Family Solidarity in the Brave New World

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In the 1960s one of the most monumental of human catastrophes occurred. A drug was invented in West Germany which, it was claimed, would greatly alleviate, if not eliminate, the distress of morning sickness in pregnant women. The drug was marketed in several countries, and the pharmaceutical companies exerted their normal pressure on doctors to prescribe it. It did indeed alleviate the morning sickness. But many of the mothers that took it gave birth to grotesque children, without arms and legs, and with misshapen heads.

The drug was marketed in the United Kingdom by a Scottish whisky company that had "diversified". It would have done better to stick to its whisky distilling. As soon as the harmful effects of Thalidomide were known, it found itself pressed to provide compensation. With typical Scottish thrift, it did not readily do so. In fact, it denied liability. But ultimately, it offered a ludicrously inadequate sum to be distributed amongst the known Thalidomide victims, on condition that they did not pursue legal action. Many of the parents were emotionally and financially at the end of their tether, and reluctantly accepted a paltry *ex gratia* compensation. In fact, a courageous campaign by a Sunday newspaper, the "Sunday Times", aroused the conscience of the nation. The whisky company was compelled to re-open the issue, and pay adequate compensation, on pain of a widespread boycott of their whisky. (This saga features at least twice in the Law reports).[1]

Now, what induced these hard-bitten whisky tycoons to refuse to pay the victims of this tragedy their morally just deserts? Well, their advisers considered that they would have had a very good chance of defending any proceedings, certainly if brought in negligence. First, they could have argued that there was no breach of duty on their part, no negligence. They simply relied on the representations of the German firm that had manufactured the drug. And secondly, it could be argued that they owed no duty to the plaintiff children. It will be noted that the parents themselves might have had great difficulty in proving damages - on the contrary the mothers had benefited from the drug. They would have found it difficult to sue for the purely economic loss associated with the upbringing of greatly disturbed children. And the contention of the distillers was that they did not owe any duty to a person who was unborn, indeed arguably unconceived, at the time of their alleged negligence.

In this contention, they had precedent on their side. There appeared to be no case in England or in any other Commonwealth jurisdiction that supported liability for damage to an unborn child. As early as 1884, the great American judge and scholar of the common law, Mr. Justice Oliver Wendell Holmes, had refused to countenance what he called a "conditional prospective liability".[2]

In the United States of America, there had been some deviation from this rule of non-liability, as from 1946.[3] But the very first instance of reported success of a claim for pre-natal injury in the British Commonwealth appears to have been in Victoria, in the 1972 decision of ***Watt v Rama***.[4] In that case the Full Court of the Victorian Supreme Court held that a child subsequently born deformed could sue the driver of a car for injuries caused to it while it was *en ventre sa mére*. The judges predicated their decision on the view that once the child had been born, the injury to it crystallized, and it was immaterial that the negligence had taken place before its birth. But one judge, Gillard J., did express the view that a foetus is a living organism which is worthy of protection from injury. Indeed, in this he is supported by at least one American case which allowed a course of action for the Wrongful death of an eight-month-old viable foetus stillborn because of the injury![5]

A child *en ventre sa mére* has always been vested with sufficient legal personality to be entitled to an interest in property[6] and is considered as a "life in being" for the purpose of the rule against perpetuities.[7]

The decision in *Watt v Rama* has been generally applauded, and indeed the English Parliament has passed legislation specifically granting a child a right to sue for pre-natal injury.[8] The remarkable achievement of ectogenesis, or birth by *in vitro* fertilization, has highlighted the extraordinarily wide ramifications of this jurisprudence. But the test-tube baby is only one phenomenom of Miranda's brave new world which demands urgent attention. This paper will examine developments in modern genetics with particular attention to tortious problems associated with their practice.

