7TH COMMONWEALTH LAW CONFERENCE

HONG KONG, 22 SEPTEMBER 1983

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Chairman of Australian Law Reform Commission

THE RIGHT TO LIVE

Problems of Humanity

Medical science and technology have presented this generation of Commonwealth lawyers with a remarkable catalogue of moral and legal dilemmas. Lord Justice Ormrod, himself a qualified medical practitioner, told the Royal Society of Medicine in 1978 that lawyers of today should welcome and not lament the opportunities to choose moral and legal positions.[1] If only the dilemmas were not so complex and if only the tools available to lawyers were more appropriate, we could perhaps share more wholeheartedly this optimism. A number of decisions of our courts since Commonwealth lawyers last met provide the focus of this paper. The controversies they point up are posed for the legal systems of all Commonwealth countries. Where life and death are concerned, we are addressing the fundamental issues of humanity, central to every legal system.

It is useful to start a paper on such a topic by stating what will not be dealt with. Any serious consideration of the 'right to live' in the context of the concerns of the countries of the Commonwealth of Nations, should, perhaps, address the great world issues of malnutrition and infection. The Executive Director of UNICEF recently claimed that 40,000 young children die every day from malnutrition. Such a topic is not remote from the concerns of the legal systems of the Commonwealth of Nations, as I discovered in January 1983 when I attended a conference organised by the Commonwealth Secretariat, UNICEF and the World Health Organisation in Harare, Zimbabwe. That conference addressed the legal regulation of the marketing of breastmilk substitutes in a number of developing countries of the Commonwealth of Nations. In Papua New Guinea, legislation has been enacted in an attempt to reduce and control the sale of breastmilk substitutes.[2] As a consequence of this legislation, infant deaths from malnutrition and infection resulting from incorrect or inadequate use of these products is reported to have fallen.[3] Legislation on community health problems of this kind may affect the 'right to

live' of larger numbers of the people of the Commonwealth of Nations than the topics I will address. They are not subjects of concern for medical administrators and health workers only. They are of concern to lawyers and lawmakers as well. But I will not tackle them.

In times gone by, a law conference paper on 'the right to live' might have provoked a discussion of the death penalty. Not so today. Some might expect a discussion of laws designed to assure the quality of life-- the right to enjoy a full life. They will not find that discussion in these pages. Limitations of space also require exclusion of laws against cultural practices involving infanticide, and laws on teratogens, such as new drugs, herbicides and pollutants. Of necessity, this paper can examine only a few of the moral and legal dilemmas presented to the law today by life and death. The realm of discourse is bioethics and the law. The paper will proceed from a few words on the abortion debate to a number of riddles now being presented to our legal systems by advancing medical technology as it affects the beginning of life. Turning to the issue of death and the law, it will then examine some aspects of death, particularly of the unchoosing very young and very old. In the course of this examination, attention will be called to recent cases and to some legislative developments both within the Commonwealth and beyond. Finally, a few words will be offered in relation to the institutional problem of lawmaking that is posed for all our countries by the variety and speed of the presentation of bioethical dilemmas.

The Abortion Debate

The common law of England traditionally fixed birth as the beginning of life, at least for the purpose of the law of murder. The killing of an unborn child was not seen as homicide, the human foetus not being regarded as a living 'person'. Such a view was not taken by Christian church law, which regarded foetal life as inviolable. Abortion, at least after 'quickening', was a separate felony at common law, although notions developed of the circumstances in which abortion might be condoned to preserve the mother's life or to prevent mental or physical risk to her.[4]

This year marks exactly 10 years since the Supreme Court of the United States held that the constitutional right of privacy in that country guaranteed a woman the right, within certain limits, to choose whether or not to have an abortion.[5] This development in the United States followed closely upon legislative reforms in England[6] and court decisions in Australia and other Commonwealth countries extending the circumstances in which abortion might lawfully be carried out.[7] There are few issues which generate such strong and apparently irreconcilable feelings in modern societies than the law on abortion. In February 1983 the new Government of Spain was reported to be

proposing legislation to permit abortion in three cases: to save the life of the mother, following a rape and if the foetus appeared to be malformed in any way.[8] Yet at the same time in Ireland, a proposal was being advanced for an amendment of the Irish constitution in the following terms:

> 'The State acknowledges the right to life of the unborn and, with due regard tc the equal right to life of the mother, guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate that right'.[9]

In the United States the so-called 'Right to Life' organisations have secured the introduction into the Congress of the Human Life Bill designed to reverse the abortion ruling of the Supreme Court. The Bill seeks to overturn the decision in Roe v Wade by making certain 'findings of fact' and declarations of law. The first 'finding' is that 'the life of each human being begins at conception'. The resulting declaration of the law is that, for the purpose of enforcing the constitutional obligation not to deprive persons of life without due process of law, 'each human life exists from conception'.[10] The legislation is said to have the support of the President of the United States. It has been criticised by some women's groups and by constitutional lawyers, the latter on the ground that it 'undermines the historic powers of the courts to protect our system of individual rights against legislative encroachment'.[11] Even those who hesitate about the implications of the proposed Irish and United States legislative changes are sobered by the statistics on abortion in the United States. According to the U.S. Census Bureau, in 1980 alone there were more than 1.5 million abortions, with about 25% of the country's pregnancies terminated by abortion. Abortion is now the most commonly performed surgical procedure in the United States. In the space of a decade, in which there have continued to be significant advances in techniques of contraception, what once was stigmatised and punished as a serious criminal offence has now become a relatively common procedure. The danger of the law 'lagging too far behind opinion and social attitudes' was a major theme of Sir Roger Ormrod's essay.[12] But capturing and converting and, if necessary, coercing opinion and social attitudes is now the determined endeavour of many groups in Commonwealth countries where abortions are regularly performed for 'therapeutic' reasons. In the recent general election in Australia, for example, the Right to Life Association campaigned strongly in a number of marginal seats against candidates, of whatever political persuasion, who had made statements in favour of 'the right to choose' and in favour of candidates who had previously moved to stop Federal health funds from being used for abortions.[13]

