

RIVERINA COLLEGE OF ADVANCED EDUCATION

WAGGA WAGGA, NEW SOUTH WALES

GRADUATION CEREMONY, 10 APRIL 1981

COPING WITH THE AGE OF TEST TUBE MAN

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

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INTRODUCTION AND CONGRATULATIONS TO GRADUATES

On an occasion such as this, a speaker in my position is obliged by tradition and common courtesy to do certain things. You will all understand that, as a judge, following tradition is to do what comes naturally!

The first thing I have to do is express a proper sense of the honour which it undoubtedly is to be invited by this College in this city to take part in such a happy occasion. The College traces its lineage back to 1892. It is undoubtedly one of the foremost of the Colleges of Advanced Education which brings scholarship and learning to increasing numbers of Australians. There are few obligations in public life more pleasurable than to stand with new graduates at the threshold of their careers.

The second thing to be done is to remind ourselves of the significance of an occasion such as this. The ceremony itself is at least as old as the Christian era. Its purpose is to place before the international community of tested scholars, in a solemn ceremony, new recruits who have earned their laurels by a period of dedicated application to study. Inescapably in that study, new graduates have acquired personal discipline and a measure of wisdom. They are sent forthwith by this College to the community with the commendation of their degrees and diplomas. The precise form of the ceremony traces its origins to the medieval church and the laying on of hands: by which authority was transmitted from one generation of intellectual leaders, to the next. On an occasion such as this, it is fitting that we pause for a minute and reflect upon the seamless continuity of education.

Thirdly, it falls to me to congratulate the new graduates and diplomates. It does not seem so very long ago that I was sitting in a similar position to them, listening to an Occasional Address and wondering what the future held in store for me. There is no escaping it. This is a watershed in the life of those who ascend the stage today. It is a time when at least one period of concentrated study is over. It is therefore a moment when the candidates are permitted a fleeting moment of self-congratulation.

I am not so far removed from your position to have forgotten the rigours which are imposed upon those who pursue tertiary education today, in whatever form. When nostalgia sets in, it all seems an idyllic time. But in many ways life has become more difficult today, not least in a College of Advanced Education such as this. There are rules and restrictions to be complied with. There are special burdens on those who study part-time. Always, there is competition to be faced. Nowadays, at the end of the road, there is sometimes uncertainty about securing an appropriate professional appointment. Factors such as these have doubtless taken their toll in one way or another upon the young men and women who come forward today.

In most cases the burden has not been borne singly. The family, parents, friends, husbands and wives, children and colleagues have all played their part. They have helped to share the burdens. The reward is here today. It is an occasion for proper, shared pride. That is why we involve the families and friends of the graduates and diplomates in this ceremony with the community of scholars. It is a recognition of the contributions they have made to the achievement which is signalled by this occasion, here today.

On behalf of the community and on my own behalf, I extend congratulations to the graduates and diplomates. I also express thanks to those who helped them on the path to this culmination of their study. The formal, structured education which began at the local kindergarten ends, for most of the graduates, here today. The education in the school of hard knocks lies ahead. The community is part of these young people. It anticipates their service. It is grateful to those who supported them on the way to this occasion.

Having discharged my primary task, it is now my function to say something of general significance. The only requirement, is that I must be brief in doing so. For five years I sat on the platform of the Sydney Great Hall as a Fellow of the Senate of that University. In that time I attended at least 30 ceremonies such as this. Thirty times an Occasional Speaker rose in his place to address the assembled throng. It is a sobering thought as I stand here before you today that I cannot call to mind a single utterance: not one item of distilled wisdom, no aphorisms, not a single jest or pearl of any of the 30 Occasional Speakers. People in my position do well to bear in mind the transiency of Occasional Addresses.

BIO-ETHICS : HUMAN TISSUE TRANSPLANTS

As you have heard, I am Chairman of the Australian Law Reform Commission. The functions of that Commission are to help the Federal Parliament in the reform, modernisation and simplification of Federal laws in our country. We are living through a time of rapid change: changes in the role of government, in the operations of business and in moral and social attitudes. But the greatest force for change of our time, and one which constantly requires revision of the law, is the dynamic of science and technology. The lives of everyone in this graduating class and indeed of every citizen will be profoundly affected by rapid scientific change.

The three sciences which most dramatically affect the law are the energy sciences, the computing sciences and the new biological sciences. I will say nothing of energy and nothing of computers: though clearly the lives of teachers and of computerists themselves will depend very much on these scientific developments.

It is timely, however, to say something about the acute moral dilemmas which are being posed for society and its law by biological developments, some of which are being pioneered in Australia.

