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

TINKERING WITH THE ESSENCE OF LIFE?

The debate about in vitro fertilisation (test tube babies) remains obstinately in the news. Within the past few weeks, it has been persistently before us. If we turn on the television set, the ABC and the commercial channels are running programs on 'In vitro, in limbo', surrogate motherhood, frozen embryos and so on. If we pick up the newspapers, feature articles present the competing arguments. Talkback radio programs allow citizens to express their viewpoints. The Victorian Government, addressing the team led by Professor Carl Wood which has proved so successful in achieving pregnancies, has sought a moratorium on certain of the IVF activities.

The issues raised by in vitro fertilisation are partly moral, partly social, partly legal. Of course, there are important questions for health care workers. But these moratorium in Victoria evidences the strong reaction of at least one government to aspects of the IVF techniques.

In an article of this length it is just not possible to outline the whole range of issues of a legal character posed by IVF. Nor is it possible to consider at length the legal implications specifically for medical staff and institutions involved in the procedure. Articles have already begun appearing in the national law journals.<sup>1</sup> All this short note can do is to identify some of the recurring issues raised by the debate.

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.

#### THE VIEW OF SUPPORTERS

Supporters on the other hand point to the thousands of couples - married or otherwise - who are unable to have children. Approximately 1 in 12 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.

Some supports have no patience with the claim that destruction of fertilised human ova, surplus to use, amounts to 'washing brothers and sisters down the drain'. They say that such activity just has no legal consequences at all. 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 voiced. 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>

#### POTENTIAL LEGAL PROBLEMS

Even supporters of the IVF procedure are now beginning to acknowledge legal issues that have to be addressed. Amongst those that will need to be examined are:

- \* Life begins. Definition of the point at which legal consequences attach to human life, in order to avoid the possible application of the criminal law, eg murder or manslaughter, 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.
- \* 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>13</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>14</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?

#### CONCLUSIONS

There are now no fewer than five committees of inquiry anxiously looking at the medical, legal and ethical issues of in vitro fertilisation in Australia. There is also a major national inquiry in Britain and Canada. Until the inquiries have reported and the law is clarified, the position of health care workers will remain unclear. This is yet another instance of the hare of science and technology dashing ahead, whilst the tortoise of the law ambles slowly and majestically behind.

#### FOOTNOTES

1. S Mason, 'Abnormal Conception', (1982) 56 ALJ 347.
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, p4.
6. B A Santamaria, Australian, 25 June 1982.
7. Sunday Telegraph, 18 July 1982, p9.
8. See Sister Mary Regis Dunne 'A plea for wisdom', in The Advocate, 29 July 1982, p10.
9. Mrs T Sellick op cit n2
10. The Advocate, 22 July 1982 citing Dr Seal.
11. J Santamaria, The Advocate, 22 July 1982, p10.
12. The Advocate, 22 July 1982
13. Melbourne Herald 24 July 1982.
14. See R Mackenzie 'The bank you can go to for a genius baby' Sun Herald, 11 July 1982, 9.