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MAKING BABIES : THE TEST TUBE AND CHRISTIAN ETHICS

FOREWORD

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Chairman of the Australian Law Reform Commission

THE INSTITUTIONAL VACUUM

At the end of September 1983 I attended a conference in London on bioethics and law in relation to human conception in vitro. One of the participants in this book (Rev John Fleming) took part. Many of the other named dramatis personae mentioned in the book were there. Dr RG Edwards and Mr PC Steptoe made their, by now, well rehearsed interventions. They were involved in the first successful IVF conception, which achieved the birth of Louis Brown in 1978. Leading the theologians were Professor GR Dunstan, who outlined the Anglican tradition and Mgr Michael Connelly, who spoke from the Roman Catholic tradition. The latter urged attention to the causes of infertility, particularly venereal disease, abortion and IUDs. He seemed to contemplate, as morally acceptable, the simple family-saving case of IVF ie implanation of all embryos created by husband and wife, bound together by marriage. But beyond such a case, the 'synthetic' production of human life was not to be countenanced.

After the doctors, the theologians and the ethics professors came the lawyers. That was when I had my turn. My message was simple. It was to express a concern I have previously voiced in Australia and which is recorded in these pages. Like the diamond, it had a number of facets:

- In vitro fertilisation (IVF) is one only of the quandaries of biology presented to our society in our generation by advances of science and technology. As a society, we must be more prompt and better organised to respond to the social, ethical and legal problems of issues such as IVF.

- IVF has social and therefore legal implications. The most critical of these is reviewed in this book. Is human life, worthy of the law's protection, to be taken to commence from the first instance of conception, including in vitro? Or should the law only offer its protection from the acquisition of 'personhood' or some other identifiable characteristic? Father Fleming expressed himself in no doubt at the London conference. In this book he repeats his thesis that human life begins from the moment of conception and is sanctified at that instant by God. No other time suffices. Accordingly a number of the surrounding procedures of IVF (which involve the potential discard of excess fertilised human embryos) are morally unacceptable. By inference they should be legally unacceptable.
- Unless we can develop a framework of appropriate institutions to help society to respond to vexed questions such as these in a satisfactory and acceptable way, the questions will not disappear. They will simply have to be solved by the existing machinery we already have for confronting and answering hard problems. In churches this doubtless means theological debates and the publication of ethical literature. In universities, it includes the conduct of vexatious seminars. The law's answers (in default of anything more coherent) are provided by the judges. This is the common law technique which we have inherited in Australia from Britain. In the midst of busy work dockets, judges are increasingly being deflected from property claims, negligence actions, interpretation of wills and application of tax statutes to provide legal (and moral) guidance on bioethical questions.
- Because of my conviction that these answers, developed in such a way, may not be entirely adequate, will often be developed in haste and usually offered after imperfect assistance and without adequate consultation on the community's interests, it is my view that a better machinery for providing responses should be found, and found quickly. In default of anything better, it has seemed to me that the methodology of the Australian Law Reform Commission provided a useful model for consideration in Australia. The earlier work of that Commission on human tissue transplants[1] showed how a controversial and potentially divisive subject presented to society and its laws by biological science and technology, could be handled to general satisfaction. The development of a regime of rules after careful consultation with experts and the general community led to proposed laws that have now been largely accepted throughout Australia.
- Finally, beyond institutions, there are principles. It is important that our responses to quandaries such as IVF should be more coherent than the stumbling efforts of ad hoc solutions offered, bandaid-like, to 'keep the lid on' this debate or that. Yet there is a risk that this is the way such quandaries will be approached unless we can develop a more coherent institutional response than we have done to date.

Judges have neither the time, the inclination or the training to develop their rules against the criteria of concepts of a fundamental character. Ad hoc committees may be tempted to resort to no more perfect guiding principles than the will of the majority in the community at present. Yet this principle has obvious defects. In Nazi Germany, the will of the majority probably supported the outrageous actions against minority races, socialists, homosexuals and anyone who did not fit the stereotype. If we are to develop our laws on problems such as IVF in a principled fashion, we must find people and develop institutions that will identify the principles.