Five years ago, the Law Reform Commission was asked to deliver a report on the laws that should govern one such biological issue: human tissue transplantation. Our report, Human Tissue Transplants¹, was produced by the participation of some of the best legal minds in Australia joining together with the most skilled surgeons and physicians involved in transplantation, aided by Protestant and Catholic theologians and by a professor of philosophy. Among the Commissioners who joined in the project were Sir Zelman Cowen, now our Governor-General and Sir Gerard Brennan, recently appointed to the High Court of Australia. Before the Commission delivered its report, it canvassed its tentative proposals in the four corners of the country, by radio, television and the printed media. Thousands of fellow citizens had their say before the report was completed. It was a remarkable symbiosis between expert and ordinary Australians. In the result, the lawmakers had the issues placed before them. These issues were faced up to, which might otherwise have ended, as so many do, in the 'too hard basket'. How should 'death' be defined? Should we continue to require consent and donation of body organs or should we, as in France, accept that everyone is a donor unless in his lifetime he objects? Should a child ever be permitted to donate a kidney to a brother or sister? There were many more such questions.

The law proposed by the Commission has been adopted already in three Australian jurisdictions (the A.C.T., Queensland and the Northern Territory). It is shortly to be adopted in another. It is under active consideration in two other States. Difficult, complex, sensitive, controversial questions have been answered and laws provided which have commanded not only local but also overseas approbation. The British Medical Journal, in a leading article, described this Australian report as:

The latest in an outstanding series. ... The publicity which the Commission's activities attracted in the course of preparing and publishing the report did a lot in Australia to remedy the ignorance of the public and the apathy of the medical profession towards this important subject.²

THE TEST TUBE DILEMMA

In the course of our inquiry about transplanting kidneys, the cornea, skin, bone and so on, the question arose as to whether a law on such topics would be adequate to cover transplantation of life itself. Writing in 1977, we foreshadowed, accurately, developments which were then scientific dreams but which, all too quickly, have become actualities that must be faced by Australian society. Test tube fertilisation, embryo transplants and transplants of foetal tissue were all listed as matters requiring 'early attention'.³ A separate inquiry was proposed into the legal consequences of artificial insemination, with its implications for such matters as the legitimacy of children, the inheritance of property and matrimonial or family law rights and liabilities that could arise within the marriage bond.⁴ And then we foreshadowed further developments:

There are other subjects which require early consideration. These include the removal, for the purposes of reproduction, of a human ovum, the fertilisation ex utero of the human ovum, and the implanting in a woman of an ovum fertilised in vitro.⁵

In short, we predicted test tube babies and fertilised human ova, and we said that it would come, it would need legislative attention and that consideration should be given earlier rather than later. That was four years ago.

Last year, in Melbourne, Australia's first test tube baby, Candice Reed, was born. Within the last few weeks, Victoria and Clara have been born in Melbourne. More test tube babies are planned to help those parents who cannot have a child normally. The aim is understandable — to help these people fulfil themselves as human beings. Statute law and common law are silent on the profound questions raised by this new technology. The issue I pose is whether we should tolerate such a silence, allowing scientists and technologists to take our society where they will, with no prior opportunity for us as a nation, indeed as a species, to consider the implications and to lay down the acceptable rules within which these developments will occur.

In 1932, nearly 50 years ago, Aldous Huxley wrote a stunning book 'Brave New World'. Bertrand Russell declared that the frightening spectre of impersonal scientific control of man, pictured by Huxley 'was all too likely to come true'. In chapter 10 of Brave New World, Huxley, 50 years ago, described a visit to the Bloomsbury Centre in which 4000 rooms contained the production line of the Director of Human Hatcheries. Men and women were no longer reared in a loving home environment but were developed and preconditioned with anonymous scientific efficiency. Listen to the description of this world written half a century ago:

'This hive of industry', as the Director was fond of calling it, was in the full buzz of work. Everyone was busy, everything in ordered motion. Under the microscopes, their long tails furiously lashing, spermatozoa were burrowing head first into eggs; and, fertilized, the eggs were expanding, dividing, or ... budding and breaking up into whole populations of separate embryos. From the Social Predestination Room the escalators were rumbling down into the basement, and there, in the crimson darkness, stewingly warm on their cushion of peritoneum and gorged with blood-surrogate and hormones, the foetuses grew and grew or, poisoned, languished into a stunted Epsilonhood. With a faint hum and rattle the moving racks crawled imperceptibly through the weeks ... to where, in the Decanting Room, the newly-unbottled babes uttered their first yell of horror and amazement. ... Blithe was the singing of the young girls over their test-tubes ...⁶

Last week we learned that the test tube team at the Queen Victoria Hospital in Melbourne had frozen twelve fertilised human eggs, the excess resulting from their test tube fertilisation programme. The fertilised egg is available for use in the mother or surrogate mother when she is in the right hormonal state to receive it. One embryologist connected with the team believes it may be possible to store the eggs for 400 years and still, then, achieve a pregnancy. An ethics sub-committee of the hospital decided that freezing and storing the eggs was a better alternative than destroying them, or using them for experiment.⁷