Meanwhile, both in the courts and in Parliament, proponents of abortion seek to find legal support for their views:

* In April 1982, Mr. Justice Helsham in the Supreme Court of New South Wales ordered that a 15-year-old State ward could have an abortion, notwithstanding the opposition, on moral grounds of the Minister who was her legal guardian. Appeals brought in the name of the unborn child to the Court of Appeal of New South Wales and the High Court of Australia failed, the latter on the basis that the issue had become 'moot' because the abortion had already been performed.[14]
* In New Zealand in November 1982, the Court of Appeal upheld the decision of Mr. Justice Speight that the scheme and purpose of the Contraception, Sterilization and Abortion Act 1977 (N.Z.) did not allow any person to represent the interests of an unborn child, other than those who were involved in the process of prior medical authorization. It was held that the appellant, Dr. Wall, had no standing to challenge the certificate given by two consultants authorising the abortion to take place.[15]
* In England, on 6 December 1982, the House of Lords voted by 57:42 to reject a Bill sponsored by Anglican bishops to narrow the circumstances for a lawful termination of pregnancy. The Anglican Bishop of London claimed that the foetus had a right to live and develop 'as a member of the human family'.[16]

The decision of the New Zealand Court of Appeal illustrates the way in which talk of 'rights' in moral or theoretical terms will prove empty unless those 'rights' can be asserted and, where necessary, enforced as legal rights in the courts.

> '...There can be no doubt that when the present proceedings were brought by Dr. Wall, they had as their primary purpose the protection of the rights of the unborn child; and in considering the jurisdiction of the court to intervene and the claim of Dr. Wall himself to invoke the jurisdiction if it exists, it is important not to lose sight of what must have been a deliberate parliamentary decision: the avoidance of any attempt to spell out what were to be regarded as the legal rights of the unborn child; with the consequential absence of any statutory means by which rights (whatever their nature) could be enforced...It will be clear from what we have said that no legal statutory right in the unborn child can be spelt out of the Act now under consideration which in itself would enable a direct claim of standing. That being the case neither Dr. Wall nor anybody else could possibly claim to represent the interests of the unborn child'.[17]

In reaching the view it did, the Court of Appeal of New Zealand made reference to earlier English and Canadian decisions concerning the general question of the legal rights of the unborn child in the context of abortion decisions.[18] Reform of the law of standing before the courts is under consideration in a number of Commonwealth jurisdictions, including in the Australian Law Reform Commission.[19] Cases of concerned citizens seeking to enforce criminal and other laws on the painful topic of abortion present advocates of reform of the law of standing with an acid test concerning the extent to which they are prepared to remove the obligation to establish a personal involvement or interest before the courts will examine legal claims.[20]

In Vitro Fertilization

The advent of new medical technologies has multiplied the problems for the law illustrated by the abortion debate. The first successful birth by the procedure of external (in vitro) human fertilization took place in 1978. Since that date, rapid advances have occurred in the technique. Births have been recorded in at least four Commonwealth countries (England, India, Australia and Canada). Supporters of the procedures by which in vitro fertilization is achieved point to the relatively high numbers of involuntarily infertile couples. They see in this procedure the opportunity to circumvent physical abnormalities and to produce a child who would otherwise be denied to a willing couple. They assert the right to live of the yet-to-be-born offspring of parents who would otherwise be denied the fulfilment of parenthood. Critics express their reservations because of the extra-utero creation of human life, fears of where this many lead and concern about the disposal of surplus fertilized human ova. Typically, donors are hormonally stimulated to produce multiple eggs. After fertilization and implantation, the issue arises as to what is to be done with any balance remaining. This analysis has been offered:

> 'There are several options for the fate of such surplus eggs. They might be killed and discarded. They might be used to gain more knowledge about these early human stages, in turn perhaps contributing to the safety and efficacy of the procedure. Or they might be frozen and stored for other, later use. Each of the options is controversial, for each raises the knotty issue of the legal and social status of the early human embryo. If one holds, as legislation pending in the U.S. Congress does, that a person exists from conception, then any option other than immediate return to the receptive uterus (and possibly even that) is excluded. If, however, one holds that the early embryo is something other than a person...then the options are admissible, but with a degree of restriction depending upon how close to a person the early embryo is defined to be'.[21]