Limits of Pre-Natal Liability

It is apparent that ***Watt v Rama*** opens up the possibility of a vast amount of claims by children. In fact, an English report estimated that between 2% and 5% of all English babies are born handicapped or in some way physically abnormal.[9] It is true that many of these children are born with genetically transmitted flaws, for which it would be difficult at first sight to attribute blame to anyone. But even in such cases, modern developments both in law and in medicine may predicate a claim. For it is increasingly possible to diagnose foetal deformity by

https://doi.org/10.1017/S1035077200903584 Published online by Cambridge University Press

diagnostic radiology, or by a process known as amniocentesis, whereby a sample is taken of the fluid in the uterus in which the foetus is floating. If anything suspicious is found by the gynaecologist, is he under a duty to inform the mother? If so, is he also under a duty to advise an abortion? Indeed, is he under a duty to the child to *undertake* an abortion even against the mother's wishes? It used to be thought that there was no liability at common law for an omission. But this was at best a doubtful proposition where there was a professional relationship, and would seem quite untenable after the jurisprudence established by *Hedley Byrne v Heller Ltd.*[10] Recent cases such as *Ross v Caunters*[11] establish that the duty to give correct advice exists towards a wider range of persons than those to whom the statement is made. Surely this range must include the particular child who is in the womb. In any case, is there really any difference between a false diagnosis, which would generally be negligent, and a correct diagnosis which was incorrectly revealed to the patient?

Accordingly, it would seem possible that the physician owes a duty to a foetus to diagnose its condition in the womb and accurately to tell its mother. Does this duty go further and require the doctor to counsel an abortion? Abortion is generally a crime in Victoria[12] but there is a defence - where the accused honestly believed on reasonable grounds that the act done by him was necessary to preserve the *woman* from serious danger, which is not confined to danger to life.[13] In a valuable account of the Victorian Abortion Law, Mr. C.R. Williams makes the point that "this formulation involves the clear value judgment that the life of the mother constitutes a stronger life than the life of the foetus."[14]

It should thus be noted first that abortion is not positively sanctioned as a therapeutic operation - it is in effect not "legalized" so much as "descriminalized" in a particular circumscribed set of circumstances. It is, moreover, sanctioned for the benefit of the mother, not the foetus. It could be argued that the mother would suffer danger to her mental health if she bore a deformed child. But whether the child could sue in its own right for failure of a Roman Catholic doctor to advise its abortion must be the subject of considerable doubt.

Secondly, there are cases where the mother's own behaviour causes or at least contributes to the defect of her own child. It has been authoritatively suggested that a mother who smokes during pregnancy may give birth to an underweight child. Is the child able to sue its own mother for defects caused by its mother's smoking during pregnancy? Or for taking dangerous drugs? Or for the mother's folly in taking part in activities manifestly unsuitable for *enceinte* women, such as skiing in the

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eighth month of pregnancy? Suppose in the accident in *Watt v Rama* it had been the pregnant mother who had been negligent? Undoubtedly, it could hardly be denied that injury to her own foetus was reasonably foreseeable, *a fortiori,* as she actually knew of its existence, whereas the man who collided with her did not, but was held to owe a duty.[15]

Some Problems in Allowing Claims

The major difficulty in allowing such claims, apart from proof of causation and reasonable foreseeability of damage in the more remote situations such as the smoking mother, is that such a possibility would hardly be conducive to family harmony. This was the reason that common law did not permit an action between a husband and a wife. Now this immunity has disappeared in Australia.[16] It is by no means certain, however, that this blanket removal of the immunity is desirable socially. The corresponding English statute abolishing the common law rule provides a caveat: the court is allowed to stay the action "if it appears that no substantial benefit would accrue to either party from the continuation of the proceedings".[17] It is clear that the intention of the legislature was to prevent husband and wife from litigating private squabbles, although the terms of the legislation are very ambiguous.

Now there is some Australian authority for the view that a child was similarly prevented from suing his parent, for the same reasons that a husband and wife were so restricted. But the better view is that there is no substantive restriction, although there may be some procedural difficulties, because normally the "next friend" of a minor is his parent himself. This is not an insuperable difficulty, however, as was shown in the thalidomide legislation itself, where it was sought to replace as next friend one of the few parents who refused to accept the Distillers' offer of settlement.[18] So it would seem clear that the mother is within the class of persons who could be sued by her child.

Is this desirable? The Law Commission thought not, because of the special relationship between a mother and a child and especially between a mother and a handicapped child.[19] I am inclined to agree, for it seems undeniable that even the potentiality of litigation would be highly distressing to a mother, would exaggerate her feelings of guilt, and might provide a dreadful weapon to her husband or lover in any future custody issue between them. Nevertheless, to prevent such a highly undesirable consequence, it would be necessary to legislate specifically that no action lies, for the common law operative in Victoria seems to permit it. The English legislation specifically makes an exception in the case of road accidents,[20] because usually there are no familial overtones to the litigation, an insurance company is the real litigant. I am not sure whether this is the wisest way to deal with the problem. There may be other situations, such as injury during employment, where an insurance company would normally be involved. It may be anomalous to bar recovery. The English legislation, by the way, does not exclude the father.

