

MINISTERE DE LA JUSTICE

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DIRECTION DES AFFAIRES CIVILES ET DU SCEAU

LES ASPECTS JURIDIQUES  
DE LA PROCREATION ARTIFICIELLE  
AU ROYAUME-UNI

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MISSION D'ETUDE

*(14 - 24 octobre 1986)*

CHRISTIAN BYK

*Magistrat*

*à l'Administration centrale*

*du ministère de la Justice*

Avec le concours du Conseil de l'Europe

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## AVANT-PROPOS

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*Cette étude sur le Royaume-Uni marque une étape supplémentaire dans les travaux accomplis pour le Ministère de la Justice et relatifs aux aspects juridiques et éthiques des sciences biomédicales.*

*Elle n'aurait cependant pu être réalisée sans l'encouragement et le concours financier du Conseil de l'Europe (M. F. ALBANESE, directeur adjoint des affaires juridiques et Mme WIEDERKEHR, Chef de la division du droit public) ainsi que sans le soutien du service scientifique de l'Ambassade de France au Royaume-Uni (M. DELBOURGO, Conseiller scientifique et Mme N. GLYNN, attachée scientifique)*

*Elle doit enfin beaucoup à l'ensemble des personnalités qui ont obligeamment accepté de m'apporter leurs informations et leurs opinions sur ce sujet.*

*Que chacune d'entre elles sache que ce rapport est un peu le leur.*

*C. BYK  
Magistrat*

LISTE DES PERSONNALITES  
RENCONTREES

- Mr T.S.G. BAKER , Queen's councilor, membre de la commission Warnock, 1 Crown office row Temple, Londres.

- Sir C. CLOTHIER , Chairman, Police complaints authority, 10 George street, Londres, membre de la commission Warnock.

- Mr R. CUNNINGHAM , Department of health and social security, Alexander Fleming house, Londres.

- Pr G.R. DUNSTAN , Department of theology, university of Exeter, Queen's building, the Queen's drive , Exeter.

- Pr R. G EDWARDS , Physiological laboratory, Downing street, Cambridge

- Dr; S. FISHEL , I.V. F unit, the park hospital, Sherwood lodge drive, Arnold, Nottingham

- Dr. K. GIBSON , Former secretary of the V.L.A

- Dr J. GUNNING , Secretary of the Voluntary Licensing Authority for human in vitro fertilisation and embryology at Medical Research Council, 20 park crescent, Londres.

- Pr J. KENNEDY , Centre of medical law and ethics, faculty of law, King's college, Londres

- A. Mc LAREN, Medical Research Council, mammalian developpement unit, Wolfon house, 4 Stephenson way, Londres

- The H. JUSTICE LATEY , High court of justice (family division), Royal courts of justice, strand, Londres



- Pr Sir M. MACNAUGHTON , President, Royal College of obstetricians and gynaecologists, 27 Sussex place, Regent's park, Londres.

- Dr B. MASON , Gynécologue, Hallam Medical Centre, Hallam street, Londres.

- Dr. J.S. METTERS , deputy chief scientist, department of health and social security, Alexander Fleming house , Londres

- Mr E. MOUTRIE , assistant solicitor, department of health and social security, Alexander Fleming house, Londres

- Sister Sharp , infirmière, department of obstetrics and gynecology, university hospital, Queen's medical centre, Nottingham

- Mr P. STEPTOE , Bourn hall clinic, Bourn Hall

- Pr E.M. SYMONDS , Chef de service ,department of obstetrics and gynecology, university hospital, Queen's medical centre, Nottingham.

-P. THURNHAM , député, House of Commons, Londres

- A. VEITCH , journaliste, the Guardian, 119 Farringdon Road, Londres

- Dame M. WARNOCK , Professeur de philosophie, présidente de la Commission sur la fécondation et l'embryologie humaines, Hertford college, Oxford.

- Dr R. WINSTON , fertility services , Hammersmith hospital , Londres.

LES ASPECTS JURIDIQUES  
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Lorsqu'on évoque le développement récent des méthodes de procréation artificielle, il est fait à juste titre référence aux travaux des biologistes et médecins britanniques. Mais une présentation du seul aspect scientifique du problème ne saurait suffire à faire une analyse correcte des aspects juridiques de la procréation artificielle au Royaume-Uni.

Les méthodes de procréation artificielle ont eu, en effet, depuis le début de la décennie 80 un tel retentissement dans l'opinion publique que leur développement est aujourd'hui largement dépendant du contexte social. Or celui-ci semble empreint d'une certaine indifférence à l'égard des actes de la pratique médicale (I) ; il apparaît, au contraire, très défavorable à la recherche (II).

I - L'indifférence à l'égard des actes de la pratique médicale

L'indifférence de la société britannique ne signifie nullement qu'elle ne marque pas une préférence, qu'elle ne porte pas un jugement sur la procréation artificielle humaine.

Elle exprime seulement un certain attentisme face à une réalité scientifique.

Des principes de conduite sociale touchant à la famille, au mariage et à l'enfant ne peuvent plus être réaffirmés en l'état face à une pratique scientifique et médicale dont il est admis, lorsqu'elle se situe dans le cadre de l'infertilité d'un couple, qu'elle présente un intérêt pour des situations individuelles (A).

