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THE THIRD AUSTRALIAN & NEW ZEALAND CONGRESS IN OBSTETRICS & GYNAECOLOGY

32ND ARTHUR WILSON MEMORIAL ORATION

ADELAIDE, 19 MARCH 1985

FROM HAGAR TO BABY COTTON - SURROGACY, '85

The Hon. Justice M.D. Kirby, CMG

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ARTHUR WILSON REMEMBERED

This is the 32nd Lecture in this series. I want to warn you at the outset that I cannot hope to rival Professor Short's essay last year on 'Sex in Elephants.'[1] Nor can I offer the delightful whimsy of Sir John Dewhurst's 'Accouchement Royale', delivered in 1977.[2] My essay will be neither as introspective as the number that have addressed the origin and aims of this College[3]; nor can I hope to turn in a performance as exciting as that typically given by Sir Gustav Nossal.[4] I hope, nonetheless when I am through, that you will judge this effort a worthy contribution to a distinguished Australian series.

The series celebrates a worthy Australian obstetrician, Arthur Mitchell Wilson. Because he died in 1947, the number of obstetricians and gynaecologists who knew and worked with him will now be a dwindling band. He was born in 1888, the only son of a widowed mother. By government scholarships he attended the Scotch College in Melbourne and the University of Melbourne. After a trip to China as a ship's surgeon, he joined the resident staff of the Women's College in Melbourne. He served at the Somme. Unlike so many, he returned to use his professional skills in full measure. We should pause just for a moment to

reflect upon the opportunities lost under the mud of the Somme.

Wilson was a foundation Fellow in Australia of the Royal College of Obstetricians and Gynaecologists. In 1931 a change at the Women's Hospital in Melbourne compelled his transfer to the gynaecological side, though his great knowledge of obstetrics was always readily available to colleagues. Accounts talk of his gentleness and dextrity, of his devotion to his family, of his lack of disparagement of others and of the universal respect and admiration in which he was affectionately held.

Of course, he lived in earlier, simpler times: less questioning times. But all professionals can take encouragement from such a life and from the memory of it 40 years after his passing. We should not ask ourselves, will we be remembered in this way 40 years from our death? We should ask ourselves, will we deserve to be so remembered and celebrated?

The challenges facing the obstetrician and gynaecologist in the world today are larger and more puzzling than in the time of Arthur Wilson. Of course, the individual responsibility to patients and their families remains. But a new element has been added, and an urgent one. Evidence of it was seen in the 24th lecture in this series given by Patrick Steptoe on 'Extra Corporeal Conception in the Human'. That was given in November 1978, in the midst of the excitement surrounding the first achievements of Bourn Hall.[5] Advances in scientific techniques have placed this College and its members at the cutting edge of radical developments profoundly affecting the nature and future of humanity. You are not alone in this. But you are specially involved. This is at once a great opportunity and a crushing responsibility. But it is also bound to keep you and your members in the midst of the most vexing and heartfelt of modern controversies. The cloak of professional obscurity, modesty and accountability to peers which was the world of Arthur Wilson no longer covers adequately the debates of this discipline. There is

a legitimate and insistent public interest. There are moral and theological viewpoints. There are economic and political implications.

There is no point in yearning for the good old days of Arthur Wilson's time. Symbolised by the President of the College (Professor Carl Wood), Australian scientists in this discipline are in the forefront of a major world debate. And it is a legitimate debate because involved is the essence of human life and, potentially at least, the future of our species. There is a great deal of extravagant talk and ill-informed opinion about in vitro fertilisation, genetic manipulation, cloning and hybridisation. In the nature of things, it is impossible to do more than to focus on a very few issues. Inevitably, I must approach them from the stand point of a lawyer.

HAGAR THE MAGNIFICENT

I always wanted to be a lawyer. According to the legend, when asked by a suitably astonished insurance agent (who only wanted to collect the insurance premiums from my family), I said, at the tender age of 5, that I wanted to be a Judge or a Bishop. Not, mark you, a fireman. Never a doctor (too much blood). Nor, I ask you to note, a humble lawyer or parish priest. One way or another, I was determined to get into fancy dress.

I lament to say, that I strayed from the straight and narrow of the religious life. But, in our tradition, the judiciary and the church began with many links and each has relevant and useful things to say about social organisation, justice and personal morality.

