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MOGUL INTERNATIONAL MANAGEMENT CONSULTANTS LIMITED
CONFERENCE ON BIOETHICS AND LAW OF HUMAN CONCEPTION IN VITRO
LONDON, 29-30 SEPTEMBER 1983

BIOETHICS - THE STATE OF THE DEBATE

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BIOETHICS — THE STATE OF THE DEBATE

Hon Justice M D Kirby, CMG

Chairman of the Australian Law Reform Commission

SESSION 1 : THE RELEVANT SCIENCE AND PRACTICE

This conference has afforded the participants a remarkable intellectual feast. Its chief value was the opportunity it provided for relevant disciplines to meet and, in dialogue, to exchange views on perplexing modern issues of bioethics. It is clear that much more dialogue will be needed in the years ahead.

The purpose of this paper is to bring together a numbers of questions which arise from the working sessions of the conference. Unlike the Australian winners of the America's Cup, I have no secret device to cut a swathe through these troubled waters. Moreover, although this is a judicial summing up, it is one where the witnesses and the jury will have a right of reply. They will even have a right of criticism and protest. But they will not, I am afraid, have a right to a 'lay day' nor can there be any legal challenge to my summation.

The conference began with an admirably lucid and simple statement by Dr Malcolm Whitehead (Director, Infertility Clinic, King's College Hospital, London) concerning the predicament of human infertility. It was this problem of infertility that gave rise in the first place to the procedures of in vitro fertilisation (IVF):

- . At least 10% of couples, and perhaps up to 20%, are infertile. That amounts to a lot of our fellow citizens, as Lord Ennals pointed out in a later session. In sum total, it is a lot of aggregate pain, grief, despair and resignation. There are observers who hold that pain is part of the human condition and that it must be accepted. But where scientists offer escape from pain and from a fate that seems too cruel to endure, mere mortals tend to flock to their colours.

Mgr M F Connelly (Secretary General to the Catholic Bishops' Joint Committee on Bioethical Issues for England, Scotland and Wales) hinted at this issue in his contribution. He suggested the need for counselling to help people to come to terms with their childlessness. But if they cannot come to terms or if they will not come to terms, but look to the scientists to help, what is our society to do?

Many cases of female infertility grow out of sexually transmitted diseases. Dr Whitehead restrained any moral judgments. There are, however, some (certainly in Australia) who hold to the view that infertility is often a punishment for promiscuity. Upon this view, infertility should not be relieved lest promiscuity, forbidden by scripture, be unpunished where nature has rendered its verdict. Indeed, it is sometimes said that, unless promiscuity is punished, the pursuit of unrestrained sexual pleasure will become even more prevalent in our societies, to the destruction of stable institutions, including the family.

The conference was then addressed by Mr P C Steptoe and Dr R G Edwards of Bourne Hall, Cambridge — involved, both of them, in the first successful IVF conception, achieved with the birth of Louise Brown in 1978. Mr Steptoe reviewed his now internationally famous procedures in a paper on 'Clinical Indications, Laparoscopy and Oocyte Recovery'. He detailed the procedures he does follow and those which he does not. He apologised for a final slide presented in his series. This slide showed the faces of happy children, produced as a result of his IVF procedures. However, there are some who would say that this slide should be shown first and not last in the series. Our societies are rightly concerned about where IVF and associated procedures may take us. But they should never forget the aggregation of human joy which IVF has already brought to otherwise childless couples and, still more, offers potentially to millions of suffering human beings throughout the world.

Mr Steptoe then addressed a number of important points. The first was the growing success rates being achieved in Britain and elsewhere with IVF procedures. The second was the very low incidence of defective births or of abortions in the case of IVF conceptions. The third was the high success rate and safety of the developed procedures for egg recovery. The fourth was the concern which Mr Steptoe, Dr Edwards and their team had, from the start, exhibited about the ethical questions raised by their techniques.