On comprendra alors que la mise en sommeil de certains principes n'implique pas que soient résolus les problèmes qui sont liés à la mise en place des méthodes de procréation artificielle (B).



## A - Le gel des principes :

Sur le plan de la morale et du droit, peu de choses semblent avoir évolué (2) depuis que l'utilisation des méthodes de procréation artificielle s'est répandue en Grande-Bretagne (1).

1) L'expansion des méthodes de procréation artificielle reste un phénomène récent (b) ce qui explique sans doute que la relative ancienneté de certaines pratiques (a) n'est pas fait prendre conscience à l'opinion publique du défi qui était posé aux règles sociales.

a) L'histoire du combat scientifique et médical contre l'infertilité illustre la place éminente jouée par le Royaume-Uni en ce domaine.

a) L'insémination artificielle avec le sperme du mari y a été pratiquée pour la première fois par John Hunter en 1799 et la première insémination avec sperme de donneur y aurait été réalisée en 1884.

Mais aussi simples que peuvent paraître les opérations d'insémination artificielle, le fait d'envisager leur application a impliqué l'étude préalable de certains éléments d'ordre technique (méthodes d'introduction du sperme, connaissance de l'ovulation, maîtrise de la congélation). Il paraît utile d'en rappeler les étapes récentes dans la mesure où les scientifiques britanniques y ont largement contribué.

- En 1964, 4 naissances sont obtenues à la suite d'inséminations artificielles réalisées avec du sperme congelé suivant la technique de vapeur de nitrogène (Perloff, Steinberger et Sherman).

- 1969 voit la première utilisation de paillettes en plastique pour la conservation du sperme (Mattheson, Carlborg et Genzell).

- En 1973 est effectuée une comparaison de l'utilisation du sperme frais et du sperme congelé dans le cadre de l'insémination avec donneur (Steinberger et Smith).

- 1975 permet d'étudier l'influence de l'état gynécologique et de l'âge sur l'obtention d'une grossesse.

- En 1976 la synchronisation de l'ovulation par induction de clomiphène est mise au point.

B/ La fécondation "in vitro" est elle aussi l'aboutissement d'un travail acharné qui, pour être plus proche de nous, n'a pas demandé moins de 12 années de recherches.

C'est en 1966 que R. Edwards, chercheur au laboratoire de physiologie de Cambridge, et P. Steptoe, gynécologue, ont commencé leur collaboration pour tenter de féconder un ovule humain en laboratoire, puis de le cultiver et de l'implanter dans l'utérus de la femme atteinte d'une stérilité tubaire sur qui il avait été prélevé.

Une pareille ambition pouvait s'appuyer sur les progrès de l'endocrinologie qui permettait de mieux connaître le cycle hormonal féminin et les mécanismes de l'ovulation. La mise au point récente du coelioscope -tube souple muni d'un système optique avec faisceau lumineux et instrument de prélèvement- allait permettre de pénétrer dans l'appareil génital de la femme par une simple "boutonnière", montrant les trompes bouchées et donnant accès aux ovaires.

- La première de ces étapes, le prélèvement d'ovules dans un ovaire de la femme, fut sans aucun doute celle qui posa le moins de problème. On savait en effet depuis quelques années provoquer l'ovulation en administrant deux hormones femelles, l'H.M.G. qui stimule le développement folliculaire et l'H.C.G. qui provoque la libération de l'ovule. L'ovulation survenant 36 heures après l'injection, il restait donc à aspirer l'intérieur des follicules, à l'aide d'une sonde guidée par un coelioscope, quelques trente heures après l'injection, pour recueillir des ovules mûrs.

- La seconde étape, la fécondation en éprouvette (en fait en boîte de Petri) se révéla plus délicate. Il fallait tout d'abord provoquer la capacitation du spermatozoïde, c'est-à-dire le rendre capable de féconder l'ovule ce qui ne semblait alors possible que par le passage dans l'utérus. C'est en 1968 qu'Edwards réussit la première fécondation "in vitro" d'un oeuf humain. Il eut simplement l'idée de déposer l'ovule et les spermatozoïdes dans le milieu où ils se rencontrent naturellement : un peu de liquide tubaire prélevé dans la trompe. En trois heures environ, le spermatozoïde fécondant pénétra dans l'ovule.

- L'étape suivante consista à cultiver l'oeuf fécondé en laboratoire car l'oeuf humain ne pénètre normalement dans l'utérus que deux jours et demi après la fécondation et ne s'y implante qu'au septième jour. Après plusieurs essais, Edwards réussit à mettre au point un milieu de culture dans lequel les oeufs se divisaient normalement. Il obtint des morula (quelques dizaines de



cellules) et même, dans les trois quarts des cas, des blastocystes (1) de plusieurs jours pour lesquels l'examen chromosomique révélait que la division cellulaire s'était accomplie normalement.

