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ROYAL PRINCE ALFRED HOSPITAL MEDICAL OFFICERS' ASSOCIATION

1983 ANNUAL REUNION

INAUGURAL LUNCHEON

TUESDAY 16 AUGUST 1983

BIOETHICS RAMPANT

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

BIOETHICS '83

Lunchtime is not the best time of the day to speak about bioethical issues. Yet I cannot believe I was invited to address your luncheon on the intricacies of foreign state immunity laws. Nor would you be particularly interested to hear the agony by which we are releasing ourselves from the Colonial Courts of Admiralty Act. I suspect that the delicate niceties of the Service and Execution of Process Act or many of the fascinating details of Aboriginal customary laws would leave you puzzled and confused.

Doubtless it was for that reason that the organisers suggested that I should offer a few thoughts about in vitro fertilisation, surrogate mothers, 'and so on'. I was told that members with an interest in obstetrics and perinatal medicine would be likely to be here today. Unkindly, I was told they would be here, not so much for my oratory as to hear Professor Dewhurst's lecture on historical aspects of Royal confinements.

One doctor I knew (I should say that she was attached to Sydney Hospital rather than this distinguished place) did express grave reservations about in vitro fertilisation for its possible implications for British Royalty and the Peerage. If you could really put a fertilised human ovum in the refrigerator for 400 years (as Dr Alan Trounson is said to have predicted) could this be done for someone of noble blood? Could it even be done for someone of Royal blood? If so, would the embryo in the fridge be entitled under the Act of Succession to priority over ordinary old-fashioned Royal births?

This, I thought, was typical of the medical profession. Here was a concern about exotica when lawyers and policymakers were distracted by the really serious problems of infertility treatment and the significant difficulties of tackling moral dilemmas posed by IVF. In the good old days, of which I expect Professor Dewhurst to speak, the problems of Royal births, however grave they were, did not encompass the embryo in the refrigerator. Perhaps the future will require him to embellish his lecture. Some of you may recall that before the birth of Prince William, Robyn Williams on the ABC Science Show, scandalised Australia by a spoof on a Royal IVF. But just as the Royal Family are not immune from the other ailments of mere mortals, so we must expect that some may come to face the special burden of infertility. The spoof was therefore not so far removed from possible reality as Robyn Williams intended. King or commoner, prince or peasant, all face the dilemmas of bioethics today.

TRANSPANTATION AND THE LAW

I became involved in biotechnology in 1976. Attorney-General Ellicott referred to the Australian Law Reform Commission the issues of the law and human tissue transplantation. At the time, it seemed an odd choice. With so many pressing problems, why set a new Federal Commission upon the task of examining what, to lawyers, seemed remote, even peculiar problems. I now frankly acknowledge that Attorney-General Ellicott got it right, and that my doubts were misplaced. Essentially, he was saying: 'Here is a new problem facing mankind and our society. The law must respond. We must find new instruments to help it respond. Those instruments must encourage interdisciplinary expertise to come together. They must also facilitate public consultation'.

Mr Ellicott's confidence was not misplaced. With the aid of top scientists, medical practitioners, theologians and moral philosophers, the Law Reform Commission developed our proposals. We discussed them throughout Australia. We used radio and television to bring the issues to audiences of millions. In the end, we produced a report. That report is now the basis of the law in all parts of Australia, save Tasmania and New South Wales. Even in New South Wales, legislation has been foreshadowed based on the report.

The report did not evade hard questions. It provided legislative answers on:

- * the definition of death
- * the rights of minors to donate non-regenerative tissue to siblings
- * the use of tissue from coroners' autopsies for the production of serum

- the rights of surviving relatives to override tissue donation by the deceased
- opt-in and opt-out systems for procuring tissue

On one important matter, the Commissioners divided. This was the subject of intra-family children donations. But the Commission's report identified the problem and left it to the elected representatives of the people to make their choice.

TWO ISSUES FOR THE FUTURE

Two issues were identified as important subjects requiring urgent future attention. How prescient, in retrospect, were our predictions:

In vitro fertilisation. The first was the subject of the transplantation of 'life itself'.