Nonetheless, Mr Steptoe acknowledged a number of problems which he suggested needed to be addressed. First amongst these was the issue of multiple implantation. Given the higher success rate in achieving pregnancies with multiple embryo implantation, is this procedure justified? Even if it is, what is to be done with any excess

fertilised human embryos not needed for the purpose of achieving pregnancy? Some religious spokesmen have proposed that all fertilised embryos should be implanted in the host mother. But if this would sometimes be unsafe, as was suggested by Mr Steptoe, must the safety of the mother and of other implanted embryo(s) be given primacy? A second question raised by Mr Steptoe was whether tubal sealing should be revived to prevent ectopic pregnancies, even though these are relatively rare. The third question was whether embryo transfer should be allowed or whether, before this procedure is followed in Britain, doctors and scientists should wait for guidelines and possibly legislation. According to Lord Ennals, legislation might not be achieved in Britain for at least five years. Many infertile women will reach 40 in that time. According to Mr Steptoe's figures, successful IVF procedures are rare after 40. In these circumstances, a legitimate question is raised: why wait for guidelines on embryo transfer? If Steptoe and Edwards had waited for guidelines and laws before venturing upon IVF itself (as seems to be the Israeli position) might we not, both in Britain and Australia; still be waiting for the development of IVF? The fundamental question is raised: when are scientists and doctors justified in going it alone — in pioneering controversial procedures without waiting for lawyers, philosophers and legislators to provide the social solutions.

Dr R G Edwards (Reader in Physiology, Cambridge University) then presented his paper 'IVF and Reimplantation: The Basic Science'. He is a scientist. But he is a scientist with very considerable gifts of communication. Father John Fleming from South Australia thought him less skilled on ethical questions and said so. But Dr Edwards made the point that for many years before theologians and lawyers began to talk of the ethics of IVF, indeed for years before the birth of Louise Brown, he and Mr Steptoe had, in writing and orally, called for attention to bioethical questions, but without avail. Dr Edwards' telling contribution raised numerous important ethical and, ultimately perhaps, legal questions. I list just a few:

- . When is a scientist not only at liberty, but even obliged morally, to pursue an experiment that solves problems and reduces pain, even when it opens up other problems?
- . In a secular and non-authoritarian state, where are the scientists' moral guideposts to be found?
- . If committees of inquiry are established but legislation or formal and authoritative policy is a long way off, is the scientist justified to tread water for one, two, five or more years when, in the meantime, he could be relieving pain and distress and providing human fulfilment to many?

- . When a technique becomes international — as IVF has now become — can domestic laws effectively do any more than to sort out some of the consequences of the procedures? Scientists from the Soviet Union were at a Vienna conference on IVF recently. Brazilian scientists are at this time in Australia examining Professor Carl Wood's unit. Dr Faber (Belgium) warned participants that ultimately it was impossible to stop science. Dr Dawson, another participant, told the conference that other cultures, such as the Chinese, would not necessarily feel bound by the same rules on bioethical questions as are adopted in Western countries. These cautionary words about the limited potential control of domestic laws were repeated from the floor by a number of participants.
- . Is there a future in the procedure of in vivo fertilisation, recently reported to have achieved success in California?
- . How do we get the politicians in a democracy to address these questions, full, as they are, with difficulty and controversy?

Dr Edwards and Dr John Loudon (Senior Vice President, Royal College of Obstetricians and Gynaecologists) urged consideration of the licensing of medical practitioners and others engaged in IVF procedures. But, whilst licensing might aim at discouraging a few incompetent practitioners or charlatans, a question is squarely raised as to whether this form of legal regulation can be justified, for example, on a cost/benefit analysis. There would be many, and not only adherents to the Chicago school of economics, who would assert that it might be better to allow the technique of IVF to spread freely throughout the world, if this would rapidly reduce levels of infertility of the maximum number of sufferers and at the maximum speed. On this view, the pain caused to a minority, the victims of incompetence and charlatans, would be far outweighed by the pleasure caused to the large numbers likely to be served by an unlicensed free medical market. Obviously, the free market is beginning to operate in the United States. At a recent conference in Hong Kong, it was claimed that by the end of 1983, there would be no fewer than 150 or perhaps 200 IVF clinics established throughout the United States.

Robert Williamson then spoke on recombinant DNA and human reproduction. Professor Williamson holds the Chair of Biochemistry at St Mary's School of Medicine in the University of London. His is a specialty which is in prospect more than actuality. It poses hard questions, particularly when DNA experimentation is married to IVF techniques.

At the end of her session, Professor Jefferys made a vivid reference to her own children's perceptions, as children of a divorced family unit. The 'family' is itself changing in modern Western societies. This fact may make legal or ethical rules limiting IVF to, for example, 'married couples' only, inappropriate, old-fashioned or just plain unprincipled and unfair in a world of many single parent families.