- La dernière étape, celle de l'implantation de l'oeuf fécondé et cultivé dans l'utérus s'avéra la plus délicate à maîtriser. Toutes les expériences animales avaient en effet montrer qu'une synchronisation parfaite entre l'âge de l'oeuf et la maturation de l'utérus se montre en effet indispensable pour que l'oeuf ne soit pas rejeté.

En 1976, Edwards et Steptoe ont décrit pour la première fois dans la revue médicale anglaise "the lancet" l'implantation d'un oeuf préalablement fécondé en éprouvette mais la grossesse ne dépassa pas neuf semaines, l'oeuf s'étant implanté hors de l'utérus, dans une trompe.

La naissance de Louise Brown, 2 ans plus tard, allait donner une réponse enfin totalement positive à ce long travail de recherche.

b) L'expansion récente des méthodes de procréation artificielle telle qu'elle résulte de ces travaux n'en est pas moins aujourd'hui singulièrement significative de l'importance de cette réalité.

α) S'agissant de l'insémination artificielle avec donneur, on estime aujourd'hui que plus de 10.000 enfants ont vu le jour au Royaume-Uni grâce à cette méthode et qu'en moyenne 1.700 enfants y naissent ainsi chaque année. Plus d'une trentaine de centres pratiquent l'I.A.D.

β) La fécondation "in vitro", bien que plus récente, connaît aussi des résultats impressionnants. Plus de 20 centres seraient actifs et la FIVETE aurait été à l'origine de 2.000 naissances, dont la moitié obtenue par l'équipe Edwards-Steptoe.

(1) stade au cours duquel l'oeuf fécondé se creuse d'une cavité centrale ou blastocèle.

D'autres techniques ou pratiques sont récemment apparues, à côté de ces deux principales méthodes, pour permettre d'en développer les effets.

- Le don d'ovule

Il permet de mener à terme une grossesse chez une femme qui ne peut produire d'ovocyte. L'ovule d'une autre femme sera ainsi fécondé "in vitro" avec le sperme du conjoint et l'embryon créé transféré dans l'utérus de la femme infertile. A ce jour, le seul cas connu au Royaume-Uni a eu lieu en 1985 et a concerné deux soeurs.

- Le don d'embryon ne semble, par contre, pas encore avoir été réalisé dans ce pays. Son emploi peut être utile dans les cas où les deux membres du couple sont infertiles.

- La pratique des mères de substitution a connu en Grande-Bretagne une certaine publicité en 1984-85 avec la naissance de "baby Cotton". Depuis que la loi y a interdit en 1985 les accords commerciaux et la possibilité de passer des annonces pour recruter des candidates à la gestation pour autrui, il paraît difficile de dire si cette pratique a persévéré. Tout au moins peut-on penser qu'elle ne s'est pas développée.

Dons d'ovule ou d'embryon, gestation pour autrui montrent que toute technique, qui permet d'augmenter les réponses à l'infertilité, connaît un certain développement. En effet, l'infertilité affecte aujourd'hui un couple sur dix, et les personnes qui en sont atteintes s'en remettent de plus en plus à la médecine pour satisfaire en Grande-Bretagne leur désir d'enfant.

Du constat que leurs jugements individuels, leurs préjugés, leurs tabous n'ont pas résisté devant la force de ce désir, on ne saurait pourtant déduire que la société a elle-même changé ses références et ses valeurs sur ce problème.

2/ L'attitude de la morale et du droit au regard des méthodes de procréation artificielle ne semble guère, à quelques nuances près, avoir évolué au delà d'une simple condamnation de principe.



a) Il n'est pas possible de dégager avec certitude dans une société démocratique et pluraliste une morale officielle. Toutefois, la convergence des opinions des courants religieux représentatifs au Royaume-Uni éclaire sur ce qui peut être considéré comme le point de vue dominant.

Il convient d'ajouter que la neutralité des autorités publiques renforce d'une certaine manière le poids de cette opinion.

α) Les attitudes morales vis-à-vis de la procréation artificielle.

Si certaines personnes s'opposent d'une façon absolue à la procréation artificielle en estimant qu'elle représente une déviation injustifiée du processus de l'acte sexuel, la majorité des courants d'opinion constate qu'elle peut être une possibilité d'aider les couples infertiles. Toutefois, cette opinion ne s'exprime pas sans une double réserve due à l'utilisation de gamètes extérieures au couple ou à la création d'embryons "in vitro".

- La réticence des courants religieux à l'égard du don de gamètes s'est faite sentir à l'occasion du développement de l'insémination artificielle avec donneur (IAD) mais les mêmes arguments valent aussi pour la fécondation "in vitro" (FIV).

\* En Grande-Bretagne, le premier commentaire officiel à propos de l'IAD a été formulé par l'église d'Angleterre.

En 1948, le rapport de l'archevêque de Canterbury sur l'insémination artificielle affirme que "l'IAD constitue une rupture des liens du mariage. Elle rompt l'union privilégiée entre une femme et son époux... Tant pour le donneur que les futurs parents, l'acte sexuel perd son caractère propre pour devenir presque une transaction. Pour l'enfant il y a toujours le risque que les circonstances de sa conception soient dévoilées". Le rapport estime en conséquence que "l'IAD est contraire aux principes de la morale chrétienne" et recommande qu'elle soit considérée comme une infraction pénale.