COURT CASES

Let there be no doubt that, in default of anything better, the courts will continue to provide their answers. Scarcely a week goes by now but there lands on my desk the decision of a court in Australia, Canada, Britain, United States and elsewhere revealing judges facing up to the hard issues of bioethics. Take these recent cases in which judges had to address the so-called 'right to life':

- The Kentucky Supreme Court in the United States in 1983 decided that a man charged with assaulting his estranged wife and killing her 28-week-old foetus cannot be charged with 'criminal homicide' under Kentucky's Penal Code. The homicide statute did not define 'person'. However, it was held by the court that the common law rule should be maintained, limiting criminal homicide to the killing of one who has been born alive. The State of Kentucky had sought a ruling from the court 'in the light of modern medical advances and legal rulings in other contexts' that today a viable foetus should be deemed a 'person' for the purposes of the Kentucky murder statute. Two judges dissented. The majority adhered to the old common law principle.[2]
- In Britain in 1983 a woman brought an action against the Health Authority running the hospital in which she had undergone a sterilisation operation. It was established that clips which should have been placed on her fallopian tubes were incorrectly located. She fell pregnant. She suffered anxiety during the pregnancy for fear the drugs she had been taken against pain could have harmed the unborn child. A normal healthy boy was born. She claimed that her measure of damages should include the increased costs to the family finances that the unexpected pregnancy had caused. The court held that it was contrary to public policy and disruptive of family life and 'contrary to the sanctity of human life' that damages should be recoverable for the costs arising from 'the coming into the world of a healthy, normal child'. Accordingly her claim for the costs of the child's upbringing to the age of 16 and enlargement of the family home was held to be irrecoverable.[3]

Unless we can develop institutions that help the democratic arm of government to offer solutions to bioethical questions, it will continue to fall to the unelected judiciary (and to a lesser extent the unelected bureaucracy) to weigh the public policies involved and to provide the answers. The courtroom is a good venue for the resolution of factual disputes between parties, where the issues are narrowly focused. It is an imperfect venue for the resolution of large philosophical quandaries, based on ill-understood scientific and technological developments and restricted to the parties and their lawyers — with little or no help from philosophers, theologians and the community.

THIS BOOK

This book is the latest contribution to a burgeoning literature in Australia about IVF. It is entirely fitting that Australia should contribute to the ethical debate. We are, after all, in the forefront of the technological advances.

Professor Walters is surely right to warn us that IVF is merely an early species of a developing genus. How will we respond to cloning? How will we react to the claim of parents to choose the sex of their child? What is our attitude to genetic screening, when it goes beyond tests for spina bifida or mental retardation? Surely we will not tolerate hybridisation. Yet if we reject any of these developments, upon what principle does our society call a halt to such developments of science? Is it simply revulsion or fear? Unless we do something in the law, scientists will be unregulated and unrestrained. Yet if the law intervenes, can we be sure that parliaments and judges will be sufficiently sensitive to changing community attitudes? And in any case, should community attitudes be the determining factor?

This lastmentioned issue is addressed most usefully in this book by Dr John Henley of the Uniting Church. He was a consultant in the Law Reform Commission's project on human tissue transplants. Rightly, he stresses that we live in a plural society and that some Protestants are offended by the seemingly authoritarian rulings of the Roman Catholic Church on bioethical questions. Yet if rationality rather than authority is to determine the reactions of the organised church to bioethical quandaries, whose rational opinion is to prevail in the event of the inevitable disputes? Dr Henley cautions us about the needs for modesty in moral judgments on bioethical questions. But if we are too modest, might not the caravan have moved on, whilst the world waits for decisions on yesterday's problems?

On the other hand, Dr John Morgan points to the problem of the churches' taking a premature stance. The shift of opinion concerning contraception is used to illustrate the answerability of the churches to the opinion of their communicants. Like Dr Henley, Dr Morgan warns us against absolutist principles in a rapidly developing field of science and technology.

The Rev Michael Hill takes us into Biblical studies for such guidance as these can offer on IVF. But what is to be the guiding principle? Is it the injunction to go forth and multiply? Or is the Biblical instruction about the sanctity of life? In the clash between these two principles, we see the quandary posed by IVF.