In the manner of a Bishop, I now want to take my text for this oration. It is a passage that will be well known to you. It is in the 16th chapter of the Book of Genesis:

1. 'Now Sarai, Abram's wife bear him no children: and she had an hand maid, an Eygptian, whose name was Hagar.
2. And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai.
4. And he went in unto Hagar and she conceived: and when she saw that she had conceived, her mistress was despised in her eyes.
6. But Abram said unto Sarai, Behold, thy maid is in thy hand; do to her as it pleases thee. And when Sarai dealt hardly with her, she fled from her face.'

This tale of surrogacy is amongst the earliest recorded. As the medico-legal correspondent for the British Medical Journal points out it is notable that 'difficulties of inter-personal emotional relationships'[6], as we call them nowadays, were experienced in that rude environment, briefly told in the Book of Genesis.

I now ask you to come forward more than 5,000 years - 5,000 years of human procreation, empires coming and going with misery and happiness, as one generation succeeded the next.

In January 1985 I was in London en route to a meeting at UNESCO headquarters. The temperature was frosty. But there was nothing frosty about the banner headlines. These are busy times for the interaction between the law and medicine. The Court of Appeal of England had handed down its decision on the provision of contraceptive advice to children under 16 in the Gillick case.[7] Debates were proceeding on the legal implications of the termination of dialysis treatment for a ' dirty, uncontrolled' homeless person.[8] The papers were full of the AIDS scare and the possible legal reactions to this. But by far the most dramatic headlines were reserved for the case of Baby Cotton.

On 4 January 1985 a baby was born in London. The genetic father of the baby was an American citizen who was, like his wife, in his thirties. They had been married for some years. The wife had a congenital defect which prevented her from having a child. Both wanted a child. But in the United States, adoption procedures (as in Australia) were slow, and the adopted child was usually aged 5 years on adoption. As well, it would have no genetic link to either parent. The couple wanted a child from birth.

In 1983, the father approached an agency in the United States. He paid the agency money. The agency undertook to find a surrogate mother to bear his child in England. In 1984, the father came to England for the sole purpose of providing semen for insemination of the surrogate mother. This semen was introduced into the mother by a qualified nurse. The father and the surrogate mother never met. Conception resulted from the insemination. It was agreed between the parties, through the intermediary of the agency, that the baby would, at birth, be handed over immediately to the father and his wife.

On 4 January 1985, the date of birth, the story hit the headlines. How this happened is not entirely clear. However, the judge who later dealt with the case (Justice Latey) said that the publicity before the birth and before the order of the court was 'understandable' and indeed 'legitimate'.

The London Borough of Barnet obtained an order under the Children and Young Persons Act 1969 (Eng) placing the child under the safety and care of nurses at the hospital. On 8 January 1985, the father issued a summons in the Family Division of the High Court of Justice in England seeking an order that the child be made a ward of court, that care and control of the child should be given to him and his wife and that he should be given leave to take the baby out of the jurisdiction and to bring it up

in another country, namely the United States.

Justice Latey found that the evidence established that the applicant was the natural father of the child. The natural mother (Miss Cotton) had voluntarily relinquished her parental rights and left the baby in hospital some hours after birth. She had not seen the baby since. The local authority supported the father's application.

The Judge pointed out that the guiding principle in the exercise of the prerogative jurisdiction over children as wards of court was what was best for the baby. In this regard, he held that the methods used to produce the child and the commercial aspects of the case raised 'delicate problems of ethics, morality and social desirability'. But Justice Latey pointed out that these matters were under consideration elsewhere and were not relevant to the decision to be made by him.[9] He then reviewed the evidence and concluded that no one was better equipped to care for the child than the applicant and his wife. He rejected arguments that the mere fact that the father had entered into such an arrangement demonstrated his unfitness. He also rejected (by inference) the xenophobic or nationalistic argument that a child born in the United Kingdom should not be treated as an object and exported like a product, to live in another country. Much of his judgment was directed at the publicity which had surrounded the case, it being normal that no publicity should occur in wardship proceedings without the leave of the court. However, he thought that the case was unusual and that the publicity was legitimate. He had even received many telephone calls and had thought it right to receive them and give help as was 'proper'. However, he stressed that there should be no disclosure or publicity that would identify the new parents of the child. It was unthinkable, he declared, that a finger should be pointed at the child and that she be 'the subject of comment of the media'. He urged that it would be 'kind and compassionate to discontinue any enquiries which might be on foot and leave the

couple to bring up the child in peace and quietness of mind'.[10]

