of IVF, though not all, start from an avowedly religious point of view. They may be Jewish or Catholic or Protestant. But they start from what might be called a Judeo-Christian perception of the intrinsic sanctity of human life. Not surprisingly this is a perception that is deeply reflected in many of the laws, especially the criminal laws, of our country.

There are real dangers in a confrontation between religion and science. The debates about Darwin's theory of evolution are still proceeding. Many of you will have seen news items concerning the recent challenges to the Darwinian theory in the courts of the United States by people who adhere strictly to their understanding of the fundamental lessons of the Bible - a literal seven day creation.

You will also recall the trial of Galileo in 1633 when that famous scientist was summoned before the Holy Office constituted by 10 Cardinals who were members of the Dominican Order. His offence was publication of his dialogue on the Great World Systems, in turn a defence of the Copernican astronomical theory. The correctness of this theory was by no means self evident to the people of Galileo's time and indeed appeared to many to fly in the face of Scripture. Galileo's judges, the Cardinals of the Holy Office, were amongst the most highly educated and sophisticated minds of the time. The trial was courteous and urbane. For example, Galileo had already recanted before he was shown the instruments of torture. The proceedings were painstaking, careful, lengthy and wrong.<sup>1</sup> It is important, as the debate about legal and moral implications of the Australian in vitro fertilization program (test tube babies) progresses, that the errors of the trial of Galileo should be avoided. Even in a matter that touches absolutely fundamental questions, we should be careful of too proud a dogmatism, whilst not of course asking people to retreat from essential views, sincerely held.

#### DIFFERENCES HARD TO RECONCILE

The differences between the supporters and opponents of in vitro fertilization techniques are, I am afraid, almost impossible to reconcile because each group starts from a different point of view.

Opponents of IVF are concerned that scientists are now tinkering with the quintessential essence of human life itself.<sup>2</sup> Many, though not all, of the opponents of IVF start from a religious point of view and demand absolute respect for the individual human life.<sup>3</sup> For them, a human life begins at the first definable instant at which a sperm cell and a human ovum begin to divide and multiply. For them, it is a shocking thought that 'brothers and sisters' - in the form of fertilized human eggs - should be frozen or worse still thrown down the drain.<sup>4</sup> Certainly, it is a remarkable thought that Einstein and Plato, Shakespeare and Beethoven began their voyage into this world as the tiniest human cell, similar to those used to secure a 'test tube baby' fertilization. Opponents fear misuse of the technique and cry halt while there is still time. Supporters on the other hand point to the thousands of couples - married or otherwise - who are unable to have children. Approximately 1 in 10 marriages in Australia are childless and not by choice.<sup>5</sup> The fulfilment of marriage, companionship and even humanity is at stake for them. Whether it be 30,000 childless couples or more or less,<sup>6</sup> many fellow citizens are involved. More than 1500 couples are said to be waiting for treatment

in the Melbourne clinics.<sup>7</sup> Many of those treated have waiting for 6, 10 or even more years. To deny these fellow citizens the fulfilment of parenthood is seen as obdurate, cruel and ironic when it comes from quarters usually supporting life and the family. This is the debate. Each faction is sincerely convinced of its own just cause. Like the Cardinals and Galileo each is passionately convinced the error of the other. It is unlikely that either side will recant. In a secular society where such passions flare, how are they to be resolved?

#### THE VIEW OF SUPPORTERS

The starting point in a secular society such as Australia, for the solutions to the debate about in vitro fertilization should be an endeavour to identify areas of common agreement and an endeavour to confine the debate, by specifying matters not really in dispute. However this will not be easy because of the fundamental differences between the staunchest supporters and opponents of IVF techniques.

The staunchest supporters of the test tube baby program have absolutely no patience with what they see as 'religionist' obstruction. They point to the strong public opinion polls favouring the IVF technique, its increasing success, the smiling happy babies appearing in women's magazines and on the television and the growing expertise of the techniques developed in Melbourne so that a higher and higher success rate is being achieved with consequent lowering of cost. They have no patience with the claim that the destruction of fertilized human ova, surplus to use, amounts to 'washing brothers and sisters down the drain'. They point out that nature is itself fantastically profligate in life cells. Even in terms of fertilized human ova, some 70% conceived in the natural process never implant.<sup>8</sup> In these circumstances, supporters of the program say it is just unreal to talk of 'murdering' brothers and sisters by discarding fertilized ova no longer need or by attaching legal consequences to the first instant of conception. Legal consequences, they say should only come later either upon birth into this world or at some stage in the process of gestation when human life has become viable. They reject analogies between IVF and abortion pointing out that the whole purpose of IVF is the making of life not its destruction. This purpose, they claim gives an acceptable moral aura to what is being done. I suspect that, rightly or wrongly, this is the view held by a large majority of our fellow citizens in Australia.