There are numerous legal problems, both actual and potential, posed by in vitro fertilization.[22] The first of these, relevant to the 'right to live' is when life begins, and at what point legal rights ought properly to be attached to this life. For some, these are simple questions. Supporters of the Human Life Bill before the United States Congress say that there is only one instant of time which is indisputably the moment at which a new potential human life in being occurs, namely fertilization of the human egg by a human sperm cell. This is a definable instant which can be demonstrated. The whole development of a human being progresses from that instant. Teachings of the Christian and other religions have lately assigned the beginning of 'humanness' to the instant of conception.[23] On the other hand, critics suggest that this is too simplistic a view. Some claim, for example, that life is continuous from generation to generation. According to this view, life does not arise anew in each individual. Life does not begin at fertilization and human life is no exception. Life, worthy of moral respect, antedates fertilization.[24] Other observers suggest alternative times for the assignment of legal consequences and enforceable rights. These range from implantation (6 days); heart function (4 weeks); acquisition of human form (6 weeks); brain function (12 weeks); the first trimester (24 weeks); the test laid down in Roe v Wade; the functioning of the nervous system and birth. Birth is the normal moment at which legal systems recognize the commencement of enforceable legal rights.[25] With all these possibilities, one can sympathise with Justice Blackmun in the United States Supreme Court when he concluded:

> 'We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.'[26]

This quandary as to when life begins — or at least, at what point legally enforceable consequences will be attached to human life — has agitated many thoughtful observers in every country. But the issue is now presented with new urgency by the technology of in vitro fertilization. In Britain an enquiry has been established. In Australia, State enquiries have been set up in New South Wales, Victoria, Queensland and Western Australia. As well, the Bio-Ethics Committee of the National Health and Medical Research Council of Australia has launched its own investigation. When in opposition, the new Federal Attorney-General of Australia (Senator Evans) urged that a reference on the subject should be given to the Australian Law Reform Commission. So far this has not been done. In an interim report in 1982, the Victorian enquiry made recommendations on safeguards, counselling of infertile couples, the provision of information, selection of participants and community

education. It did not specifically address the question of the commencement of human life. Indeed the Roman Catholic Archbishop of Melbourne criticized it for failing to answer the question of whether or not the embryo was 'a human person, a piece of tissue or some midway grading of human being who has no rights'.[27] On the subject of the disposal of surplus embryos, the Victorian committee was divided. Whilst acknowledging 'the deep concern' of a section of the community 'which considers that from the moment of fertilization an embryo is a human being to be accorded substantial measure of respect and rights (some would say at the same level as persons born alive)', the Victorian committee acknowledged that not all members of the community shared this 'philosophical view of personhood and the attitude towards embryonic life that derives from it'.[28] The committee was of the view that in vitro fertilization would be acceptable if all fertilized human ova (oocytes) were transferred back to the uterus of the donor mother. Where too many embryos were produced to be transferred, a majority believed the wishes of the couple concerning handling of the excess embryos should be respected. However a minority, including the Chairman (Professor Louis Waller), had reservations. It was the minority's view that until the committee had had the time to consider fully the implications of alternatives such as freeze-thawing of embryos, donation of embryos and surrogate motherhood, the procedures of fertilizing extra oocytes 'should not be employed' in programs for in vitro fertilization. This division of opinion reflects the so far unresolved debate about the commencement of human life for the purposes of legal rights, including a legally enforceable right 'to live'.

These are not just nice academic questions for the modern lawyer. They are not the equivalent of earlier debates about the number of angels that can dance on the head of a pin. Nor are they questions to be resolved by reference to public opinion polls, though these show in Australia a general but declining support for in vitro fertilization (69% of the population according to a Gallup Poll in July 1982, but only 44% supporting the practice of freezing embryos).[29] Controversies have now broken out in Britain, Australia and elsewhere about experimentation with human embryos, including for transplant purposes. For example, in Melbourne medical scientists are experimenting with pancreatic tissue removed from aborted foetuses in research aimed at transplanting the tissue into diabetics in order to restore supply of insulin.[30] The prospect of specifically developing human life in a test tube in order to 'grow' basic organs for use in transplantation - discarding the remainder of the foetus - is now being seriously discussed in medical circles in many Commonwealth countries. Supporters of the use of foetal tissue, such as Sir Gustav Nossal of Melbourne, suggest that the procedure has been successful in mice and would relieve great human suffering and discomfort. The right to live, they might say, cannot be denied to people suffering a defective organ that could readily be replaced by such procedures. Professor

Peter Singer of the Monash Biocthics Centre, a philosopher, put it thus:

> 'The use of tissues from these foetuses may seem grisly and repellant but so is the use of tissue from any corpses, for example the use of the pituitary gland to prevent dwarfism in children born with a pituitary deficiency. Surely it is better that tissues that can save life or contribute markedly to health should be used for these purposes rather than being incinerated or buried'.[31]

On the other hand critics are vocal. They point with concern to the special problems that are posed, not by the use of cadaver organs or foetal organs, but by the suggested positive creation of organs in order to provide a compatible supply. With due deference to the needs of infertile couples, some observers are now calling for the law to intervene and to stop such developments of medical technology. They are horrified by reported experiments involving the mixture of human sperm with the ova of rats.[32] They are alarmed at genetic engineers who have produced a strain of mice in the United States twice as large as the normal household and farmyard pest. They are warned by distinguished scientists, including Sir Macfarlane Burnet, an Australian Nobel Laureate, of the potential danger of experimenting with the cloning of viruses for fear that they might generate recombinants or mutants of unacceptable human virulence.[33] They are fearful of the prospects of human cloning.[34] They are perplexed by the patenting of life forms now possible in the United States, at least, following the decision of the Supreme Court in Diamond v Chakrabarty.[35] They are concerned about the inadequacies of the sanctions on enthusiastic scientists experimenting with genetic engineering involving human genes.[36]