Not so with Miss Cotton. She had been promised L 6,500 for acting as surrogate. But one newspaper, the Daily Star reportedly paid her L 20,000 for her story. This caused the American head of the agency involved to express doubts as to whether the promised fee would be paid. Whereas the head of the American agency and British counter-parts suggested that the case would mark an enormous expansion of the facility of surrogacy (some even suggesting that it would be cost effective because of the rise of the American dollar in value) the media and political comment was generally cautious, reserving special attention to the commercial elements of the transaction, the publicity and the removal of the child to another country. The Times said:

> 'If commercial surrogacy became in practice an alternative to adoption (for the wealthy) with much better odds, an impetus would be created to rapid growth of a practice whose effect to bring into being children in a necessarily equivacol situation. Adoption by contrast is only a matter of doing the best for the child which already exists. In these circumstances legislation will be justified to make it a crime for third parties (or rather fourth parties) to arrange surrogacy arrangements whether for profit or not. Direct transactions would be a more difficult problem for it would be harsh to make a couple (and still more a mother) a criminal in such circumstances: that might only encourage an underground trade.'[11]

WARNOCK & AFTER

The events of the Baby Cotton case bear out the parallel drawn by Sir Rustam Feroze in a recent speech to the World Congress on Law and Medicine in New Delhi. When artificial

insemination by donor developed in a gradual and somewhat haphazard way, the Feversham Committee in England in 1960 reported unfavourably on the procedure, adopting the then Archbishop of Canterbury's view that Artificial Insemination by a Donor (AID) was unacceptable. Yet only 8 years later the Minister of Health proposed that both AIH (Artificial Insemination by a Husband) and AID should be available for medical reasons within the English National Health Service. Laconically, Sir Rustam pointed out 'he did not, of course, provide the resources'.[12] In 1971, a BMA Committee under Sir John Peel, one of my predecessors in this series, advocated the establishment of accredited centres for AID. By 1982 the Royal College of Obstetricians & Gynaecologists was aware of 1,000 pregnancies with 780 live births in Britain arising from AID. This figure was 'almost certainly an under-estimate'.[13]

Sir Rustam pointed out that 'if AID has crept in somewhat surreptitiously, surrogate parenthood has come in with a bang.'[14] Whereas intra family and other surrogate arrangements like those of Hagar may have been going on for years, the new element in the equation is the introduction of in vitro fertilisation and embryo transplantation.

In July 1984 the Report of the United Kingdom Committee of Inquiry into Human Fertilisation and Embryology delivered its report.[15] That report acknowledged that surrogacy presented the Committee with 'some of the most difficult problems we encountered'.[16] The Committee recognised that there was a 'serious risk of commercial exploitation of surrogacy'. It therefore called in aid the criminal law. It recommended that legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wished to utilise the services of a carrying mother. Such legislation, they recommended, should be wide enough to include both profit and non

-profit making organisations. It was further recommended that the legislation should be sufficiently wide to render criminally liable the actions of professionals and others who knowingly assist in the establishment of surrogate parentcy.

Acknowledging that it was necessary to avoid the tainting of surrogate mothers and children with criminality, the Warnock Committee recognised that there would continue to be privately arranged surrogacy agreements. The Committee considered that most, if not all of these agreements would already be legally unenforceable in their terms as being contrary to public policy. They recommended, however, that the statute should provide that 'all surrogacy agreements are illegal contracts and therefore unenforceable in the courts'.[17]

Not everybody agreed with these recommendations. Mr. Robert Winston of the Hammersmith Hospital in London declared that he was perfectly happy to be helping childless couples to arrange a surrogate parentcy. He said that in one case, not uncommon, a woman would carry the embryo of her sister and brother-in-law and hand over the baby to them when it was born. He said that the sisters had agreed with the support of their husbands, to enter into a 'love, not money' arrangement. He pointed out that if the Warnock recommendations were implemented, such arrangements would be illegal and unenforceable and that he would be guilty of a criminal offence. He said that he would fight the law banning him from participating in non commercial surrogate pregnancies.[18]

> 'I think such a law would be unworkable and one would have to work to get the law changed. There are unquestionably perfectly deserving cases for surrogacy and I am dealing with one such patient for whom there is no other hope. I will be disappointed if providing such hope is made illegal and I would fight against it.'