Whilst these developments proceed here, in Australia, in the United States last week a Bill was introduced into the Congress seeking to circumvent 1973 decisions of the U.S. Supreme Court to make it plain that 'the earliest embryo' is human life.⁸ Another Congressman, Representative Robert Dornan of California, has gone further, proposing an amendment of the United States Constitution itself to state that 'life begins when a sperm cell fertilises an egg rather than at conception when the fertilised egg begins to grow and implants itself.'⁹

Representative Dornan would certainly say that the 12 frozen fertilised eggs in the hospital in Melbourne are 'human life'. But what is to be done with them? Is it really conceivable that they may be used long after their natural parents have died? Is it really acceptable that we should tolerate experimentation, even on so primitive a form of life? Is it unsettling to think of scientific developments of this kind?

A leading Catholic theologian, Dr. Thomas Connolly, has recently suggested that asexual reproduction in the form of human cloning should be absolutely prohibited.¹⁰ Certainly Pope Pius XII forbade artificial insemination even by a husband donor. Dr. Connolly cautioned about the need for public debate of high quality in which the churches must accept the challenge of proposing moral standards which address the serious moral implications of reproductive engineering only possible in our time.¹¹

It is not only the churches which must give a lead. Society itself must state its standards. There are some who feel the whole practice of insemination in this way should be forbidden, at least for the present. There are others who see nothing morally wrong and who regard the Brave New World as a long way off. Most Australians are simply perplexed, a little unsettled, preferring not to think of the problem at all. Meanwhile, artificial insemination and test tube fertilisation goes on. The 12 fertilised eggs remain snap-frozen, suspended in a solution of liquid nitrogen in a Melbourne hospital. The doctors are unsure. The law is unclear. Society faces a dilemma.

WHAT IS TO BE DONE?

One distinguished judge has said that we should not be frightened or disturbed by such dilemmas. On the contrary, they signal, he said, the privilege of choice which represents 'one of the greatest achievements of humanity'.¹² Just the same, I can only repeat what the Law Reform Commission said in 1977. We must seek to face up to these dilemmas or else we will be the hostages of science. Human values, and the respect for the integrity of human creation may be lost in a dazzling display of scientific inventiveness.

There are some who feel that it is better not to do anything about such problems, lest in default of complete social unanimity, we provide laws 'in advance of the moral judgments which the laws should reflect' and thereby 'build an edifice on shifting sands'.¹³ This week, it was suggested that the Melbourne test tube programme would be raised at a meeting of Federal and State Attorneys-General later in the year.¹⁴

If I can say so, the one thing that is plain is that the law on this topic is not a matter to be drafted behind closed doors by committees however expert and sincere. It is certainly not a matter for doctors and scientists only, nor for lawyers alone. It is not a matter for university scholars working in their offices nor for individual researchers. It is not a matter for hospital ethics committees. If ever there was an issue upon which there is a need for a profound and thoughtful community debate, this is it. Neither legal imperialism nor medical paternalism, nor even scientific inevitability, should carry the day. Where issues of life and death are involved, we must seek out an informed community consensus. Worst of all is a failure to do anything. Down that track lies the spectre presented by Huxley's Brave New World.

The community must search out its own role in relation to the life of its members and of its future generations. Bodies such as the Law Reform Commission provide one means by which we can help our lawmakers resolve the dilemmas of our time.

The gift of education which the new graduates and diplomates received at the hands of this College requires them to spare a thought, even on this happy occasion, for the questions I have raised. May you all be worthy of the privilege of education which you have received here. May you be conscious of the responsibility which that privilege imposes upon you, all of you, to give the lead, beyond your immediate professional pursuits, to renewing our society and helping it respond to the quandaries of a time of rapid scientific change.

FOOTNOTES

1. ALRC 7, 1977, AGPS.
2. British Medical Journal, 28 January 1978, 195.
3. ALRC 7, 21 (para. 49).
4. *ibid*, 19 (para. 42).
5. *ibid*. See also Russell Scott, The Body as Property, Viking Press, N.Y., June 1981, forthcoming.
6. Aldous Huxley, Brave New World, Granada, 1977, 121.
7. The Melbourne Herald, 6 April 1981, 6.
8. Newsweek, 6 April 1981, 30.
9. *id*.
10. T. Connolly, 'The Morality of Cloning and Artificial Insemination', in The Catholic Institute of Sydney, Faith and Culture, Vol. 1 (ed Neil Brown), 1978, 86, 95.
11. *id.*, 117.
12. Sir Roger Ormrod, 'A Lawyer Looks at Medical Ethics', in (1978) 46 Medico-Legal Journal, 18, 21.
13. Mr. Justice F.G. Brennan, 'Law Ethics and Medicine', in Medical Journal of Australia, 18 December 1978, 577, 578.
14. The Australian, 9 April 1981, 2.