Sir Gustav Nossal, an eminent Australian medical researcher, has said that biotechnology is just moving so fast that the 'genie is out of the bottle'. Laws, he said, cannot keep pace. Therefore, we should put faith in the scientists working with basic life forms:

> 'Biotechnology is moving so rapidly that if we have a Royal Commission, or introduce legislation now about recombinant DNA or in vitro fertilization or heart transplants or anything else of this nature, the ground will have shifted before we have gone through the mechanics; the action will have moved to the next level. It is so much better to use soft-edged measures depending on human judgment and decency, such as strong ethics committees including outside lay members to monitor research and treatment in laboratories and hospitals. In any case, the genie is out of the bottle and cannot be put back'.[37]

Transplant Laws

No clear answers have been found in Commonwealth legal systems to most of the issues just raised. Yet laws have been enacted to govern transplantation of human organs and tissues. In some cases, as where the tissue is regenerative (such as blood and skin), the problems posed for the law are mainly peripheral ones. To what extent, for example, should the State step in to protect the 'right to life' of a young person where his parents, and possibly he himself, object to, say, a blood transfusion for reasons of religious principle?[38] Superficially, it may seem that donation of cadaveric tissue for transplant purposes also raise few legal or moral questions. But an examination of the Australian Law Reform Commission's report on the subject will reveal that this is not so. Just as the beginning of human life has proved elusive for legal specification, so has the definition of its end. The Australian Law Reform Commission[39], the Canadian Law Reform Commission[40] and numerous other bodies and legislatures have attempted definitions of 'death'. This is so, in part, because of conflict situations that potentially could arise between the 'right to live' of the dying donor and the 'right to live' of the recipient. In judging the acceptability of a legislative scheme under which all citizens are deemed to be donors of organs for transplant purposes, unless in their lifetime they 'opt out', consideration must be given to the claim on life of fellow citizens who will otherwise die for want of available transplant material.[41]

Nowhere in the Australian report on transplantation laws is the 'right to live' more starkly faced than in respect of the needs of a young person whose suggested donor of a paired, but non-regenerative, organ is a sibling, also under legal age. On this issue, the Australian Law Reform Commissioners divided. Two Commissioners (Sir Gerard Brennan and Sir Zelman Cowen) took the view that, even in a case where life itself was at stake, the law should forbid such donation, to defend a young person against improper pressure or bravado.[42] The majority preferred to permit such inter-sibling donation but only in critical circumstances and then with the approval of a judge and other procedural protections.[43] Legislation adopted in the different jurisdictions of Australia based on the report have reflected this division of opinion. One has adopted the majority view but most have adopted the minority position. Though the fundamental values which underlie these differing conclusions are not articulated, it may be assumed that playing a part was a different value assigned to the role of the law and the right to live of a young person who might effectively be condemned to die if there was a complete legal prohibition.

THE RIGHT TO DIE

The Neonate

A number of cases in Britain in the past year have required the courts to examine the other side of the coin: the right to die or to let die. Three of the cases have concerned very young babies. These babies are undoubtedly human persons in the eye of the law, because fully born and therefore entitled to the law's protection, whatever controversies may exist in respect of the 'humanness' of the unborn child, foetus, embryo or oocyte:

* In August 1981 the Court of Appeal in England had to decide an appeal from a decision delivered by Mr. Justice Ewbank concerning the performance of an operation on a child born with Down's Syndrome. The child also suffered from an obstruction which, without operation, could be fatal. If the child had been intellectually normal, the operation would have been instantly and routinely performed. But the parents did not consent to the operation. They believed, and their doctors supported them, that it was in the child's interests that she should be allowed, under sedation, to die naturally. The Court of Appeal, reversing Mr. Justice Ewbank's decision, made the child a ward of court and ordered the operation to be performed.[44]

* In November 1981 a specialist obstetrician, Dr. Leonard Arthur, was acquitted by a jury in the Leicester Crown Court in England of the charge of attempting to murder a mentally retarded new born baby, John Pearson, who had been rejected by his parents. The doctor had ordered a course of 'non-treatment' for the child, prescribing a pain-killing analgesic which also sedates and depresses appetite. As reported, there was evidence that with 'normal treatment' the child had an 80 per cent prospect of living to adulthood. The defence case was that the drug merely eased the child's inevitable progress towards death. A statement reportedly issued after the verdict by the British Medical Association, the Royal College of Nursing and the Medical Protection Society urged that it was 'the parents' responsibility to decide what was best for their child. It was the doctor's job to advise and help them.' The same statement claimed that the verdict showed that the public was right in allowing doctors considerable freedom in coping with the burden of handicapped babies.[45] Yet it claimed that 'parents may find it a great deal harder to reach a tacit agreement with the doctor that the child should be left to gradually slip out of life'.[46]

* In February 1982, the Court of Appeal in England had to consider whether a child could bring an action against medical authorities alleging 'wrongful life'. In the United States, actions have been brought by children and parents against doctors, even by children against parents themselves, claiming 'wrongful birth' or 'wrongful life'. Wrongful birth cases involve the assertion of negligence in allowing pregnancy (incompetent sterilization) or in permitting or causing a defective birth. 'Wrongful life' cases involve the claim that the life of physical or mental handicap to which the child is condemned from birth is such that reasonable parental and medical precaution, before birth, would have required termination of the pregnancy.[47] The Court of Appeal in England in 1982 dismissed such a claim on the basis that the common law of England did not recognise a cause of action against doctors for allowing the child to be born deformed.[48]The court said that to impose a duty to terminate the child's life would make a further inroad into the sanctity of human life, which would be against public policy.