Mr. Patrick Steptoe thought that commercial 'rent-a-womb' agencies should be made illegal.[19]

In Australia, a number of committees have been examining aspects of surrogacy as examples of some of the new problems presented by the radical advances in biological techniques. The Waller Committee in Victoria has delivered a number of reports, recommending legislation along the lines similar to that urged by the Warnock Committee. Some legislation has in fact been passed in Victoria, namely the Infertility (Medical Procedures) Act 1984 (Vic). According to the Victorian Attorney-General (Mr. Jim Kennan) the controversy in England surrounding the birth of Baby Cotton was 'unlikely to happen in Victoria because of the legislation'.[20] Mr.Kennan pointed out that under Part V of the Act, which 'will be proclaimed soon', it is an offence to publish any advertisement or notice likely to induce a person to become a surrogate mother, which seeks women to act as surrogate mothers or states that a woman is willing to become a surrogate mother. The penalty for such an advertisement or statement is $5,000 or two years gaol. As well, any contract or arrangement for surrogacy is deemed by the legislation to be void'. Mr.Kennan said that this legislation would 'deter surrogate motherhood' by preventing the establishment of agencies offering surrogacy services.

> 'If a service cannot advertise or circulate information it will be unable to attract potential clients. Secondly, if people know that the Parliament has deemed that contracts for surrogacy are void and unenforceable, then they will be most unlikely to go ahead with such a contract. Surrogacy arrangements in Victoria might also contravene the adoption legislation'.[21]

Mr. Kennan said that Victoria was fortunate to be one of the first places in the common law world where the government had already established a law and a regulatory framework to address

these issues. He referred to the on-going work of the Standing Review and Advisory Committee on Infertility which would advise on 'new developments and monitor community attitudes to these important social and ethical issues'.

IN ENGLAND: DELAY AND ACTION

In England, the government prevaricated. It indicated that it would leave the Warnock Report for public debate, and public debate there has been. In the House of Lords, a great deal of the debate was addressed to one recommendation on research on human embryos. The Warnock Committee had recommended that the human embryo should be afforded protection in law, including in respect of research. Research conducted on embryos in vitro should be permitted only on license and otherwise constitute a criminal offence. Specifically, the Committee recommended that no live human embryo delivered from an in vitro fertilisation, whether frozen or unfrozen, should be kept alive if not transferred to a woman within 14 days of fertilisation. This 14 day period was fixed by reference to the development of the human individual as evidenced by the 'primitive streak' which most authorities put at about 15 days after fertilisation. Needless to say, the members of the committee divided on whether such research should take place at all and whether it should be confined to 'spare' embryos or upon embryos deliberately grown for the purpose of research.[22] Similar divisions have occurred in the Waller Committee in Victoria. The divisions reflect reference to strongly held fundmental views as to the beginning of human life at the moment of conception and the need to afford such human life special protection, including in the law.

Powell Bill

Reflective of this attitude is the latest development to have occurred in Britain. Mr. Enoch Powell in February 1985 introduced into the House of Commons a Private Members Bill for the protection of human embryos. It was not expected at first that the Bill would proceed, for private members legislation is

comparitively rare both in Britain and Australia. However, the Unborn Children (Protection) Bill 1985 was given a free vote. It split the Cabinet, the parties, the ministry and even members of a family in the House of Commons. MPs divided 238 to 66 in favour of giving the Bill a second reading. It proposes criminal penalties to prevent 'a human embryo being created, kept or used for any purpose other than enabling a child to be borne by a particular woman'. 'Research' or 'experimentation' - alternative words used on the two sides of the argument - would be expressly banned.[23]

The legislation, having received a second reading, now goes to a House of Commons standing committee. This, according to newspaper reports, is dominated by supporters of the Bill and experienced parliamentarians have said that the legislation is now 'unstoppable'. According to the Times, Mrs. Thatcher favoured limited research on embryos as recommended by the Warnock report. The Minister for Health urged that the Bill would stop beneficial research. He called for caution before the Parliament rushed into the use of the criminal law. Three members of the Cabinet voted for the Bill. On the Labour side, 44 voted for the Bill and 41 against it.[24]