Un second rapport, datant de 1959, confirme cette position en dénonçant la fraude qui consiste à déclarer devant l'état civil que le mari de la femme est le père de l'enfant né par IAD. Toutefois, le rapport n'estime plus nécessaire de faire de l'IAD une infraction pénale. Depuis lors, bien que le point de vue officiel de l'église anglicane n'ait pas été modifié, les théologiens ont analysé l'IAD de façons très variées. Certains la considèrent toujours comme un adultère. D'autres, comme G.R. Dunstan, qui fut pourtant l'un des auteurs du rapport de 1959, en admettent la pratique dans la mesure où elle concerne des couples mariés et que l'époux a consenti à l'insémination.

Aussi, dans les faits, appartient-il à chaque couple qui veut respecter les préceptes de son église de se déterminer en conscience aussi bien à partir des rapports officiels qu'en considérant les opinions des théologiens.

\* L'église catholique, minoritaire en Grande-Bretagne, n'en fait pas moins entendre son point de vue avec force. En ce domaine, il est d'une parfaite clarté. L'IAD est considérée comme une atteinte aux règles du mariage de sorte qu'"aucun catholique ne doit agir comme donneur ou accepter l'IAD" (Pie XII, 1949). Cette ferme interdiction a été rappelée en 1960 par la "Catholic Truth Society" à l'attention des catholiques britanniques. Elle a été reprise par Paul VI en 1968 et en 1987 par la Congrégation pour la doctrine de la foi. Dans le mémoire que les évêques catholiques britanniques ont remis en 1983 à la commission Warnock, ils se sont même d'une façon générale montrés très réservés à l'égard de la procréation artificielle dans la mesure où, excluant l'acte sexuel, elle a des conséquences négatives sur les rapports du couple et le statut de l'enfant.

L'église méthodiste et les juifs orthodoxes sont également opposés à l'IAD.

- Bien que réprouvant l'IAD, on peut se demander si la morale religieuse ne s'accommode pas d'une pratique qui reste malgré tout précaire. Ne préfère-t-elle pas faire porter tous ses efforts sur les problèmes éthiques soulevés par la création d'embryons "in vitro" ?



\* L'église d'Angleterre n'a pu sur ce point aboutir à une opinion officielle en raison des divergences qui sont apparues au sein du "Comité de la responsabilité sociale" chargé de présenter un rapport au synode général ("personal origins" 1985).

Si les membres du Comité ont été d'accord pour reconnaître que l'apparition de la "gouttière primitive" aux environs du 14ème jour de développement implique qu'une protection complète soit accordée à l'embryon, ils se sont, par contre, divisés sur la nature du statut de l'embryon avant cette date clé.

Le Pr G.R. Dunstan, théologien à l'université d'Exeter et l'un des principaux experts de l'église en ce domaine, estime que la philosophie chrétienne ne permet de reconnaître une nature humaine à l'embryon qu'à partir du moment où il a acquis les caractères d'un individu. Tant que la division cellulaire se poursuit, il n'y a donc pas individu. L'archevêque de York, le Dr J. Habgood, qui est également médecin et membre du comité d'éthique sur la recherche et l'infertilité du conseil de la recherche médicale, partage le même point de vue.

\* L'église catholique qui estime que le caractère de personne humaine de l'embryon commence dès la conception a entamé une vigoureuse campagne dans l'opinion publique contre certains aspects de la F.I.V. et ce d'autant plus que le principe de travaux menés sur l'embryon semble bien accepté par la communauté médicale et scientifique. Cette action vise notamment à faire interdire toute expérimentation, voire observation, sur l'embryon humain dès lors qu'elles pourraient lui causer un quelconque dommage ainsi que toute pratique visant à sélectionner les embryons à replacer.

B)- Face à ce débat, le Gouvernement a estimé qu'il était prématuré de prendre position.

Cet attentisme des pouvoirs publics revêt dans la réalité deux aspects :

- Le premier est en apparence positif puisqu'il a conduit le Gouvernement à institué en 1982 une Commission sur la fécondation et l'embryologie humaines. Celle-ci, présidée par Mme M. Warnock, reçut pour mandat d'"examiner les progrès récents et potentiels dans le domaine de la médecine et de la science concernant la fécondation et l'embryologie humaines, d'étudier la politique et les garanties qui devraient être instituées, en évaluant notamment les répercussions sociales, éthiques et juridiques de ces progrès, et enfin, de faire des recommandations". Son rapport a été déposé en 1984.

- Le second nous interroge sur la volonté réelle des autorités britanniques de mener une politique dans le domaine des nouvelles méthodes de procréation artificielle.

Certes, le Gouvernement a indiqué à plusieurs reprises son intention d'introduire une législation d'ensemble sur ces problèmes mais les recommandations du rapport Warnock n'ont jusqu'à présent pas donné lieu à une prise de position officielle.

Tout au contraire, le Gouvernement a souhaité qu'une nouvelle période de consultation soit ouverte avant toute proposition de réforme législative.

Le développement devant l'opinion publique des arguments d'ordre moral que nous avons rappelés n'est sans doute pas étranger à cette attitude.