The opportunity for controversy about these cases is virtually limitless. Both in Britain[49] and in Australia[50], discussion in the legal and other journals has examined whether death caused by the deliberate withholding of sustenance or of normal medical treatment, withheld with the intention to cause death, can constitute murder or manslaughter. The suggestion by medical organisations that such painful decisions can simply be left to the decision of parents, guided by their medical advisers, may be sensible, practical and upheld by juries. But it may not give sufficient attention to the law's insistence that the criterion is not the best interests of the parents nor the protection of the public purse, let alone any social interest in eugenics. In the first case above, Lord Justice Templeman stated the law's approach:

> '[A] t the end of the day it devolves on this court in this particular instance to decide whether the life of this child is demonstrably going to be so awful that in effect the child must be condemned to die, or whether the life of this child is still so imponderable that it would be wrong for her to be condemned to die. There may be cases, I know not, of severe proved damage where the future is so certain and where the life of the child is so bound to be full of pain and suffering that the court might be driven to a different conclusion, but in the present case the choice which lies before the court is this: whether to allow an operation to take place which may result in the child living 20 or 30 years as a mongoloid or whether (and I think this must be brutally the result) to terminate the life of a mongoloid child because she also has an intestinal complaint. Faced with that choice I have no doubt that it is the duty of this court to decide that the child must live. The judge was much affected by the

reasons given by the parents and came to the conclusion that their wishes ought to be respected. In my judgment he erred in that the duty of the court is to decide whether it is in the interests of the child that an operation should take place'.[51]

These observations and the consequential obligation to perform the life saving operation received words of approbation in the popular media.[52] But they were denounced by many medical observers. For example, a Professor of Paediatrics said that society was indulging in hypocrisy in insisting on a life-saving operation. Three hundred spina bifida babies were allowed to die each year in the United Kingdom. In the 1950's and 1960's heroic efforts had been made to sustain such babies. Now, most of them grown into adulthood, they languish in nursing homes, frequently unloved, unvisited and 'a costly burden to themselves and to society'. The Arthur trial and the other English cases have generated a serious debate in Australia, and doubtless, in other Commonwealth countries. They have lifted a stone and revealed a largely unknown world of medical practice affecting the life of defective neonates. Sir Macfarlane Burnet asserted as a fact that in Australia 'compassionate infanticide' was 'standard practice where the product of birth is such as to justify the term "monstrous"'.[53] The course followed by Dr. Arthur in Britain is apparently not at all uncommon in hospitals in Australia.[54] If it happens, it occurs either with indifference to the law of murder (deliberate omissions intended to kill) or by turning a blind eye in the comfortable knowledge that such decisions will rarely become known, where they become known will rarely be prosecuted and, where prosecuted, will rarely result in a jury conviction. It is not too much to say that decisions of the kind that are apparently regularly made by doctors in the case of neonates born with gross physical or mental disabilities are at present left to the vicissitude of unstructured, possibly idiosyncratic determinations varying from individual to individual and from hospital to hospital. Such decisions appear to be made without any guidance of principle, or at best with the help only of a closed hospital committee or an appeal to 'the traditional medical way of doing things'.

The decision of the Court of Appeal quoted above was assailed because it required medical intervention to save the retarded child. But it has been equally criticised, from the opposite point of view, because it was not sufficiently uncompromising. The door was left ajar for the termination of the child's life, if it had been shown that its life was 'demonstrably going to be so awful that in effect the child must be condemned to die'.[55] In some ways this exempting phrase is more significant than anything else in the decision. The law's tendency to retreat to simplistic and absolute rules, respecting the sanctity of every human life, may seem unrealistic in the messy business of a hospital crisis. It may be out of touch with majority community values, certainly in Britain and Australia. For example, an opinion poll in Australia

found that two out of three respondents believe that doctors should be allowed to permit a badly deformed new born child to die, rather than to try to keep it alive.[56] The present state of the law is unsatisfactory. Plainly it is not being observed. Clearly it is offering little guidance in daily decisions of life and death in many hospitals. Attempts to improve it would be more likely to succeed if they were developed by law reforming agencies. This is no reflection upon the hard pressed judges who, in urgent cases amidst other busy duties, have had to respond immediately to the dilemmas posed by the cases I have mentioned. I shall return to this point.