This initiative by Enoch Powell has jumped the gun on the government's initiatives to follow up the Warnock report. According to the Lancet it illustrates the 'impressive record of miscalculations' which the Health Minister has to his credit. Mrs. Thatcher 'with her unerring populist instinct' had indicated that she favoured a quick Bill to stop surrogacy.[25] On 7 March 1985 it was announced that a Bill would be introduced into the House of Commons before Easter to outlaw commercial surrogate mother agencies. The announcement 'warmly welcomed' by all sides of the House will ban agencies, prohibit advertising and make it a criminal offence to provide such services. This was described as a 'well defined evil.' The Lancet commented that 'as far as the backbenchers and Mrs. Thatcher care, the rest of Warnock can

be shelved for action at some later date'.[26]

It was into this rather limited legislative program that the surprise introduction of Mr. Powell's measure injected a note of urgency. The support for the Powell Bill indicates the way in which populist instincts can capture the imagination of accountable politicians. It is not necessarily the best way to grapple with difficult and sensitive problems such as surrogacy and embryo experimentaton. It may pay insufficient attention to the definition of fundamental objectives. It may respond excessively to opinionated and vociferous minorities. It may reflect the attitudes of people, most of them men and most of them elderly, who may not be sufficiently sensitive to the predicament of childless couples. It may weigh up inadequately the special value to human health and happiness that could arise from scientific experimentation. We have not devised a better system for making law. But the flaw of parliament debating an emotional issue, often with inadequate information and frequently with indifference to the painstaking reports of expert committees, may say more for short term knee jerk reactions than long term reflection upon the proper place of the law in its relationship with science and medicine.

Of all the journals in England commenting on the Cotton case, only one, the Economist would not join the band wagon condemning the commercial aspects of the arrangment with the surrogate agency. According to the Economist such a facility, properly controlled, might ensure that surrogacy was properly and openly conducted and not confined to the wealthy few who have the means for (or are prepared to take the risk of) back door operations with professionals paid enough to turn a blind eye and run the gauntlet of criminal prosecution.

I have some sympathy for the criticism, now being voiced with increasing insistence, that concentration on the commercial

aspects of this problem represents an obfuscation of the main moral issues raised. Instead of facing up to them, there is a tendency to divert attention to ancillary matters such as payment to a search agency and to a surrogate mother. If surrogacy as such is not to be stopped why, for example, should there be no proper fee to the mother who bears the child: for the inconvenience; out-of-pocket expenses; pain and emotional trauma, when these are elements of the human condition that are daily compensated by the courts in accident cases? If surrogacy is desirable as a means of assisting childless couples, why should those who help them and who can obtain suitable, healthy surrogates, not be encouraged in their search and provided with a proper commercial reward? Lurking in the background of opposition to the commercial aspect is what Mr. Kennan, the Victorian Attorney-General, candidly admitted. By attacking the commercial element, it is hoped that the problem of surrogacy will be removed or at least diminished by a combination of criminal and civil laws.

That seems to me to be unacceptable confusion in defining and pursuing our social goals. If we are opposed, as a society, to surrogacy, we should say so and we should attack surrogacy as such. An attack on surrogacy through banning commercial arrangements and declaring the contracts unenforceable is an attempt to have it both ways. It is an attempt not to stigmatise the women and children involved. But, at the same time, to make it hard for the poor, the friendless, those without influence and the wherewithal to obtain surrogate assistance. Such assistance will remain the privilege of a wealthy few able to go to another jurisdiction, including in Australia, to find doctors like Mr. Robert Winston of London who are prepared to run the risk of criminal prosecution or under-ground agencies whose fees will be higher because their activity is, and is known to be, criminal and stigmatised by some as 'evil'.

I am all for the law facing up to problems such as

surrogacy and embryo experimentation. But I hope that we will do so with a much clearer appreciation of the hard moral choices that have to be made. Perhaps in a democracy obfuscation and confusion are the only ways of achieving laws tolerable to the majority. Upon matters such as surrogacy, in vitro fertilisation and embryo experimentation we tend to divide severely. There are, as Professor Charlesworth has grouped them, the 'bio-conservatives' and the 'bio-utopians'.[27] The level of debate tends to be 'deplorably low'.[28] Slogans are used as if they were arguments and 'the dialogue of the deaf continues'.[29] The concern I have is an institutional concern. Unless we can develop means to assist parliament to come to grips with fundamental and consequential legal, social and ethical problems such as I have been addressing, the result will be one of three, each equally undesirable -

* Doing nothing. First is that nothing will be done. That is to make a decision. It is to involve our society in opportunity costs that are necessarily incurred by reason of a failure, for example, to relieve human pain through experimentation or misery and suffering through surrogacy. If our laws are silent, the overwhelming likelihood is that, for the great part, things will continue as they are - science will continue to leap ahead and society will have little say.

