

UNIVERSITY OF NEW SOUTH WALES

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MONDAY, 2 NOVEMBER 1981

BIO-ETHICS AND TEST TUBE BABIES

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

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BIO-ETHICS : HUMAN TISSUE TRANSPLANTS

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 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 all of us, certainly the majority of students of this College, 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 itself.

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 Transplants<sup>1</sup>, 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 Law 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.<sup>2</sup>

#### 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'.<sup>3</sup> 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.<sup>4</sup> And then we foreshadowed further developments:

There are other subjects we said 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.<sup>5</sup>

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. Earlier this year, Victoria and Clara were 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 predicted 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 ...<sup>6</sup>

In April 1981 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.<sup>7</sup>

Whilst these developments proceed here, in Australia, in the United States in April 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.<sup>8</sup> 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.'<sup>9</sup>

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 acceptable 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.<sup>10</sup> 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 now possible in our time.<sup>11</sup> After Millenia these issues arise for us to face.

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, according to him, they signal, he said, the privilege of choice which represents 'one of the greatest achievements of humanity'.<sup>12</sup> 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'.<sup>13</sup> It has been suggested that the Melbourne test tube programme would be raised at a meeting of Federal and State Attorneys-General.<sup>14</sup>

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.

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, 16 December 1978, 577, 578.
14. The Australian, 9 April 1981, 2.