Par ailleurs, la nécessité de faire des choix à un moment où une rigueur budgétaire sans pareil touche le service de santé, explique une certaine gêne à reconnaître que les problèmes de stérilité constitueraient un élément de la politique de la santé.

Pris entre le rappel des principes, même s'ils ne sont pas toujours appliqués, et l'indécision des pouvoirs publics, le droit pouvait-il véritablement appréhender les problèmes juridiques posés par les nouvelles méthodes de procréation artificielle ?

b) En fait, le droit n'a apporté aucune réponse d'ensemble à ces questions mais il a permis à deux d'entre elles de trouver des solutions.

- La situation de l'enfant issu d'une insémination artificielle avec donneur au regard du lien de paternité est certainement un des problèmes les plus anciens sur lesquels les juristes se soient penchés.



Pourtant, si on fait exception d'une décision qui a estimé que l'IAD n'était pas constitutive d'un adultère (*Mac Lennan V. Maclennan, Scottish Court of Sessions, 1958 SLT 12*), aucune jurisprudence n'a statué de façon précise sur la paternité de l'enfant issu de l'IAD.

En l'absence d'interprétation jurisprudentielle, l'enfant né à la suite d'une IAD est donc considéré comme illégitime et son statut est le même que celui de l'enfant adultérin.

Aussi, la Commission du droit anglais a-t-elle proposé (*English law commission, report on illegitimacy, 1982*) que l'enfant conçu par IAD avec le consentement du mari de la mère soit considéré en droit comme l'enfant de cet homme.

Deux raisons ont conduit la Commission à faire ce choix.

La proposition de supprimer le statut d'enfant illégitime et d'accorder de façon automatique l'exercice des droits parentaux à tout père aurait conduit, sans cela, à accorder le bénéfice de cette législation à venir au père biologique (le donneur) et non au père social (le mari).

En outre, il convient, de l'avis de la Commission, de faire cesser la pratique actuelle qui consiste à faire de fausses déclarations à l'état civil et qui entraîne ainsi la réalisation d'une infraction pénale.

La Commission estime par ailleurs qu'une disposition législative serait le meilleur moyen de mettre en vigueur sa proposition. S'agissant de la nature du consentement donné par le mari, la Commission a également estimé que l'intérêt de l'enfant justifiait qu'il soit présumé, le mari pouvant cependant faire la preuve de ce qu'il n'a pas consenti.

Le législateur n'a jusqu'à présent pas répondu à cette initiative des juristes de la Commission qui viennent pourtant de la réitérer dans un second rapport publié en octobre 1986. (1)

- Le problème des mères de substitution a également appelé l'attention du raisonnement juridique à l'occasion d'une affaire judiciaire concernant l'enfant Cotton.

(1) Un projet de loi vient d'être déposé (courant 1987).

*Un couple stérile américain s'était adressé à une agence spécialisée qui, moyennant 6.500 L, avait recruté une mère porteuse en Grande-Bretagne. L'histoire ayant été rendue publique, la direction de l'hôpital dans lequel la femme accoucha le 4 janvier 1985 saisit la justice pour savoir à qui l'enfant devrait être remis. La Haute Cour estima dans sa décision du 15 janvier 1985 que le couple stérile constituait tant d'un point de vue matériel que psychologique le meilleur foyer pour l'enfant. Elle lui en confia donc la garde sous son contrôle, sachant cependant que l'enfant devait être emmené à l'étranger où il ferait l'objet d'une procédure d'adoption que la loi britannique n'aurait pas rendu possible dans de telles conditions. Cette consécration juridique de la maternité de substitution entraîna une réaction immédiate du Gouvernement. Afin d'éviter l'éclosion au grand jour des intermédiaires commerciaux qui se déclaraient prêts à payer pour d'autres grossesses, une loi fut votée le 16 juillet 1985.*

*Le "Surrogacy arrangement act" érige en sanction pénale le fait pour quiconque de faciliter à des fins lucratives des accords, visant à réaliser des "locations" d'utérus.*

*Cette loi qui n'interdit pas de façon générale la maternité de substitution n'a pas non plus souhaité répondre aux questions touchant à la déontologie médicale comme au statut de l'enfant.*

*Ainsi que l'avait clairement expliqué le Ministre des Affaires Sociales, ce problème serait abordé lors de l'examen des conclusions du rapport Warnock.*

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*Le rappel insistant des valeurs morales, l'inexistence d'un consensus et d'une volonté politiques qui puissent permettre certaines évolutions ont eu pour contrepartie d'entraîner une étude sur la réalité des méthodes de procréation artificielle au Royaume-Uni.*



B - La mise en place des méthodes de procréation artificielle au Royaume-Uni :

Si l'incertitude des principes n'a pas empêché la constitution d'une infrastructure liée à la mise en place de la procréation médicalement assistée (1), l'absence de réglementation qui en est la conséquence en freine cependant largement le développement ordonné (2).