Father Fleming, believing that human life begins at the moment of conception, expresses his concern about the apparent indifference of proponents of IVF to the fate of the potential live sacrificed in its procedures. His chapter requires us to face squarely the question of the beginning of life. If it is not the instant of conception, what other time can be satisfactorily chosen? Yet even if it is the moment of conception, is that determinate of the debate. Some will say not. They will suggest that ethical and, more especially, legal respect will attach at a later point in the development of the human embryo. Yet Father Fleming drives home his theme. If it is not to be the moment of conception, what other moment will offer a coherent principle? His conclusion is that in solving infertility by IVF, we are creating new and different problems.

Mr Rick Brown, a lawyer, reflects on the role of the law in this debate. Is it to respond to majority community opinion? Or is it to mould community attitudes? If we believe the opinion polls, the community's response to IVF is generally sympathetic, even among practising churchgoers in Australia.[4] Yet the nagging question remains whether that opinion has itself been manipulated by a media campaign of smiling babies and grateful parents. Is it an opinion worth respect if it is formed in ignorance of or indifference to the long-term consequences of disturbing what Father Fleming calls 'the sexual roulette' which has been followed for millennia into this generation?

The Rev Alan Nichols looks at the problem from the point of view of the rights of the IVF child to know his origins. But it is not an unsympathetic examination. For example, he points out that the use of artificial insemination, the precursor to IVF, has helped those infertile couples who have used the technique to stay together and to avoid the ever-widening doors of the divorce courts.

The Rev Roy Bradley looks at the problem from a compassionate point of view of pastoral case. Churches should not only preach authoritative theology. They should be involved at the clinical level in the very personal, intimate and stressful crisis of infertility. Dr Ditta Bartels, like Professor Walters, calls for a national approach in Australia to the response to the IVF questions. But given our constitution which reposes most health care matters in the States, how can such a national response be developed in Australia?

Professor Gareth Jones, addressing the issue of foetal experiments, brings us back to the 'fundamental issue'. There is no escaping it. Is the in vitro embryo nother more than 'experimental matter'? Or is it an incipient human life deserving of respect by ethics and protection by the law? This concluding chapter brings us full circle. Who will provide Australia, indeed who will provide mankind, with the thoughtful, reasoned and persuasive answers to the questions that are posed in this book?

CHURCH AND STATE

In a recent debate in the House of Lords, their Lordships were addressing suggested reforms of the English divorce law. Opposition was voiced to the government's proposal to reduce from three years to one year the minimum duration of a marriage before a divorce can be sought.

Some Bishops at the Anglican Church opposed the amendments. They protested that one year was not an adequate time in which a couple should and could judge if their marriage was a failure. Lord Hailsham, the Lord Chancellor, agreed that not a single marriage had been saved by the imposition of a time bar. However, though a practising churchman himself, he said that those members of the Church who had opposed change had 'every right to legislate' for the Church's own communicants. They did not have the right to 'impose their views about marriage' on the 'other kinds of marriage which the State has to celebrate'.

The divorce between Church and State is even more clearly established by the Constitution in Australia. Accordingly, the views of the Churches and of theologians cannot, in our polity, have a binding effect. Just the same, our culture remains profoundly influenced by the Judao-Christian tradition. Even agnostics will gladly look to the Churches, their leaders and members for guidance upon the ethical debates of IVF and beyond. It is for that reason that this book is a useful contribution to the literature. There are many who will read these pages and differ from the views expressed. But none may doubt that the questions posed are deserving of the thoughtful reflection of our citizens. At stake is nothing less than the future of humanity.

FOOTNOTES

1. Australian Law Reform Commission, Human Tissue Transplants (ALRC 7), AGPS, Canberra, 1977.

2. Hollis v State of Kentucky, 33 Criminal Law Rep 1005 (1983).

3. Udale v Bloomsbury Area Health Authority [1983] 1 WLR 1098.

4. See eg the Morgan Gallop Poll, April 1983, noted E Weisberg, 'Report From Fertility Society of Australia Second Scientific Meeting', in Healthright, Vol 3 No 2 (February 1984) 33, 35.