The Mature Adult

Time does not permit consideration of all the legal implications of euthanasia, of so-called 'mercy killing'[57] or of reform of the law of suicide which, years after its amendment in England, remains unreformed in many other parts of the Commonwealth of Nations.[58] These and other issues are addressed in a 1982 working paper of the Law Reform Commission of Canada, Euthanasia, Aiding Suicide and Cessation of Treatment.[59] The Canadian Commission recommended that existing prohibitions in the Canadian Criminal Code concerning homicide should be maintained to forbid active euthanasia in any form. It did not favour the complete decriminalisation of aiding or counselling suicide. Nor did it favour enactment of legislation to permit a patient suffering a terminal illness to forbid prolongation of medical treatment. Such legislation has been enacted in a number of States of the United States.[60] In Australia, Private Member's Bills have been introduced in two State Parliaments along similar lines.[61]

The law on 'euthanasia' was examined in a recent decision of the English courts. The case involved the prosecution of two members of the British Euthanasia Society EXIT. They were charged with aiding and abetting suicide. The jury convicted the secretary of EXIT, an Oxford don aged 34, and a 70 year old man who had been sent to visit eight people contemplating suicide. Six of the people visited died by their own hand soon after these visits. The Secretary of EXIT was sentenced to be imprisoned for two and a half years. Sentencing him, the trial judge said that he had flouted the law and was 'using the Society, the object of which is to get the law changed, to jump the gun'. As he was led from the dock at the Old Bailey to serve his term, he denounced 'the idiocy of the present law', claiming that the law should be changed to allow doctors to give a 'peaceful death' to people in great distress and suffering from terminal illness. An appeal resulted in reduction of the sentence.

Support for voluntary euthanasia, at least in the case of the seriously ill, incapacitated and dying, is not a notion of a few disturbed cranks. A national opinion poll in Australia in November 1982 revealed that 69% of the people polled believed that if an adult has a terminal or chronic illness and wished to end his life, a doctor should help him to die if asked to do so. Only 24% considered the doctor should refuse, 8% being undecided.[62] Critics of euthanasia have tended to isolate the issue of active euthanasia from the issue of the right of a terminal patient to refuse extraordinary care. But public opinion indicators suggest that the law's rigid defence of human life and its refusal to countenance moves to expedite the active termination of life (whatever its quality and whatever the distress and pain being suffered) are simply not accepted by a large majority of the population. The difficulty for reform is bringing such a distressing topic into the open and providing useful criteria and procedures that will be properly defensive of human life, but at the same time be respectful of individual autonomy, attentive to the relief of pain and distress and accepting of the natural processes by which we eventually move out of this life.

The Very Old

In the United States, more than in Commonwealth countries, decisions to withhold life-prolonging treatment from very old or incompetent patients have tended in recent years to move in increasing number from families and physicians into the courts. In 1977, in the case of Saikewicz[63], the Massachusetts Supreme Court firmly rejected the approach adopted by the Supreme Court of New Jersey in the Quinlan case when it ruled that such decisions were to be made by the patient's family and physician, subject only to review by the hospital's ethics committee.[64] The assertion of the function of the courts, as guardian of very old or incompetent persons, to make decisions on life and death has generated a flood of literature in medical, philosophical and legal journals.[65] Courts in the United States are now appointing guardians ad litem to represent incompetent persons and to conduct an adversary hearing on the issue of whether treatment should be terminated, where the termination will probably result in death. A typical recent case involved Earle Spring, a 78 year old senile hemodialysis patient whose final year of life was marked by continual court battles and banner headlines as his wife and son moved from court to court in a vain struggle to terminate treatment which they believed Earle Spring did not want. Adhering to the Saikewicz decision, the probate court in Massachusetts appointed a guardian ad litem to represent Earle Spring, conducted an adversary hearing and issued an order to terminate the treatment. The guardian appealed. The Court of Appeals approved the probate judge's order. The guardian appealed again to the Supreme Court of the State. That court determined that 'it was an

error to delegate the decision to the attending physician and the ward's wife and son'.[66] The matter was then remitted to the judge at first instance. He ordered the guardian 'to refrain from authorising any further life prolonging treatment until further order of the Court'. Earle Spring was allowed to die.

Lawyers have defended the case as the assertion by the law and the courts of the ultimate respect for human life: providing legal protection for an incompetent person to make a decision that he would have made himself had he been competent and had he known all the facts. Such a view coincides with the insistence in the English Court of Appeal:

> 'Fortunately or unfortunately, ... the decision no longer lies with the parents or the doctors, but with this court'.[67]

Medical practitioners and theologians are not so sure. Spring's physician was highly critical of the way the case had been handled:

> 'If you must go to court every time a treatment is to be stopped, the implications are mind boggling. These decisions...are made perhaps hundreds of times a day in Massachusetts...I do not think courts of law can draw the line...The decision that it is up to the courts to say when treatment ends, was a very bad mistake'.[68]

And a theologian reflected:

> 'Earle Spring suffered an additional year of hemodialysis. His family experienced that suffering and endured the pain and cost of litigation, headlines, murder accusations and the agony of a public dying. The benefits for them: bitterness and financial ruin. For the public: a Supreme Court opinion that evidences little sophistication, sensitivity to medical realities, or tight legal reasoning, one that will serve only to exacerbate the already existing tensions among patients, physicians, families, lawyers, and courts'.[69]

Cases such as this may illustrate the need to defend the right to die and and to uphold the duties of medical practitioners to lessen suffering instead of concentrating on prolonging for the longest possible time — using any means and under any circumstances — a life which is no longer fully human and which is drawing naturally to its close.[70] Death has been described as the last great taboo of the 20th Century. Cases such as Quinlan, Saikewicz and Spring in the United States and the recent cases in England alert Commonwealth lawyers to the fact that they may ultimately be forced to address, not merely the definition of death, but also the proper balance between the right to live and the equal right, in due time, to die naturally and with dignity, harassed neither by heroic