Action For Pre-Natal Injury - Possible Defence

The decision in *Watt v Rama* gives rise to an important question which is not considered in the case itself. Can the defendant avail himself of any defences available as against the mother in an action by the child?

Suppose, first, that the mother foolishly accepts a lift with a drunken driver, in circumstances which would be held to have given rise to no duty of care, under the principle of *Insurance Co. v Joyce.*[21] Or suppose the pregnant mother foolishly agrees to take part in a wrestling match, where of course *volenti non fit injuria*[22] would be a complete defence to an action in assault. Or, and this is the most practically important query, suppose the pregnant mother is contributorily negligent?[23] Is the child *identified* with the mother so as to make the defence available to the tortfeasor?

The issue of identification may be raised in more remote situations, such as the liability of an occupier to a child *en ventre sa mére.* Suppose the mother is trespassing? How can you say that the unborn child is a trespasser? At the other extreme, can you argue that the foetus of a pregnant woman selling "Salamander" goods is on a business venture, so as to be an invitee?[24]

Unfortunately, our lady the common law is quite inadequate to solve these conundra, and legislation would be necessary. It is a matter of policy as to which solution you prefer. Each has its difficulties. It could be argued that it would be unfair to impose higher duties on defendants towards foetuses that they did not know than towards human beings that they did. But on the other hand, the child *en ventre de sa mére* is completely innocent and should not be debarred by its mother's fault.

Now these issues seem to flow relatively obviously from the decision in *Watt v Rama.* The further developments that I am going to discuss may be thought to be futuristic if they were not here and present with us.

They will require imagination and reasoning by analogy.

Pre-Conception Injury

(a) Does the decision in *Watt v Rama* extend liability not merely for injuries to *embryos and foetuses* (that is, pre-natal injuries) but also for injuries before conception? Suppose a woman's pelvis is injured in a car accident before she even marries. If her child is born defective, there seems no reason why the child should not be able to sue the tortfeasor, subject of course to questions of causation. There may be a *novus actus interveniens* [25] if the mother takes the risk of having a child notwithstanding that she is aware of the danger. If the doctor who examines her fails to warn her, it may be he who is liable. But there does not seem to be any reason at common law why the *injuria* may not take place before birth or conception provided that the *damnum* becomes apparent after birth. After all, if the child contracted dermatitis because of the negligence of the manufacturers of its nappies, it would be no defence to say the the nappies were manufactured before the child's conception.[26] This possibility was indeed adverted to (necessarily *obiter*) by Gillard J. in *Watt v Rama.*

(b) **Limitation Period**[27]

Another difficulty is the question of limitation of action. Suppose a defect caused by the defendant's negligence before birth or conception does not manifest itself until the child is, say, 12 - for example, a menstrual defect, or sterility or impotence which does not become apparent until puberty. Can the defendant argue that the limitation period prevents the child from suing? It would seem that the answer is no, provided that the child sues within the requisite number of years after the damage became apparent.[28] In any event, the child not in actual custody of a parent or guardian may be exempt until reaching the age of 18.

But there are some diseases which may be negligently caused and transmit themselves from generation to generation. Can subsequent grand - and great - grandchildren sue? This may be the situation with Agent Orange, although there is a recent American report which states that this chemical mixture, widely disseminated in Vietnam, was not capable of causing hereditary defects. Assume for a moment that the contrary is so. The manufacturers of the chemical would arguably be liable to the unborn children and to their children and to their children. The English legislation restricts liability to the children first born after the negligent act.[29] But I would not advocate this. The doctrine of *Novus actus interveniens* may prevent recovery where the hereditary disease is known (either by the mother or doctor), and for the cases where it is not known, I do not see why subsequent generations should not be able to sue. The common law principles on remoteness may also limit liability.