1) La réalité des centres de procréation artificielle laisse apparaître la situation la plus diverse tant sur le plan de l'organisation que sur celui des méthodes utilisées.

a) Diversité dans l'organisation des centres

- Donnons tout d'abord quelques informations générales; Au 25 juillet 1986, le "Royal College of Obstetricians and Gynaecologists" avait recensé 56 centres d'insémination artificielle. 32 étaient des centres hospitaliers, 12 des cabinets privés, 3 étaient installés dans des cliniques et 9 appartenaient à un réseau privé (le "British Pregnancy Advisory Service").

En avril 1986, la "Voluntary licensing authority" avait relevé 30 centres de fécondation *in vitro* dont 3 se consacraient exclusivement à la recherche (22 hôpitaux, 5 cliniques, 3 centres de recherche). Sur ce nombre, 5 hôpitaux, 1 clinique et 1 centre de recherche pratiquaient à la fois l'I.A.D. et la F.I.V.

La création de ces centres est essentiellement due à l'initiative locale puisque même lorsqu'il s'agit de centres intégrés au service national de santé ("national health service"), la politique sanitaire est définie par des autorités régionales indépendantes. On notera à ce propos que peu d'entre elles se sont engagées dans l'ouverture de centres puisque seuls deux centres l'un pour l'insémination artificielle (University Hospital, Nottingham), l'autre pour la fécondation "in vitro" (St Mary's Hospital Manchester) travaillent dans ce cadre.

Ce caractère régional des centres a pour conséquence que certains d'entre eux ne traitent que la population du district ou de la région (un quart des centres d'insémination artificielle) mais un nombre important accepte des étrangers (60 % des centres I.A.D.) à un coût de traitement toutefois plus élevé (à Bourn Hall, chez le Pr Edwards et le Dr Steptoe, il en coûtera le double aux étrangers non ressortissant du Commonwealth). Les délais d'attente qui varient en fonction du coût des méthodes et de la "publicité" faite à certaines équipes s'en ressentent également (6 mois pour la moitié des centres d'insémination artificielle).

On notera que nombre d'unités, et particulièrement de centres privés, ont été spécifiquement créées pour pratiquer la procréation médicalement assistée ou traiter des problèmes d'infertilité. Dans les hôpitaux publics où cette activité existe, elle s'exerce en général dans le cadre d'un service d'obstétrique.

Enfin, si la plupart des centres s'adressent uniquement à des couples stériles, ceux qui sont associés au sein du "British pregnancy advisory service" accepte les femmes célibataires, voire les couples homosexuels.

- L'organisation du don de sperme varie elle aussi suivant les centres.

Si la plupart des centres d'insémination artificielle exercent à la fois l'activité de banque de sperme et de clinique d'insémination, certains, comme à Nottingham, ont volontairement séparé ces deux activités afin que le personnel médical qui réalise les inséminations ignore l'identité des donneurs (pour la "fécondation in vitro", au contraire, chaque centre conserve toujours sa propre banque d'embryons).

Le principe de l'anonymat de ceux-ci est en effet une "règle" générale que les centres mettent en pratique sous différentes modalités (tenue de registres ne permettant pas l'accès direct aux donneurs, nom de code, voire destruction des fiches de renseignements concernant ceux-ci lorsque leur sperme n'est plus utilisé).

Les modes de recrutement sont cependant très variables. Certains centres prospectent essentiellement parmi les étudiants en médecine, d'autres font appel au sens "civique" de certaines catégories professionnelles (policiers, pompiers). D'une façon générale, le nombre de donneurs dont dispose chaque centre est assez limité : de moins de 10 à une trentaine).



Ces modes de recrutement ont l'avantage, aux yeux des praticiens, de leur permettre de mieux connaître leurs donneurs et ce d'autant qu'ils s'efforcent d'avoir recours à eux de façon régulière. La seule limite apportée à leur contribution est le nombre d'enfants conçus à partir de leur sperme (de 10 à 20 suivant les centres). Une compensation des frais ou une faible rémunération (18 centres) est en général accordée aux donneurs : elle s'élève de 5 à 30 L par recueil.

b) Si l'absence d'harmonisation dans l'organisation des centres s'apparente à un certain pragmatisme, il n'en va plus de même dès lors qu'on aborde le problème des techniques médicales utilisées.

- Ainsi, l'utilisation de sperme frais par encore près d'un centre sur trois appelle-t-elle de sérieuses réserves quant à la mise en place d'un dépistage efficace des donneurs ayant été en contact avec le virus du S.I.D.A.

- En outre, le choix parfois systématique fait par certaines équipes au profit d'une méthode de ponction des ovocytes (laparoscopie ou échographie) voire de fécondation (F.I.V.E.T.E. (1) ou G.I.F.T. (2)), ou la décision de transférer un nombre élevé d'embryons peuvent créer des doutes sur la maîtrise qu'elles possèdent des techniques de procréation artificielle.

Ces remarques semblent d'autant plus fondées, qu'en l'absence de conseils donnés par les organismes médicaux et professionnels comme le "Royal college of obstetricians & gynaecologists", les statistiques fournies par les centres pour évaluer leur taux de succès sont établies sur des bases différentes qui ne favorisent guère la comparaison. Certains centres prendront ainsi en compte comme grossesse de simples "grossesses" biochimiques.