INSTITUTIONS

The subjects of this paper, because they touch two of the most fundamental aspects of human existence, are endlessly fascinating. Yet the points of this paper are essentially two. The first is that medical science and technology are presenting to the law in our generation a large number of complex and intriguing puzzles. They require moral and ethical judgments. But they also require legal judgements, for they affect human life and traditionally the law has sought to guard and defend this precious, mysterious and fragile phenomenon. Whether we should rejoice in the moral choices that are posed for us is beside the point. The choices that must now be made challenge many assumptions of the legal system and pose issues that have never previously had to be considered. In vitro fertilization is simply the most vivid illustration of the new technology. Many other illustrations have been offered: cloning, genetic engineering, surrogate parenthood, transplantation and termination of life support, to name but a few.

The second point is illustrated by the English, Australian, New Zealand and other cases cited. Bioethical questions are increasingly coming before our courts. With little guidance from the legislature, judges in the midst of busy and more familiar tasks, are required to offer decisions of principle in complex questions of life and death that baffle philosophers and theologians. When does life begin? Should a life sustaining operation on a deformed infant take place? What principle distinguishes insisting on treatment in such a case from withholding it from the aged and chronically ill? Is withdrawal of sustenance to a deformed baby, murder? Should there be an action for 'wrongful life'? Who should have standing to challenge an abortion or a decision to terminate treatment? What is 'death'?

Living with the new biology can be exciting. It will extend the intellectual horizon of lawyers and lawmakers throughout the Commonwealth of Nations. But if our solutions are to escape the criticism of superficiality and unsophistication, or adherence to values no longer shared by our communities, and if we are to provide legal principles that make some pretence to keeping pace with the technology, it seems to me that we will need to do better than we have been doing. It is asking too much of the judiciary and the common law system, of the adversary trial and the limits of the curial process to afford the next generation appropriate and satisfactory legal principles on these subjects where these are needed.

It is here that the law reforming agencies which have sprung up in all parts of the Commonwealth of Nations have an essential role to play. By painstaking and interdisciplinary research, by public consultation and community education, they can help our legislators to face up to hard

questions that will otherwise be ignored or fudged, to the danger of the rule of law. It is just as important to define where the law should not intrude as to try to state the community's standards in rules that are relevant to the problems of today. If pressed, the common law system and the courts will provide answers to the new problems of life and death. But the questions are so hard and the answers so uncertain that it will be safer and wiser to address the problems in bodies which have more time, wider sources of information and opinion and in which the voices of scientists, theologians and philosophers will be at least as loud as the voices of lawyers.

FOOTNOTES

1. R. Ormrod, 'A Lawyer Looks at Medical Ethics' (1978) 40 Medico Legal J 18.
2. Baby Food Supplies (Control) Act 1977 (PNG).
3. M.D. Kirby, 'Breastmilk Substitutes, Bioethics and Law Reform' in (1983) 6 Uni. of N.S.W. L.J. (forthcoming, June 1983).
4. R. v Bourne [1938] 3 All ER 615; [1939] 1 KB 687. Cf R. v Smith [1973] 1 WLR 1510, 1512, Scarman L.J. (as he was then).
5. Roe v Wade 410 US 113 (1973).
6. Abortion Act 1967 (Eng).
7. R. v Davidson [1969] VR 667; R. v Wald [1971] 3 D.C.R. (N.S.W.) 25.
8. As reported in the Melbourne Herald, 9 February 1983, 16.
9. Ibid, 17 February 1983, 13.
10. T.I.Emerson, 'The Power of Congress to Change Constitutional Decisions of the Supreme Court: The Human Life Bill' 77 Northwestern Uni L Rev 129 (1982).
11. Id, 142.
12. Ormrod, n 1 above, 24.
13. See e.g. Melbourne Herald, 19 February 1983, 5.
14. In the matter of an application of Kathleen May Harrigan, Gibbs CJ, Mason & Wilson JJ, unreported transcript of argument in the High Court of Australia, 11 June 1982.
15. Wall v Livingston, CA 4/82, Woodhouse P for the N.Z. Court of Appeal, mimeo, 22 November 1982.
16. As reported in the Advocate, 16 December 1982, 3.
17. Wall v Livingston, ibid, 8, 14.
18. See Paton v British Pregnancy Advisory Service Trustees [1979] 1 QB 276; Dehler v Ottawa Civic Hospital (1980) 101 DLR (3d) 686; Affd. Ontario CA (1980) 117 DLR (3d) 512; l.a.r. Supreme Court of Canada, 3 February 1981.
19. Australian Law Reform Commission, Access to the Courts - I Standing in Public Interest Suits, Discussion Paper No. 4, 1976.
20. See, e.g., Laskin C.J. dissenting in Minister of Justice of Canada et al v Borowski (1981) 64 CCC 97.
21. C. Grobstein, 'Coming to Terms with Test Tube Babies' New Scientist, 7 October 1982, 14.
22. S. Mason, 'Abnormal Conception' (1982) 56 ALJ 349. Many new books have been published on IVF. See, e.g., D. Overduin and J. I. Fleming 'Life in a Test Tube', Adelaide, 1982; R.G. Edwards and J.M. Purdy, 'Human Conception In Vitro', London, 1982; C.Wood and A. Westmore, 'Test-Tube Conception', Melbourne, 1983.
23. See, e.g., statement made by Pope John Paul II on 23 October 1982 at the opening of the Pontifical Academy of Sciences Conference on Biological Experimentation.
24. Grobstein, 15.