(c) Artificial Insemination

The potentiality for recovery for pre-natal injuries now leads us to the new and frightening world of artifically created babies. There has existed for more than 50 years a method of insemination of females with seed either of their husband (A.I.H.) or of another man

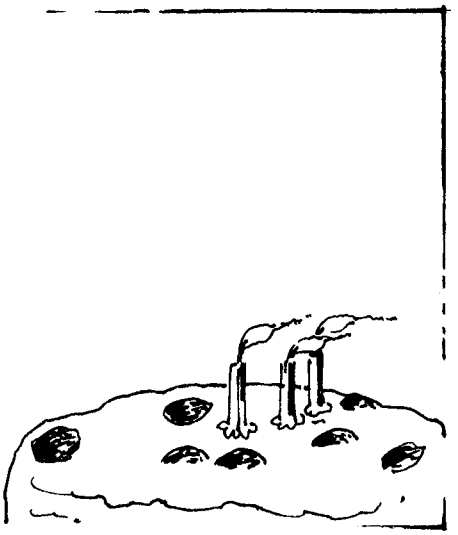
https://doi.org/10.1017/S1035077200903584 Published online by Cambridge University Press

(A.I.D.) or of a mixture of semen of more than one donor (C.A.I.). The first case to come before Commonwealth courts involving A.I.D. appears to have been *Orford v Orford*[30] in Canada in 1921, when the judge suggested that it was tantamount to adultery. Two British reports of 1948 and 1960 condemned the practice as disgusting, and quite contrary to Christian belief. (Report of Archbishop of Canterbury's Group S.P.C.K. 1948. The Faversham Report, Cmnd. 1105 (1960). But there is no doubt that it has continued. It is mentioned deprecatingly in an important Victorian case of 1971,[31] where the court opined that a child born of A.I.D. was illegitimate, and the husband was denied access, the fact of his not being the natural father being regarded as significant. Nevertheless it appears to be recognized by the medical profession and perhaps the community as a respectable panacea for childlessness. There is no legislation regulating its practice, and it seems to be practised *sub silentio* by a group of specialists.

I must confess that I find the practice extremely distasteful. There seems to be no control over the quality or quantity of seed. So far as I am aware, there are no genetic tests of the donors, and no attempt to use the method to foster a super-breed. There is, of course, the potential to do so, as was recognized in Nazi Germany. Aldous Huxley satirizes the process in "Brave New World", a book which I thought to be beguiling satire when I read it as a teenager, but which I now perceive to be frighteningly prophetic.

What are the dangers of this practice, and what legal problems does it give rise to?

First, it seems to me that doctors who practise it do so at some risk of criminal prosecution. It is doubtful whether it is permissible to sell a part of the body, which at common law is not a species of property.[33] Thus the donor could be prosecuted and the doctor who bought it could be guilty as an accessory. If it should turn out that the seed is negligently implanted - say, the syringe is infected - there may be available an action to the mother and, possibly, the child. It is also possible that a child who suffers handicaps because of a clash of blood groupings may sue the doctor or other person who supervised the insemination. Perhaps the husband of a woman who is inseminated without his consent may be able to sue. It would be interesting to speculate on whether a non-consenting husband can stop an insemination, by an injunction, perhaps invoking the *Family Law Act* 1975, s. 43, which required a court to have regard to the need to preserve and protect the institution of marriage. On the other hand, the Australian Courts may follow the example of the Supreme Court of the United States of America, which has naively proclaimed that a woman has a



fundamental right to determine her own reproductive processes.[34] In practice, I understand that Victorian doctors generally require both spouses' consent to artificial insemination as to vasectomy, hysterectomy and other methods of discouraging or encouraging birth. There is, however, no statutory warrant for this, and it may indeed be anathema to some spouses, especially if they are separated. And what of unmarried persons? Are they entitled to artificial insemination? There is one American case where a donor of semen inseminated by the unmarried mother herself has been given custody rights.[35]

The fact is that doctors are playing a role of social engineering of the profoundest significance, and are doing this with apparent impunity. Adoption, which is a much less delicate and controversial institution, is subject to the most stringent control. Artificial insemination is freely available, presumably to those who can afford it. It is possible without the aid of a medical practitioner. It is also diverting and not altogether fanciful to speculate on whether the expensive procedures of artificial insemination and *in vitro* fertilization are available on Medibank or on Private Insurance Schemes. I would personally as a taxpayer and a contributor to H.B.A. object to my moneys being expended to subsidize essentially cosmetic rather than therapeutic medical procedures.