Mrs Helene Hayman, a former Member of Parliament, offered a highly intelligent layman's guide through these issues:

- Mrs Hayman wanted to see IVF on the NHS. She said that it was impossible to set priorities in the provision of health services. Yet this assertion is a denial of the fundamental economic problem and the obligation which governments of all persuasions and their bureaucracies have to divide up the limited public funds available. Economic priorities are set. What may legitimately be demanded is that these priorities, and the principles by which they are decided, are exposed to public gaze and evaluation. In Australia, there is at least a suggestion that unknown opponents of IVF in the unelected bureaucracy at one stage moved to use their power to stop expenditure of public funds on IVF research and NHS support. It can surely be agreed that decisions on this topic should not be made in secret nor by unaccountable administrators.
- Mrs Hayman sought to explain her opposition to surrogate motherhood as an adjunct to IVF. She was properly concerned about the danger of uninformed consent on the part of the surrogate mother and commercialism in the form of 'womb leasing'. However, these identified problems could probably be cured by legal rules and procedures. At heart, it was Mrs Hayman's third reason that raises the hard issue. This was that, 'instinctively', she found the procedure of surrogate motherhood objectionable. To what extent does the strong feeling of revulsion of at least some people, including thoughtful people, not immediately involved, warrant the law intervening between consenting adults perfectly happy to participate? I shall return to this theme.
- Mrs Hayman closed her contribution with a very important observation about the responsibilities of the media in dealing with the complex web of issues raised by the IVF debate. Unfortunately, the media in a free society often prefer the sensational, the trivial or the personal to the dull and measured language of law books, moral tracts, scientific theses or theological arguments. The lesson that the experts must draw is that we must all labour to make moral debates more interesting, relevant and understandable for the ordinary citizen.

Professor G Duncan Mitchell (Exeter University) then stirred the conference with a number of provocative points:

- . If IVF techniques spread, will it be necessary for our societies to take special protection against accidental incest?
- . Does IVF undermine the trusting family unit by its tendency to encourage secrecy as between family members ie parents who will not frankly inform their children of the manner of their conception?
- . Will we ever get to the point of artificial insemination or IVF by mail order? Already in the United States at least one clinic has been established to provide the sperm of Nobel scientists for AID procedures.
- . If the procedures of IVF flourish, may they not threaten the genetic integrity of the family unit as the stable norm in Western societies?

Dr John Loudon vividly illustrated the relatively weak armoury of the organised medical profession when tackling radical new developments such as IVF. On matters of ethics, doctors may ask : is anyone's opinion as good as the next man? Ethics committees can ruminate and draw up guidelines. But unless a law is broken, it takes a tough-minded peer group to then interfere with a dedicated scientist who is simply trying to help his patients. Father John Fleming urged an approach of conservative caution as one appropriate for the professions to adopt. But since Galileo and, more lately, Simpson, Western communities have, for the most part, learned to be cautious about attempted scientific moratoria. For all that, the advocates of a moratorium on IVF have, at least temporarily, won a battle in Victoria in Australia. A moratorium has been imposed by the State Government of Victoria against certain IVF-related techniques. Clearly Father Fleming would strongly support this 'conservative' approach, on the ground of the need for further debate and the uncertainties of the issues, let alone the answers.

Lord Ennals, a former Minister of Health in the United Kingdom, then gave a delightful and tolerant politician's eye view of the IVF quandary. His most important contribution was the prediction that those who wait for legislation on this subject in Britain will wait for five years or more. In other countries it may take longer still. If this is right, how can our institutions keep pace with the variety and complexity of these issues? I will also return to this theme.

Many other debates arose from the floor during the course of the first two sessions:

- . Does human personality, after all, begin at conception? Or is there a stream of life which antedates and follows the event of conception?