* Judicial solutions. The second possibility is equally unpalatable to me. It is that judges, like Justice Latey, will be confronted in the midst of other busy duties with the sudden necessity to solve a novel problem for which current legal rules or ancient legal precedents provide little guidance and example. This was the point made in November 1984 by the Chief Justice of Australia in opening the 5th International Forensic Sciences Congress. Sir Harry Gibbs asked rhetorically 'Where does one begin in deciding such questions as

whether surrogate motherhood is in itself morally right or wrong, or what is the legal status of an embryo developed in one woman from an egg supplied by another? Can there be legal custody of or property in an embryo? Is it permissible to clone embryonic cells, or to use tissue from embryos for research or therapeutic purposes? ... The time for consideration must be short since the problems are urgent ones. In some places already the courts are being asked to solve them.'[30] Courts are being asked, in default of legislation, to rule on the definition of death[31], the duty of the doctor to warn the patient about risks of medical treatments[32], decisions in relation to operatons on deformed or retarded neonates[33] and so on. The forensic setting may not be the most appropriate for the resolution of all of these problems. The relevant interest groups may not all be present. The social data may not be admissible. Public consultation will be unavailable. Always there is the necessity to reach a decision quickly, with relatively little time for philosophical reflection and speculation. Finally, there is the inevitable tendency of judges to conservatism and the status quo. With notable exceptions, I think it is inevitable that turning bio-ethical decisions over to courts is bound, in the great majority of cases, to produce rulings and law favourable to the bio-conservatives. The decisions in the neonate cases and the recent decision of the English Court of Appeal on contraceptive advice to teenagers, are cases in point. This bio-conservatism might be congenial to many in our society. It may be desired by many of our citizens. The point I am making is that to opt for judicial law making in this area (or to contemplate it by default of other solutions) is to opt, by and large, for a conservative stance in the law, administered as it is largely by middle aged gentlemen who have led, for the most part,

rather secluded lives.

* Instant legislation. Thirdly, there is the instant parliamentary solution. This is the passage of piecemeal legislation dealing with particular topics. Such is the legislation in Victoria. Such is Mr. Powell's Bill presently before the House of Commons. Such is the reported legislation on surrogacy proposed by Mrs.Thatcher. In fairness to the Victorian measure, it was passed, in part at least, following the Waller Committee report. But the great risk in this area is the risk of instant legislation; enacted as an outcome to a wave of political pressure, voiced by a sincere and noisy minority which seizes the initiative because of the powerlessness of those who will be adversely affected, the apathy and ignorance of the rest of the community and the tendency of people, not confronted by a particular problem, to react in very orthodox terms framed by their own life's experience. Many a judge will have had the opportunity to speak with parents of young people caught up in the drug problem. Such parents suffer a sea change in their attitudes to punishment and drug control. What was previously a simple matter of stern laws, imprisonment even flogging and execution suddenly becomes personalised as a human predicament facing them, closely. So it is with infertility. I can understand the strong desire of childless couples to have the fulfillment of children, preferably genetically related to them. Such couples go through the crisis of discovery, grief, anger, depression and resignation. But when resignation is not necessary, and when science provides a facility of increasing availability and diminishing cost to relieve them, in whole or part from their predicament, it ill behoves those members of the community who do not face this problem, to react insensitively, rapidly, instinctively, punitively

against the relief of pain and suffering which such experiments may produce. But some do. Dr. R.G. Edwards has said, in words relevant to Mr. Powell's Bill that if stringently supervised investigations on early embryos are to be forbidden by law, it is the 'patients who will be the losers, not the scientists' or, might I add, the politicians.[34] Nor is this a matter upon which the Churches speak with one voice. The Reverend Professor Dunstan, former chaplain to the Queen and Emeritus Professor of Moral and Social Theology of the University of London, chaired the Council of Science and Society working party which produced a report in Britain just before the Warnock Committee's report. He said that absolute protection for the embryo was a novelty in the moral tradition. Whilst accepting that society had an obligaton towards embryos, he did not believe that this amounted to endowing them with full human rights. He concluded that there was no ethical objection to experimentation on spare human embryos since this would yield invaluable information of benefit to the community as a whole. Such a potential to bring wide spread benefit to others justified the experimentation.[35] Bio-conservatives are unconvinced. For them human life begins at the moment of conception -the one unarguable instant. Human life is in a special class, deserving of special reverence, man being made in the nature of God and having a soul. Upon this view any tampering with the embryo, save for the benefit of the particular embryo concerned, could not be justified whatever the consequence in aggregate social benefit. This, then, is the debate.