The Status of Artificially Produced Children

The consequences of artificial insemination and *in vitro* fertilization for the children concerned have been grievously underrated. There is a growing literature in child psychology relating to the instinctual needs of a child to know its origins.[36] On this basis, legislation has been recommended so as to permit a child access to its birth records, contrary to current law and practice in Victoria, but now accorded to English adoptees. How does this relate to children born of insemination? Must they know the identity of the donor? Are they indeed entitled to inherit from the donor, so called, as illegitimate children are entitled to inherit from their fathers under the *Status of Children Act* 1974? How could paternity be established in the lifetime of the father,[37] when seed may be stored for years? Undoubtedly, children of A.I.D. are not legitimate children regardless of whether the husband consented to his wife's insemination.[38] It seems not unlikely that husbands in these circumstances are encouraged to commit perjury by placing their names on the birth register as if they were the actual fathers. It is argued that the so-called "presumption of legitimacy" will protect them. But this does not allow for the possibility (indeed with the divorce rate in Australia running at 1:4 marriages, high probability) of hostility between the parents, possibly leading to a divorce. The truth will out. Nor does it allow for the fact that not all donors are anonymous. It is perfectly possible for a woman to be fertilized by the seed of an express donor. Lady Bracknell's eyebrows were mightily raised when she was told that the suitor of her daughter was born in a handbag. Imagine her discomfiture when told that he was conceived in a test tube. How can a child live with such knowledge? Should a child artificially conceived be told? Adoption experts unanimously agree that an adopted child must be told the truth. What of an artificially inseminated child or a child born in a test tube? Is Louise Brown really going to live a normal life?

Suppose she falls in love. How can she be sure that her fiance is not her half-brother. She must be told the truth. How does she know whether her ancestry has some history of mental illness? She must be told who her real father is. All these arguments are put forward almost as axioms by the advocates of the essentiality of preserving natural relationships for adoptees. They apply with equal force to the children of artificial conception.

https://doi.org/10.1017/S1035077200903584 Published online by Cambridge University Press

There is a real difference of opinion as to what form the regulation of these practices should take. I for one am not enamoured of either practice. The detriments of each to my mind far outweigh its benefits. The moral arguments against the practices are very similar to those against euthanasia. To alleviate a desperate individual want does not justify a deviation from the fundamental ethic that God alone gives life, through the beautiful concurrence of the bodies that takes place in coition.

Nevertheless, even if one disagrees with this view, there can be little doubt that legislation is needed, both to regulate practice and to avoid doubts as to status.

Some Possible Issues

For it must be obvious that these practices give rise to a potential myriad of cases. Look at these situations.

1. A woman is inseminated by defective semen by a doctor. Can she, or her child, sue the doctor? Is her consent to exempt the doctor binding on her or her child?
2. A woman is inseminated by a non-medical quack. Is the same remedy available? And is the quack, consonant with general tort principles, held to the same standard as the doctor?
3. The receptacle of the semen, or the test tube itself is damaged through someone's negligence. The child is born a monster. Can the mother or the child sue?
4. A sterile and ignorant mother sees her doctor. The doctor, who is morally opposed to artificial conception, prescribes hormone treatment and other remedies, but does not mention *in vitro* fertilization as a solution. Is he liable in negligence?

That a doctor's responsibility may be much more onerous than is immediately apparent is clear from American case of *Coleman v Garrison*[39]. There a contraceptive device failed, with the result that an unwanted child was born. There was no doubt that the doctor who equipped the mother with the device owed a duty of care to her, but it was difficult for her to prove damage. The question was, whether the child could sue. This depends on whether a "wrongful life" is a recognizable head of damage. On this point, there are several authorities in Canadian and American jurisdictions. The early cases denied liability on the basis that life is a blessing. Then in *Gleitman v Cosgrove,*[40] a child was born mentally retarded after its pregnant mother had German measles. Her doctor had failed to inform her of the danger of continued pregnancy. It was held that the child could not sue, for he could not prove damage. The court said that it was impossible to "measure the difference between the value of his life albeit with defects as against the utter void of non-existence". There is, however, contrary authority suggesting that a *mother* can sue for "wrongful life". Where an abortion failed, a mother was able to sue for pain and suffering during delivery, the costs of rearing and damages incurred because the mother would be forced to "spread her society, comfort, care, protection and support over a larger group".[41] Moreover, in *Coleman v Garrison supra* it was even held that the four brothers and sisters of the unwanted child could sue on the basis that they had each been deprived of 1/5 of the love and affection that would otherwise have been lavished on them by their parents.