See G. Weeramantry 'The Slumbering Sentinels', Sydney 1983 (forthcoming).

26. Blackman J. in Roe v Wade 410 US 113, 159 (1073).
27. Archbishop Little, quoted in the Advocate, 14 October 1982, 1.
28. Victoria, Committee to consider the Social, Ethical and Legal Issues arising from In Vitro Fertilization, Interim Report, 1982, 25.
29. Quoted in A. Baker, 'Embryos Wasted', The Australian, 26 October 1982, 8.
30. G. Nossal, The Age 27 September 1982, 1.
31. P. Singer, The Age, 4 October 1982, 12.
32. Australian Academy of Science and CSIRO, The Australian Journal of Biological Sciences, reported The Australian, 5 October 1982, 3.
33. Sir Macfarlane Burnet, opening address to ANU seminar on viral diseases, reported Sydney Daily Telegraph, 10 February 1983, 17.
34. Editorial, 'Cloning Must Stop', in The Australian, 16 October 1982, 14. For some of the legal issues of cloning see P.D. Turner, 'Love's Labor Lost: Legal and Ethical Implications in Artificial Human Procreation', 58 Uni Detroit J. Urban L. 459, 482 ff (1981).
35. 447 US 303 (1980). Cf Plant Variety Rights Bill 1982 (Aust).
36. See, e.g., the case of Dr. Martin Cline, New Scientist, 26 November 1981, 587.
37. G. Nossal, Lemberg Lecture of the Australian Academy of Science, AMA Gazette, March 1982, 224.
38. Australian Law Reform Commission, Human Tissue Transplants, (ALRC 7) 1977, 16, 48.
39. Ibid, 52.
40. Law Reform Commission of Canada, Criteria for the Determination of Death, Working Paper 23, 1979.
41. ALRC 7, 64.
42. Ibid, 51.
43. Id, 50.
44. In Re B (A Minor) [1981] 1 WLR 1421.
45. As reported Sydney Morning Herald, 7 November 1981, 4. See also British Medical Association, Handbook of Medical Ethics, para 5.10.
46. I. Kennedy, Reflections on the Arthur Trial, New Society, 7 January 1982, 13.
47. S. Hayes and R. Hayes, 'Mental Retardation: Law, Policy and Administration', Sydney, 1982, 44. See also Scuriaga v Powell, noted (1981) 44 Modern L.Rev. 215.
48. McKay v Essex Area Health Authority and Anor [1982] 2 WLR 890. See discussion J. Finch, No Wrongful Life, (1982) 132 New LJ 225; The Lancet, 20 March 1982, 691.
49. H. Beynon, 'Doctors as Murderers' [1982] Crim LR 17.
50. P. Gerber, case note (1982) 56 ALJ 139; (1983) 57 ALJ 57.
51. [1981] 1 WLR 1421, 1424
52. See, e.g., London Times 10 August 1981, 13.

M. Burnet, 'Endurance of Life: The Implications of Genetics to Human Life', 1978, 96.

54. See e.g. the statement of Dr. J. Bebridge, Director of the Prince of Wales Children's Hospital, Sydney, Sydney Morning Herald, 7 November 1981, 1.

55. [1981] 1 WLR 1421, 1424, Templeman L.J.

56. See Herald Survey, Sydney Morning Herald, 15 November 1982, 2.

57. R. Ling, 'Mercy Killing and the CLRC' (1982) 132 New LJ 76.

58. See Suicide Act 1961 (UK). Cf. Canadian Criminal Code, s 224. The Crimes Act was amended in Victoria in 1967 and in other States since then, most recently by the Crimes (Mental Disorder) Bill 1982 (NSW).

59. Law Reform Commission of Canada, 'Euthanasia, Aiding Suicide and Cessation of Treatment', Working Paper 28, 1982.

60. G.J. Strand, 'The "Living Will": The Right to Death with Dignity?', 26 Case Western Reserve L Rev 485 (1976).

61. See e.g. Natural Death Bill 1980 (SA); Refusal of Medical Treatment Act 1982 (Vic).

62. Herald Survey, n 56 above.

63. Superintendent of Belchertown State School v Saikewicz, 370 N.E. 2d 417 (1977).

64. In Re Quinlan 70 N.J. 10, 355 A. 2d 647 (1976).

65. See e.g. A. Relman, 'The Saikewicz Decision: A Medical Viewpoint' 4 American Journal Law and Med 233 (1978).

66. In Re Spring, Mass 405 N.E. 2d 115 (1980).

67. Templeman L.J., In re B (A minor) [1981] 1 WLR 1421, 1424.

68. Dr. L. Shear, cited J.J. Paris, 'Death, Dying and the Court: The Travesty and Tragedy of the Earle Spring Case' 49 Linacre Quarterly 26 (1982), 32.

69. Paris, 40.

70. Pope Paul VI cited McCormick, The Moral Right to Privacy, abstracted in 64 Iowa L Rev 573, 583 (1979).