CONCLUSIONS

What are the conclusions that can be drawn from this review?

First, there are many legal questions which need to be addressed as we continue to haul the band wagon of the law, laboriously, after the racing horses of science. Some legislation has been passed. But largely it has been left to judges, steeped in land law and knowledgeable about wills and taxes, to respond, instantly, to these novel dilemmas. The Californian Supreme Court holds that artificial insemination by donor does not produce a child by an adulterous relationship.[36] A Scottish judge opines that self adultery is a conception as yet unknown to the law.[37] One earlier English judge describes a surrogate arrangement in 1978 as 'pernicious and void'.[38] American courts and legal writers consider whether surrogate contracts may come within 'constitutional rights'.[39]

Secondly, we are now witnessing the beginning of a further, and potentially dangerous development. I refer to 'quick draw' legislation. Laws introduced by populist politicians, capturing the battlefield by the passage of legislation which favours a bio-conservative viewpoint with scarcely a passing nod at the competiting moral and social questions which point in the opposite direction or at least in the direction of caution and the limited operation of the criminal law.

Thirdly, because a democratic society, faced by polarising views, seeks to avoid confrontation and the subjection of one point of view by another, the alternative legislative strategy is one of indirect attack, constituting a compromise. The politicians hope that this will be acceptable to both sides. But the risk they run is that the legislation will be conceptually unsound and leave both sides discontented. In my view, surrogate legislation which concentrates on the commercial aspects is such a case. It tries to leave a little door open for surrogate arrangements whilst making them pratically impossible, except for the wealthy few. The slightly open door is for the supporters of surrogacy. The impediments are for the opponents.

It is typical democratic legislation: something for everybody. But it confuses the basic moral question and imports objectionable problems that will leave nobody satisfied, but the bio-utopians more dissatisfied than the bio-conservatives.

Fourthly, we must ask whether there is a better way? Better than judges, who will not all have the wisdom of Justice Latey. Better than legislation, hastily pushed through a divided parliament with little opportunity for thoughtful public debate and informed public reaction? There is such a way. I believe it was demonstrated by the Australian Law Reform Commission in its Report on Human Tissue Transplants.[34] This was a unique Australian endeavour to involve the best experts in the country and to engage them and the law commissioners in thorough and highly visible public debate so that a community view could emerge based on knowledge not prejudice. I believe that it is a great misfortune that a decision was made in 1978 not to refer to the Australian Law Reform Commission the subjects later studied by the Warnock Committee in England and now by numerous State committees in Australia. The result is that in a matter so universal and fundamental as this, we are still talking. There has been piecemeal legislation. It has been confined to a few jurisdictions only. Above all there has been inadequate expert and community dialogue. This is the price we are paying for that 1978 decision. And the price will increase with a toll of opportunities lost, if (as seems likely to me) we in Australia replicate the legislative knee jerks that are now visible in the United Kingdom.

It is important for this College, which includes members with a unique knowledge, special opportunities and, I would suggest, special obligations, to speak out to the Australian community and to promote an informed and national debate on these subjects. Otherwise, the pass will be sold. And we will see our country, too, locked in the harness of premature and ill-considered legislation, harshly judicial decisions or indecisive inaction.

FOOTNOTES

* President, Court of Appeal, Supreme Court, Sydney. Formerly Chairman of the Australian Law Reform Commission. The views expressed are personal views only.

1. R Short, Sex in Elephants, 31st Arthur Wilson Oration, 1984.

2. Sir John Dewhurst, 'Accouchement Royale', 22nd Arthur Wilson Oration, 1977.

3. Sir Arthur Bell,'The Origin and Aims of our College', ANZJO & G Vol 4 No 1, 10th Arthur Wilson Oration; I A McDonald, 'Floreat Collegium ANZJO & G vol 16, No. 2, 21st Arthur Wilson Oration, 1975.

4. Sir Gustav Nossal, 'Immunology and the Future of Medicine', 26th Arthur Wilson Oration, 1979.

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