Cet état de fait pose à l'évidence le problème de la réglementation de ces techniques.

(1) Fécondation "in vitro" et transfert d'embryon.

(2) "Gamete intrafallopian transfer".

## 2) La recherche d'une réglementation :

La prise de conscience de la nécessité d'une réglementation n'est pas chose nouvelle au Royaume-Uni. Elle s'est concrétisée par la création en juillet 1982 de la "Commission d'enquête sur la fécondation et l'embryologie humaines" qui a fait un certain nombre de propositions en ce domaine.

Les réticences du Gouvernement à en tirer des conclusions ont conduit au développement d'une "réglementation de substitution".

a) La Commission Warnock s'est ainsi prononcée sur les principes d'accès et de mise en pratique des méthodes de procréation artificielle ainsi que sur l'organisation et le fonctionnement des services concernés.

- Sur le premier point, elle a estimé que ces techniques devaient être réservées à pallier la stérilité de couples.

Elle a condamné aussi bien l'insémination "post-mortem" que la pratique des "mères porteuses". En outre, elle a souhaité que la gratuité du don et l'anonymat du donneur soient respectés. Elle a fixé à 10 le nombre d'enfants qu'il est possible d'engendrer avec le sperme d'un même donneur.

Enfin, elle a déconseillé en l'état, la technique de congélation des ovocytes et celle du don d'embryon par "lavage".

- Sur le second point, la Commission s'est montrée particulièrement préoccupée par "la longueur des listes d'attente pour un traitement gynécologique et par la tendance de certains hôpitaux à placer les patients atteints de stérilité au dernier rang de la liste d'attente".

Elle a souhaité qu'une autorité indépendante soit chargée d'agréer les centres de procréation artificielle.

Une réorganisation de ceux-ci destinée à permettre une meilleure prestation lui a paru également nécessaire. A cette fin elle a notamment recommandé que :

\* des fonds soient alloués pour la collecte de statistiques adéquates sur la stérilité et les services de santé ;

\* chaque département de santé envisage la création d'une clinique spécialisée dans le traitement de la stérilité ;



\* la F.I.V. soit proposée dans le cadre du service national de santé ;

Restées lettre morte sur le plan législatif (à l'exception de l'interdiction des intermédiaires à but lucratif pour le recrutement de mères de substitution), ces recommandations ont été en partie repris par les directives données aux médecins par les organismes professionnels.

b) La "normalisation" professionnelle :

En 1960, le comité Feversham avait relevé que seulement 20 médecins pratiquaient l'insémination artificielle avec donneur.

La désapprobation de la profession médicale à l'égard des techniques de procréation artificielle s'est aujourd'hui atténuée. Déjà en 1973, l'Association médicale britannique (B.M.A.) recommandait l'établissement de centres d'I.A.D. (1).

Aussi avec le développement de ces techniques, la profession admit-elle la nécessité d'établir à l'attention des praticiens certaines règles de conduite.

C'est principalement au Collège royal des obstétriciens et gynécologues qu'il revint de les formuler.

Les recommandations sur l'I.A.D. (mars 1979) reposent sur les principes suivants :

- \* indication de stérilité chez un couple ;
- \* consentement écrit du mari et de la femme ;
- \* anonymat du donneur ;
- \* secret de l'acte.

(1) Une étude de A.Mc Laren venait de montrer que 10 à 15 % des cas de stérilité chez le couple étaient d'origine masculine.

Concernant la F.I.V. le "Royal College" a également formulé certaines observations lorsqu'il a été consulté par la Commission Warnock (mars 1983).

On retiendra notamment qu'il a souhaité que :

\* la F.I.V. soit en principe réservée aux couples stériles mariés, l'insémination de femmes célibataires ne devant être admise que dans des circonstances exceptionnelles ;

\* le don d'ovules soit admis ;

\* la pratique des "mères porteuses" ne puisse être utilisée à l'occasion d'une F.I.V.

De cette analyse de l'état des techniques relatives à la procréation médicalement assistée, il ressort un curieux paradoxe. La Grande-Bretagne qui est un des pays où ces techniques sont nées et se sont développées de façon considérable observe à leur égard un attentisme qui les maintient dans une certaine incertitude.

Il semble en revanche que la position qui est en train de s'affirmer à l'égard de la recherche ne laisse plus de doute quant à la précarité du développement des sciences biomédicales dans ce domaine.

## II - La mise en cause de la recherche :

Autant il peut paraître possible d'estimer que le recours aux techniques de procréation artificielle relève de la seule conscience personnelle, autant il est plus difficile d'admettre que les travaux accomplis par les chercheurs sur des embryons (A) puissent ne pas intéresser une société.

Tout au moins doit-on admettre que cette question est propice à ouvrir à nouveau le débat sur les origines et le respect de la vie humaine.

C'est ce débat qui a resurgi au Royaume-Uni et qui y rend aujourd'hui difficile toute politique ou réglementation de la recherche (B).



A - Les développements de la recherche sur l'embryon au Royaume-Uni :

La F.I.V. qui implique de faire se rencontrer dans une éprouvette ovocyte et spermatozoïde est en apparence une procédure simple. En fait, sa mise au point suppose une parfaite maîtrise technique qui ne peut s'acquérir que par des travaux de recherche.