The cases where, to quote "Oklahoma", the American courts have "gone about as far as they can go", are those in which an injured foetus which has been born dead has been awarded damages for pain and suffering![42] And it is a measure of the remarkable capacity for the bizarre that American life seems to encourage that a New York court has recognized the possibility of tort action brought by an illegitimate child against its father for negligence in not using a contraceptive, thus resulting in the child's being born with the stigma of illegitimacy.[43]

In Vitro Fertilization

Some of these extraordinary North American developments may never be paralleled here, where the doctrine of precedent is a firm corrective to lawyers with an excess of imagination. Nevertheless, it is apparent that there is a great potential for development, especially as the categories of negligence are never closed and indeed are being constantly expanded. It is by no means unforeseeable that a mother may be able to identify the damages in giving birth to a deformed child as being the nervous shock caused by first sight of that baby. Perhaps her husband and the brothers and sisters will have a similar action, as the boundaries of nervous shock liability are being widened.

Australian jurisprudence has hardly got off the ground in these areas, and is way behind medical developments. The law seems to think that the problems will disappear if they are ignored. That is why scientists are able to get away with frightening experiments of genetic engineering.

I would advocate that experiments in genetic engineering be preferably banned, and certainly strictly controlled. Society cannot leave it to the moral sensibilities of scientists.

Finally, lest it should be thought that I am obsessed by a chimerical fear of the unknown, and lest I should be accused of lack of feeling for the unfortunate persons who are beset by sterility, let me put forward a number of issues that I see as flowing from the practice of *in vitro* fertilization.

This practice can be a risky one. The possibilities for negligence abound. It involves the removal of ova from a woman's uterus. It may even be achieved in a hysterectomy, without the woman even being aware of it. Since there is no need to fertilize the ovum immediately, it may be stored in a freezer. It is thus possible for a woman to have a child many years after the normal age of child-bearing. An ovum may be fertilized in a test-tube by a man's semen. The next question is, should it be permissible to fertilize a woman with only the seed of her husband? On whom should this choice lie? Indeed should it be permissible to fertilize only married women?

When the ovum is fertilized, it is retained in the uterus, but this need not be the uterus of the same woman that donated the ovum. Should it be permissible to transfer it to another woman? Several commentators have recommended this, as a therapeutic measure to enable a woman who would otherwise find childlessness dangerous or difficult. If this is permitted, whose child will it be, that of the woman who gave the ovum or that of the woman to whom it was born? Again, there are some respectable voices crying that this is not merely a possibility, but a desirable development, likening it to a kidney transplant by a sibling, and suggesting that a woman whose sister cannot bear a child should feel guilty if she does not offer herself as a "uterine mother". They claim that the child will suffer no detriment, praying in aid the influential theory of Goldstein, Freud and Solnit that the "psychological parent" is all-important to a child.[44] They not surprisingly seized on a sentence: "for the child, the physical realities of his conception and birth are not the direct cause of his emotional attachment".[45] This, of course, is a simplistic distortion of a theory which in any event is by no means a universal truth. Can one foreshadow contests for custody between genealogical and uterine mothers?

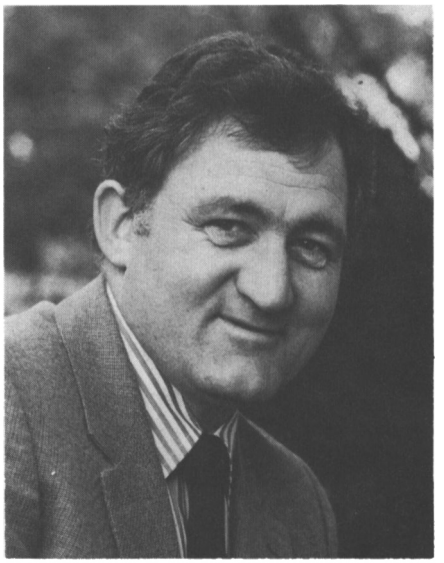
The development of test-tube fertilization has been hailed as a tremendous scientific advance, capable of alleviating the distress of thousands of frustrated couples. Unfortunately, I would forecast that it will add in the long run to human misery. It will complicate human relationships. Its availability will exacerbate the emotions of those women who in the past would, reluctantly, have been prepared to accept childlessness with resignation, as God's will if you like. The desperation of the infertile to conceive their genetic offspring may render them vulnerable to reckless exploitation. The time may not be far distant when parturition within the uterus will be regarded as unnecessary and an unpleasant inconvenience. I would consider this the ultimate desecration of humanity.