- . If the event of conception is not to attract social and legal consequences, what other time can legitimately be fixed, with any measure of responsibility? Should it be birth, the time adopted by the common law for most purposes? Should it be viability, the test adopted by the Supreme Court of the United States on the application of abortion laws? Should it be an arbitrary foetal age as provided in a number of abortion statutes? Should it be the moment of 'quickening' as provided for in the common law relating to abortion?
- . Is the IVF process usefully described as 'artificial' or 'unnatural' or are these expressions merely used for pejorative effect without truly advancing the debate? Professor R M Hare in the following session rightly laid emphasis upon the search for whether IVF and associated techniques are right or wrong rather than what we call those techniques.
- . Another question raised was whether the cost of IVF was too high. This, in turn, produced a debate as to whether the costs were really as high as opponents suggested. Dr Whitehead urged that IVF might actually be better value for money than tubal operations performed by surgeons of varying skills, which procedures, unlike IVF, were presently available in Britain on the NHS.
- . Running through the debate was the nagging question of whether a new procedure, whether the contraceptive pill, IVF, use of surrogate mothers or freezing of embryos, should wait for, or anticipate, ethical guidelines and legal rules.

SESSION 3 : THE ETHICS

The session on the ethics of IVF was opened by a brilliant exposition of the moral philosopher's approach by Professor Richard Hare, formerly White's Professor of Moral Philosophy in Oxford University. Professor Hare took us to the moral philosopher's approach by way of an analysis of the morality of adultery. This led to a protest that adultery was not analogous — for its aim is normally to avoid, not secure, conception. Professor Hare proposed a four-stage approach to examining a new ethical problem, such as IVF:

- (1) What are the reasons behind any relevant old principle, such as the ethical rule against adultery?
- (2) Do the same reasons still hold in the new case?
- (3) Will relaxation lead to a 'slippery slope'?
- (4) If not, can we make an exception to the old rule, if the result of doing so is better than not doing so?

Dr Raanan Gillon, editor of the Journal of Medical Ethics, presented a competing philosophical approach. It was the approach of the intuitionist. Dr Gillon told us not to be too worried about slippery slopes. Like skiers in the soft snow, we may make appropriate manoeuvres and decisions. But where does intuition take us as to what Mgr Connelly called the sixty four thousand dollar question, and what the Right Reverend Professor G R Dunstan later called the 'inescapable question'?

- . Do we, like Catholics and others, feel intuitively that we must stress individual human respect starting inseparably from the moment of conception?
- . Do we, like Jeremy Bentham and Professor Peter Singer, find ourselves led by intuition to adopt a criterion of sentience?
- . Or do we, like Dr Gillon, accept a test of 'personhood'?

Dr Faber was provoked by these remarks to urge that the distinction should be drawn between the 'beginning of life' and the 'beginning of life as an independent human being'. Legal and moral consequences, according to this view, should only attach to the second 'beginning'. But by what criterion is it to be judged to differ from the first? Dr Elliot Philipp and Dr Shenkar took us through the intricacies of Jewish Rabbinical teaching. This begins with the first commandment to be found in the Bible, namely to be fruitful and multiply. But beyond that commandment, with its presumption in favour of life and of the human family, much else is unclear. AID has been described by Jewish commentators as 'hideous and an abomination'. Sperm may not be frozen. And surrogate motherhood provides special problems for a religion that teaches that religious identification passes from the mother.

Mgr Connelly, speaking of the Roman Catholic tradition, started with a lament about the pace of the complexity of the new technological quandary facing society and its theologians today. How simple, by comparison, may seem the issue of the contraceptive pill compared to IVF, surrogates, cloning and so on. Mgr Connelly urged attention to the causes of infertility, particularly venereal disease, abortion and IUDs. Yet it does seem unlikely that the sexual revolution witnessed in this generation will somehow be rolled back. In these circumstances medicine, law and even theology would appear bound to address the society we have, with all its foibles, rather than to hope, against all the odds, that the good old days of sexual abstinence will return. Mgr Connelly seemed to contemplate as morally acceptable, the simple family-saving case of IVF, ie implantation of all embryos created by husband and wife bound together by marriage. But beyond that, the 'synthetic' production of human life was not, in the Catholic view, to be countenanced. The childless should be helped to accept their predicament, even when, with their full consent, they can now be helped by the very genius of man's inventiveness.

Professor G R Dunstan then reviewed the Anglican tradition. He stressed the need for respect for individual moral judgments of individual patients caught up in the quandaries of infertility. His review of church law led naturally into the final session on civil law.