A year before the birth of the first 'test tube' baby, the Law Reform Commission proposed that in vitro fertilisation would shortly achieve successes. It urged that consideration be given to having the moral and legal implications of this development examined quickly. In the result, this was not done. In vitro fertilisation proceeded apace. It developed, with great success, in this country. No national inquiry, after the same manner as the Law Reform Commission inquiry on human tissue transplants, was initiated. At this time the Federal Attorney-General changed. Mr Ellicott was replaced by Senator Durack. Senator Durack took the view that medical law matters were matters for the States, not the Commonwealth. The result of this view is that we now have five inquiries proceeding in Australia to examine the moral and legal implications of in vitro fertilisation. None is being conducted on a national basis with national exposure of the issues or pooling of the top talent from the whole country. Each is proceeding, with small resources, in its own centre. It will be a miracle greater than in vitro fertilisation itself if these five inquiries come up with results that are compatible and nationally acceptable. I have spoken previously, in other places, about the legal implications of in vitro fertilisation. I do not propose to talk about that topic today.

- * Foetal transplants. The second matter reserved for future attention has also, suddenly, become relevant. It was the use of foetal tissue for transplant purposes. Attention was drawn in our 1977 report to overseas developments in the use of tissues obtained from aborted foetuses and used in transplantation. The special value of foetal tissue in immunology was underlined. The greater propensity of the human body to accept transplanted foetal tissue where it would energetically

reject adult human tissue was called to notice. So were the results of government inquiries in England, the United State and New Zealand. But the Commission concluded that transplantation of foetal tissue raised discrete subjects of major social importance requiring separate attention. Nearly seven years ago we wrote:

The use of aborted foetuses raises substantial questions involving public policy, moral and religious attitudes and legal problems. The legal problems alone are formidable requiring among other things study of the status of foetal tissue when in utero, when ex utero, when exhibiting attitudes of life, when dead, when 'viable' and when 'not viable'. The subject is inextricably bound up with the laws applying to abortion and the methods of abortion. Accordingly, any consideration of the use of foetal tissue for transplantation necessarily will involve consideration of abortion practices and abortion laws. ... The subject should be given early attention.

FOETAL EXPERIMENTATION

Readers of this morning's Australian newspaper will note that Mr B A Santamaria has suggested that foetal experimentation 'puts the law to the test'. He calls attention to the experiments being done by the Walter and Eliza Hall Institute on aborted foetuses. Now, it seems, the use of foetal tissue, taken from a foetus which spontaneously miscarries, is to be used in Australia for transplantation purposes. The technique is not entirely new. For years the special properties of foetal tissue in transplantation have been known. Experiments have been conducted with animals. Now foetal pancreatic tissue is to be transplanted. Later foetal brain tissue may be used. One distinguished academic in Adelaide has even suggested a specific development of a foetus, by procedures of in vitro fertilisation and cloning, to produce pancreatic tissue, absolutely acceptable to the patient. The process would be looked upon as a mere scientific experiment. The foetus would be nothing more than an excrescence of the body of the patient. Destruction of an early foetus, developed in this way, would be justifiable for the pain and suffering it saved the patient. The procedure, so it was said, would promise possible replacement of diseased or injured organs, with organs absolutely compatible with the person at once the donor and the recipient.

Responses to this vision of the 'brave new world' vary. I would discern five categories of response:

- * Fundamental opposition. At one end of the spectrum there are commentators, substantially from a religious point of view but not exclusively, who denounce this

distortion of 'the natural order of things'. They would forbid such experiments and procedures because they perceive them as showing a want of true respect for human beings -- even human beings in foetal form. For such people there is no room for compromise. The scientist has finally overstepped the mark. The foetus, being incipient man in the image of God, must be assured respect. It must not be cut about and used for experiments, let alone specifically developed and grown as an organ farm, to be discarded when excess to use.

Where will it lead? Then there are those, like Mr Santamaria, who are anxious about where these experiments and procedures will take us. They are concerned about the 80,000 abortions a year in Australia. They are fearful that still more abortions will be procured to service the industry of experimentation and the corporations involved in tissue processing and serum manufacture. They see such developments as further evidence of the destruction of respect for the ultimate dignity of human beings. They see them as a distortion of a natural Plan : unacceptable refusal to accept inevitable suffering, pain and death.

Unsettled opposition. Then there is a group who, whilst not specifically opposed to these experiments, is greatly unsettled by them. Amongst this group would be some who do not even feel strongly about abortion. But they do feel uneasy about letting scientists loose upon foetuses. They have a suspicion about scientific enthusiasm. They might fear that pressure would be placed upon scientists to advise abortions or to conduct them in less than perfectly safe ways, in order to secure, protect or preserve desirable tissue. Not being themselves recipients or potential recipients of the tissue, they would just prefer such experiments not to occur. Such people can suffer a sea change when the experimentation might aid them or loved ones. Attitudes to in vitro fertilisation, for example, can change radically when the agony of infertility is your own.