NOTES

1. See **S v. Distillers Co. (Biochemicals) Ltd** [1969] 3 All England Law Reports; **Distillers Co. (Biochemicals) Ltd. v. Thompson** [1971] Appeal Cases 458.
2. **Dietrich v. Northampton** (1884) 138 Massachusetts Reports 14, at page 16.
3. See **Bonbrest v. Kotz** (1946) 65 Federal Supplement Reports 138 (D.C.)
4. [1972] Victorian Reports 353.
5. **White v Yup** (1960) 458 Pacific Reports (2nd) 617
6. This means that if a man is killed in a road accident, and his wife is pregnant, the posthumously born child is entitled to a share in his late father's property as if he had been born before his father's death. It is, of course, an entirely just rule.
7. See **Villar v. Gilbey** [1907] Appeal Cases 133, at page 144. The rule against perpetuities is a device which renders a gift void if it may vest in the very distant future. Its purpose is to prevent property being tied up. Incidentally, the practice of freezing embryos, which may then be implanted into women after the death of the donor of the sperm, may give rise to great problems with respect to this rule. For, of course, a child may be born years after the death of the donor. See C. Sappideen, Life After Death - Sperm Banks, Wills and Perpetuities, (1979) 53 Australian Law Journal 311.
8. Congenital Disabilities (Civil Liability) Act 1976 (Eng.) There is great need for some similar legislation in Victoria.
9. Law Commission Report No. 60: Injuries to Unborn Children (1974). This fascinating report was instrumental in persuading the English Parliament to pass the legislation referred to in Note 8, although the legislation differs in several ways from the report's recommendations.
10. [1964] Appeal Cases 465. The principle in this most important House of Lords case, that it is possible to bring an action for a negligent misstatement, regardless of whether there is a contractual relationship between the giver and receiver of the advice, has been recently approved by the High Court of Australia: **Shaddock v. Paramatta City Council** (1981) 55 Australian Law Journal Reports 713