SESSION 4 : THE LAW

In the final session, Miss E Platt QC outlined the law in England as it is and as it affects IVF procedures. Mr Douglas Cusine (Law School, University of Aberdeen) then addressed the problems of doctors brought before the courts. Specifically, he examined the potential liability of medical practitioners in the area of negligence, as for example in the case of negligent laparoscopy. He examined briefly the need for patient consent, particularly where experimental procedures are involved. He examined the questions of surplus embryos and the freezing of embryos against the legal question of when, in law, a human life begins. This subject he preferred to pass up to the Warnock Committee and, one could say, equivalent committees in Australia and elsewhere in the common law world. Mr Cusine expressed a strong preference for guidelines laid down by medical bodies rather than legislation laid down by Parliament. But might not a medical body sometimes be too tender to the concerns of the medical profession or too sensitive to peer pressure, even perhaps too conservative in the approach to experimental and novel techniques offensive to the complacent or less imaginative professional mind?

Sir David Napley (a past President of the English Law Society) then examined the interests which the law should protect. Without claiming that lawyers were necessarily the best persons to prescribe a framework for legislation, Sir David proceeded to offer his suggestions:

- . Child born of the sperm and egg of married parents should enjoy all the rights and privileges of a natural child of that family.
- . It should be a serious criminal offence to implant a fertilised ova in a woman without her consent or by fear, fraud or duress.
- . It should be a serious offence to fertilise without the full consent of the donors of the ova and sperm.
- . Surrogate motherhood performed for money should be forbidden, other than in the case of reimbursement of necessary expenses.
- . The right to engage in IVF should be limited for properly and specially trained persons.
- . If a child when delivered is abnormal, he or she should be able to recover from those responsible and the onus should be on the IVF operator to establish no lack of reasonable skill and care.
- . It should be a serious criminal offence to develop a human embryo to full maturity outside the body of a woman.

- . Fertilisation outside marriage should be forbidden under pain of substantial penalties.
- . All rights of inheritance and title should derive from being a member of the family and not depend on the manner of conception.
- . It should not be 'abortion', in law, to terminate the growth of an embryo before it is implanted in the host mother.

Many participants felt sympathy for particular suggestions here. But equally, others asked for an indication of the principles by which specific rules were drawn up. For example, in a secular community, with widespread and growing community acceptance of de facto relationships, some would question the justice of limiting the publicly funded facilities of IVF to married couples only. People who, for whatever reason, have a stable de facto relationship may also pay their taxes and resent exclusion from the benefits of IVF facilities.

In the final paper, I outlined the debate that had followed the Wolfenden report on homosexual offences and prostitution concerning the limits of the role of the state in the enforcement of personal morality. In the new bioethical area, are there matters which 'crudely and bluntly' are not the law's business? Should the law intervene and prohibit or to facilitate IVF and its ancillary developments? Or should the role of the law be limited strictly to sorting out the consequences of IVF on such matters as the child's identity, the passing of property and the rights of parents and donors.

A number of points were made about the inquiries in Australia concerning the legal and moral implications of IVF and associated procedures. The work of the Australian Law Reform Commission in the development of a uniform law on human tissue transplantation was then put forward to indicate that expert bodies can help a community, with speed and efficiency, to face up to difficult bioethical questions, so long as they adopt procedures that involve multidisciplinary interaction of experts and consultation with the lay community. This point was well made in the presence of the chairman of the closing session, Sir Zelman Cowen. In addition to being a past Governor-General of Australia and distinguished law teacher who had written many years ago about transplant laws, Sir Zelman was for a time a part-time Member of the Australian Law Reform Commission, when it worked on human tissue transplants.

The need to develop institutional means of responding to bioethical questions is plainly urgent. For the good health of the rule of law, whether in Britain, Australia or elsewhere, it is necessary to give urgent attention to the institutions that will be adequate to respond to the numerous problems now being presented by medical and other sciences. It is the misfortune of the present generation to face at the one instance in history, the quandaries of nuclear fission, the microchip and new information

technology and rapid advances in biotechnology. Scientists had proved themselves ingenious and inventive. It is up to lawyers, philosophers, theologians and law makers to prove themselves equally competent.

It was upon this note that the conference concluded. An expression of thanks was voiced to Mr M I Mogul of Mogul International Management Consultants Limited for organising the conference. I expressed the view that in doing so he had performed a public service for Britain, Australia and communities beyond. The dialogue between the disciplines is only beginning. Adequate responses will require that the dialogue be continued and extended.