Medical fatalists. Then there is the group of medical fatalists. There is no more distinguished spokesman for this group than Sir Gustav Nossal. 'The genie is out of the bottle', he declares. The law should have no place in deterring that the experiments which man's mind devises. Controls should simply be left to medical peer review. Better to use tissue from the 80,000 abortions for human good -- than to bury or burn it. Do not stop these experiments, warns the medical fatalists. They will go on elsewhere in the world. We must not be left behind in medical developments, because at least in Australia they will take place within the conservative medical profession which has due respect for moral rules and human dignity.

* The 'modernists'. Finally, there are those who positively welcome the developments. They have no time for the opposition. They denounce it as religious dogmatism. As for the humanist opposition, they point out that it is man's creative genius that is developing the procedures. If it saves life or pain in living human beings, it is, on this view, morally justifiable without proof of anything else. Rules may be needed to prevent misconduct, such as the destruction of a viable foetus purely to secure desired organs or tissue. But beyond this a growing section of our community sees nothing particularly wrong with the use of foetal tissue. Indeed, because of the remarkable qualities of the foetus in transplantation, it believes the experiments should proceed apace.

THE ROLE OF LAW

With such a range of opinion in the community, it is difficult to see how views could possibly be reconciled in law. Certainly, the overseas reports suggest that issues need to be considered, even if the use of foetal tissue is to be countenanced:

- * Should the tissue be limited to foetuses produced through spontaneous miscarriage or should foetuses the result of therapeutic abortion be available for use?
- * Should the consent of the mother to the use of the foetus in this way be required? If so, under what circumstances should such consent be secured?
- * Should the use of the foetus be treated in a way identical to the use of other organs under transplantation legislation?
- * Should the law insist upon independence of the caring gynaecologist and the doctor using the foetal tissue in order to prevent a conflict of interest and duty?
- * Should the law forbid the immediate transplantation of foetal tissue following birth, in order to discourage the risk of deliberate destruction of viable life for transplantation purposes?
- * Should the law insist, as the Peel report in Britain did in 1972 on evidence of a minimum weight of a foetus as prima facie proof of viability. The Peel report suggested 20 weeks gestation or a weight of 400 to 500 grams as a maximum. Professor Nossal has insisted that the foetuses used in Melbourne are no older than 18 weeks.
- * Should the law forbid the sale of foetal material or would this rule simply prevent the large-scale development of beneficial results from the use of abandoned biological specimens?
- * Should the law reinforce the rules on abortion to prevent the deliberate growing of foetuses as a source of tissue for transplantation in a donor?

These are acute problems. They cause repugnance and revulsion for many good citizens. To others they are nothing more than the wonderful developments of scientific ingenuity.

The point I want finally to make is an institutional one. The problems I have mentioned will not go away. The law will ultimately have to provide answers. The answers will be found either in busy courtrooms by judges developing the common law or behind closed doors by unaccountable medical bureaucrats or in a representative Parliament, reflecting the opinions of the community.

There are some who are fearful of parliamentary intervention. They may resist the notion of Parliament giving ostensible community approval to conduct they regard as indefensibly morally wrong. They may fear the creation of laws on the basis of shifting sands and public opinion. On the other hand, the 'modernist' may fear that Parliament will be unacceptably conservative : frightened off by noisy minorities.

And this is where, in my view, law reform commissions come in. As in the project on human tissue transplants, they can mobilise the best expert opinion. They can search for the identification of common ground. They can catalogue and acknowledge the problems to be addressed. They can examine overseas developments. They can debate the issues, free from party political turmoil, before the forum of the whole community. They can help the democratic legislature to an informed voice on the sensitive and difficult issues involved.

These sensitive and difficult issues are multiplying apace. In vitro fertilisation, AID, trans-sexualism, euthanasia, right of minors to contraceptive advice and treatment, surrogate mothers, human cloning, patenting of life forms. I list but a few of the bioethical issues that confront our generation. The need for new institutional arrangements to tackle these problems is plain. If they are not secured, I suspect we will see more moratoria and a backlash of community disquiet. Be you never so high, the law is still above you. That is the proud boast of our democracy under the Rule of Law. It applies to Premiers and Princes. But it also applies to medical scientists. It is an empty boast unless our community can find effective means to develop and state its rules.