    It has important consequences for psychiatrists, psychologists, doctors, social workers and others who give gratuitous advice or information.
11. [1979] 3 Weekly Law Reports 605 (England). In this case, a solicitor who gave wrong advice to a witness to a will, was held liable to a **beneficiary** of the will, who was named in the will, but could not take his share because his wife had witnessed it. The beneficiary was not the solicitor's client, and so there was no contractual relationship. It was a case in **tort**, not contract.
12. Crimes Act 1958, Section 65.
13. **Regina v Davidson** [1969] Victorian Reports 667. (This is sometimes known as the "Menhennitt" ruling, after the judge who delivered the judgement of the court).
14. C.R. Williams, Abortion, in Law and the Citizen, Lectures at the Faculty of Law, Monash University, 1977, at page 5/4. (A few copies of this series are still available from the author of this article).
15. The law says, in effect, that a reasonable man should foresee that there are, statistically, a relatively large number of both handicapped and pregnant people in the community. Accordingly, a person who leaves a dangerous object on the pavement may be liable to a blind man who runs into it, even though the object would not have constituted a danger to a person with sight. See **Haley v. London Electricity Board** [1965] Appeal Cases 778.
16. Family Law Act 1975, section 119.
17. Law Reform (Husband and Wife) Act 1962, section 1 (2)
18. See above, note 1.
19. See note 9, above.
20. Congenital Disabilities Act 1976, Section 2.
21. (1948) 77 Commonwealth Law Reports 39. In this case, a passenger accepted a lift in a car, when he knew that the driver was drunk. He was unable to recover damages, for he, in effect, had consented to the risk of injury.
22. "There can be no claim by a person who consents to injury".
23. Contributory negligence does not completely bar a claim. It reduces the damages. Accordingly, in a motor-car case, the plaintiff may be found, say, 40% to blame. He would accordingly be awarded only 60% of the damages.
24. The law of torts generally provides that owners of houses owe to their visitors different duties, depending on the capacity of the visitor. The highest duty is owed to an invitee, the lowest to a trespasser. For a full explanation, see J.G. Fleming, the Law of Torts, Chapter 21 (Law Book Company, Sydney, 5th edition, 1977).
25. "A new, intervening act" which breaks the chain of causation. Thus the original wrong-doer in not responsible for the ultimate damage.
26. **Grant v. Australian Knitting Mills** [1936] Appeal Cases 85.
27. I.e. a period in which claims must be brought. After this period (which varies according to the type of claim), the claim lapses.
28. See **Anns v. Merton London Borough Council** [1978] Appeal Cases 728.
29. Congenital Disabilities Act 1976. And see Nuclear Installations Act 1965.
30. (1921) 58 Dominion Law Reports 251.
31. **Roberts v. Roberts** [1971] Victoria Reports 160. Interestingly, the child in that case was called, "Miranda". the name of Shakespeare's heroine who first coined the term, "Brave New World".
32. This is the view of Marilyn Mayo (Legitimacy for the A.I.D. child, 7 family Law 19 (1977). See also M. Mayo, The Legal Status of the A.I.D. child in Australia, 50 Australian Law Journal 562 (1976).
33. **Doodeward v. Spence** (1908) 6 Commonwealth Law Reports 406.
34. **Roe v. Wade** (1973) 410 United States Reports 113.
35. **C.M. v. C.C.** (1977) 377 Atlantic Reporter (2nd) 82 (New Jersey).
36. See, e.g. C. Picton, Persons in Question: Adoptees in search of Origins (1980).
37. This is required by Status of Children Act 1974, section 7, before ex-nuptial children can inherit from their fathers.
38. **Roberts v. Roberts, supra.** It has recently been proposed that they be so regarded (Family Law Amendment Bill 1981, section 5), but there is no certainty that this Bill will pass.
39. (1971) 281 Atlantic Reporter (2nd) 616.
40. (1967) 227 Atlantic Reporter 689 (New Jersey)
41. **Custodio v. Bauer** (1967) 251 California Appeals (2nd) 303. This, and several other cases on "wrongful life" are discussed in M.J. Mullen, Wrongful Life: Birth Control Spawns a Tort, 13 John Marshall Law Review 401 (1980).
42. The American decisions are considered in a most valuable book, B.M. Dickins, Medico-Legal Aspects of Family Law (Butterworths, Canada, 1979). And see W. Walters and P. Singer eds., Test Tube Babies (Oxford University Press, Melbourne, 1982).
43. **Zepeda v. Zepeda,** 190 North Eastern Reporter (2nd) 849 (1963) (Illinois).
44. See J. Goldstein, A. Freud and A. Solnit Beyond the Best Interests of a Child (Free Press Paperback, New York,
45. **Ibid.,** page 17 ●

Burnside Appointment



Mr. Graham Jackson has been appointed to the newly created position of Director of Professional Services at the Burnside Homes for Children at North Parramatta.

Mr. Jackson will be responsible for the development, direction and introduction of new Burnside programmes for the care of children in distress, following the recommendations of a University of Sydney research and evaluation study commissioned by the Burnside Board to advise on changing needs of child care in Sydney in the 1980's.

With the support of a staff of trained social workers and specialist consultants, Mr. Jackson's immediate priorities include the special problems of children in institutional care and the extension of Burnside counselling and support for families to avoid where possible the need to take children into institutional care.

Mr. Jackson came to Burnside from Adelaide, where he had been responsible for the amalgamation of three children's homes and the development of crisis intervention and family care programmes for the Anglican Child Care Services. He has a Bachelor of Arts (Social Work), studied for five years at St. Michael's House Theological College and worked in local parishes and parish missions in South Australia in family and marriage counselling and crisis intervention programmes.

Burnside Homes for Children is a Uniting Church facility, caring for children in distress in the village style complex of Homes at North Parramatta, in Family Group Homes and in Foster Care homes throughout Sydney.

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https://doi.org/10.1017/S1035077200903584 Published online by Cambridge University Press