#### BASIC CRITICISMS

It is important, on the other hand, for the inquiries into the legal and social implications of in vitro fertilization, to take into account the criticisms that are voices. These include:

- \* that scientists have gone beyond human powers and are interfering with basic natural practices;<sup>9</sup>
- \* that asexual reproduction, apart from the loving human situation, tends to degrade humanity<sup>10</sup>, making the result an object of an experiment rather than a natural born child;
- \* that legal consequences must attach to the first instant of human conception because of the biological continuity of the embryo through to the adult person and the impossibility of choosing any other later point as an acceptable legal commencement of human existence;<sup>11</sup>
- \* that insofar as IVF techniques involve super-ovulation, it contemplated destruction of the overwhelming majority of fertilized ova and hence the destruction not of 'potential persons' but actual human beings.<sup>12</sup>

It is difficult to see any circumstances in which commentators who take this position would be satisfied with in vitro fertilization techniques under any conditions. For them, it is a non-natural creation of a human being. The typical answer to those who want a child by this technique is to suggest that they seek micro surgery or to adopt a child (especially one who might otherwise have been aborted as unwanted) or, if this does not prove possible, to accept their predicament. Some even say there is merit in suffering. Such alternatives will not, I am afraid, appear very persuasive to an anxious couple seeking a child who know that medical techniques are available that might help them.

#### POTENTIAL PROBLEMS

Although some opponents of in vitro fertilization call for an absolute or even temporary embargo or moratorium on the techniques<sup>13</sup> I do not think that this is likely to come about. Neither the New South Wales nor Victorian Committee inquiring into IVF has asked for a moratorium. In any case, a moratorium in Australia would be unlikely to affect developments elsewhere. More promising is a consideration of the limits of the technique when it goes beyond a couple in a stable, loving relationship wanting a child. Also worth attention are the legal consequences of IVF. Amongst the legal consequences that will have to be examined are:

- \* Life begins. Definition of the point at which legal consequences attach to human life, in order to avoid application of the criminal law to discarding unwanted fertilized ova.
- \* Freezing life. Consideration of the possibility of freezing a human embryo, with consideration of the identity, passing of property, name and other legal consequences of birth from such an embryo into a later century, perhaps even 400 years hence.<sup>14</sup>

- \* Surrogates. Consideration of the demand for surrogate parents where a woman can donate the ovum but cannot carry the pregnancy to full term. In such cases the law must define legal parenthood, the enforceability of any contract or arrangement, the rights to amniocentesis and abortion of the foetus in the event of a proved abnormality, payment for the service, circumstances in which it will be permitted (e.g. will it be permitted for busy business women or wealthy people who do not wish the inconvenience of carrying a baby?). The status of children legislation in Australia generally presumes a child born within a marriage to be a child of the marriage. But will this be so if the biological fact can be demonstrated to be otherwise.
- \* De factos. The issue of confining the technique to a married couple is one raised by the Anglican Church's statement on this subject. But in secular society, where de facto relationships are much more common, should the law require this? If not what other criterion can be allowed in order to ensure fair protection to the embryo so that it is not treated as an object to be discarded when unwanted?
- \* Asexuality. Should a lesbian mother be entitled to asexual procreation in this way? Recent United States studies tend to show that there may be no psychological damage to children born and raised by a mother who is homosexual.<sup>15</sup> If this be so, does the law in this time have the right to forbid motherhood on such a ground?
- \* Ova banks. Should ova banks be developed as sperm banks have and if so should the law countenance the current developments by which Nobel Laureates are said to be offering their sperm as donors?<sup>16</sup> Should a couple or even an individual be able to put in an order for a child of particular racial, intellectual, physical or other characteristics including gender?
- \* Confidentiality. Should records be kept of donors of genetic material or does confidentiality of the medical relationship override the possible future medical utility of such genetic information or accidental incest?
- \* Divorce. What is to happen to a fertilized human ovum kept in a frozen state, if there is a subsequent divorce between the donors or if one dies? Should one party have a right to require destruction? Should one party be entitled to insist upon preservation of a fertilized human ovum against the risks of death or injury preventing procreation? Is the refrigerator to be seen as a sort of insurance policy against loss of children or later infertility?
- \* Destruction. What legal consequences if any should attach where, either deliberately or as a result of accident or industrial disruption, a hospital refrigerator is turned off or an embryo is destroyed? I have seen a report of a recent suit for damages successfully brought against a doctor in New York who had destroyed a fertilized human ovum. It is said that the couple were awarded compensation of \$50,000. Could that happen here? Should it happen here?

### LONG TERM PROBLEMS

Apart from the immediate legal problems facing the various inquiries into IVF techniques, there are also long term problems relating to experimentation, genetic engineering and human cloning which are a source for concern. At the heart of some of the most serious opposition to the IVF program is the fear of where it will lead. Cloning of mice has already been achieved. Work is progressing, including in Australia to develop cloning of prize bulls. The prospect of cloning human beings, including by IVF techniques cannot now be dismissed as futurology.<sup>17</sup> Indeed, some thoughtful scientists are already contemplating the prospects. Some of you will have seen the television program in which a distinguished Adelaide doctor suggested that the resolution to the serious shortage of organs and tissues for transplantation would be found in the production of a cloned foetus as a source of an exact tissue typed organ, suitable for immediate implantation. The development of a foetus to provide pancreatic tissue is usually mentioned.<sup>18</sup> Problems of tissue rejection would be overcome by the combination of IVF and cloning techniques. Many Australians would see nothing wrong in such an idea. For them, the foetus would be a deliberate product of the body of the recipient designed to relieve human pain and suffering by providing a new organ. Others would see this as the beginning of organ farming, eugenics and the reduction of the respect traditionally given in our morality and in our law for the individual human life. Other commentators point to the synthesis of the human gene from basic chemicals, to the possible mating of human genes with those of other species, to the possible industrial and commercial implications of these developments now that it has been said, in the United States, that life forms can be patented. For some observers these potentialities are too unthinkable and should be stopped, at least until we collect our thoughts. Others, more optimistic, say that this is just another case of the Galileo syndrome. They say that we should have faith in the good sense of our scientists. In any case, some of them, including Sir Gus Nossal, claim with an air of fatalism, that the genie is out of the bottle and that laws and Parliaments cannot hold up the advancing tide.

### INQUIRIES NEED HELP

Three official interdisciplinary inquiries have been announced to examine the legal and social implications of in vitro fertilization in Victoria, in New South Wales and in the United Kingdom. It is important that the debate should be an informed and thoughtful one, not a sensational one. It is, however, too much to hope that emotion can be left out of the enquiry because the subject matter is of its essence likely to touch the most profound human emotions. So far, there has been no surge of widespread involvement in the Australian enquiries. It is for this reason that I congratulate the Women Who Want To Be Women for organising the seminar and for arranging for people with differing points of view to have an opportunity to speak.

We see here, today, the chief advantage of a liberal democracy. We have before us a matter of the greatest complexity, upon which thoughtful and decent fellow citizens hold diametrically opposite views. It would have been impossible to resolve the differences in an afternoon - or even in a month of afternoons. But if we come together and share our fears and concerns, it is possible that we will be able to assist our law makers to isolate the areas of agreement and disagreement. Only then can they proceed to chart, with any sense of assurance, the laws that will be needed to state society's minimal standards. I repeat. We live in a secular community where even the passionately held views of some members of the community are not necessarily reflected in the laws. Secularism invokes the principle 'live and let live'. It is guided by the notion of a high degree of tolerance of difference. But where matters of life and of respect for life are concerned, every member of the community has a right to be heard in the design of the law. And on such subjects, the law is not usually silent.

#### FOOTNOTES

1. P.D. Connolly, *The Adversary System - It is any longer appropriate?* (1975) 49 ALJ 439.
2. See Mrs. T. Sellick, letter to Melbourne Herald, 20 July 1982.
3. Editorial The Advocate, 29 July 1982.
4. J. Santamaria, The Advocate, 22 July 1982.
5. Australian Women's Weekly, 28 July 1982, p.4.
6. B. A. Santamaria, Australian, 25 June 1982.
7. Sunday Telegraph, 18 July 1982, p.9.
8. See Sister Mary Regis Dunne 'A plea for wisdom' in The Advocate, 29 July 1982, p.10.
9. Mrs. T. Sellick op cit n. 2
10. The Advocate, 22 July 1982 citing Dr. Seal.
11. J. Santamaria, The Advocate, 22 July 1982, p.10.
12. The Advocate, 22 July 1982
13. See B. A. Santamaria op cit n.6.
14. See Anglican Church.
15. Melbourne Herald 24 July 1982.
16. See R. Mackenzie 'The bank you can go to for a genius baby' Sun Herald, 11 July 1982, 9.
17. B. A. Santamaria op cit n.6.
18. Dr. H. Lander, cf. B. A. Santamaria op cit n.6.