C'est à l'importance de celle-ci que la Grande-Bretagne doit d'être le pays où la F.I.V. est apparue.

Aujourd'hui encore l'amélioration des techniques passe par la continuation de la recherche. Mais cette amélioration est aussi l'occasion d'approfondir des connaissances dans des domaines voisins (1). Aussi les choix à faire sont-ils de plus en plus dépendants des organismes pourvoyeurs de fonds (2).

1) Les orientations de la recherche :

a) De nombreux problèmes scientifiques se posent encore dans le cadre de la fécondation "in vitro" :

Des progrès appréciables pour l'obtention des ovocytes et le traitement préparatoire de la femme peuvent résulter de meilleures connaissances sur l'ovulation et l'activité hormonale. Des études sont actuellement menées sur l'ovulation par les équipes des Prs R.W. Shaw (Royal free Hospital School of Medecine, London), A.A. Templeton (University of Aberdeen) et D.T. Baird (University of Edinburgh) tandis que les équipes des Prs M. G.R. Hull (Bristol Maternity Hospital) et I.D. Cooke (Jessop Hospital for Women, Sheffield) travaillent sur la préparation hormonale de l'utérus.

Les Prs Baird et Hull contribuent en outre à l'étude de la fécondation tant il est important de s'assurer que l'observation d'une fécondation normale correspond bien à la réalité biologique.

Il y a également beaucoup à attendre des travaux relatifs à la viabilité de l'oeuf fécondé auxquels participent plusieurs centres (Dr D. Whittingham, MRC experimental embryology and teratology unit ; Dr Lease, York University ; Dr Braude, the Rosie Maternity Hospital, Cambridge, M. Steptoe, Bourn).

Obtenir des réponses à l'ensemble de ces problèmes montre de façon évidente combien la recherche fondamentale et l'approfondissement des connaissances générales en embryologie et en hormonologie humaines sont essentiels. La procréation artificielle ne peut plus simplement se satisfaire de techniques ; elle doit aller de pair avec la compréhension des mécanismes de la reproduction humaine.

Il n'y a en effet à l'heure actuelle aucun moyen de s'assurer avant son transfert dans l'utérus de la viabilité d'un oeuf fécondé "in vitro". Sa forme comme son apparence ne sont d'aucun secours. Parmi les embryons qui donneront naissance à des enfants en parfaite santé, certains présentent une irrégularité des plastomères ou ont un aspect inhabituel. A l'inverse, des embryons de belle apparence n'ont aucun potentiel de développement parce qu'ils sont, par exemple, polyploïdes.

L'amélioration des techniques de la fécondation "in vitro" passe également par une meilleure maîtrise de la conservation ce à quoi contribuent plusieurs recherches (Dr Wittingham, Pr Shaw, Mr Steptoe).

Des progrès sont enfin nécessaires pour permettre de comprendre les mécanismes d'implantation ou de refus d'implantation chez une femme et ce notamment par l'analyse du caryotype de l'embryon (Pr T. Baird).

b) La tentation est ainsi grande de franchir le pas à l'occasion de la mise au point des méthodes de procréation artificielle et d'utiliser des embryons humains à d'autres fins, qu'elles soient cognitives ou d'application immédiate.

Il n'est d'ailleurs pas sûr que s'agissant de cette première finalité, la ligne de partage entre ce qui est purement cognitif de ce qui est utile aux techniques de procréation artificielle soit "a priori" aisée à tracer. Ainsi que nous l'avons laissé entendre, il n'est pas non plus certain qu'il soit scientifique de vouloir établir un tel partage.

Dans cette perspective, il est difficile de classer certains travaux en cours au Royaume-Uni.

Nous citerons pour mémoire :

- l'étude du temps de cinéphotographie du développement du pré-embryon après la fécondation (Mr Steptoe, Bourn),

- les conséquences immunologiques de l'insémination "in vivo" pendant la F.I.V. (Dr Little, John Radcliffe hospital, Oxford),



- l'analyse du caryotype du pré-embryon après fécondation (Pr Baird),

- l'étude de l'activité génétique chez le pré-embryon humain (Dr P. Braude, the Rosie Maternity Hospital, Cambridge),

- les changements dans la surface cellulaire au cours de l'interaction ovocyte-sperme (Dr D. Whittingham, MRC experimental embryology and teratology unit).

On peut toutefois estimer comme l'ont relevé les autorités britanniques que tous ces travaux ont un lien plus ou moins direct avec l'amélioration du taux de succès de la F.I.V., le dépistage d'anomalies génétiques ou le développement de nouveaux moyens contraceptifs.

2) L'orientation de la recherche par les organismes chargés de la subventionner pouvait ainsi devenir un moyen de contrôler certains "dérapages" et d'éviter ainsi aux chercheurs d'avoir à se justifier devant l'opinion public.

- C'est bien l'analyse qu'a faite dès 1978 le "Medical Research Council" (MRC, conseil de la recherche médicale). Chargé d'aider la recherche médicale, le conseil avait dès cette époque mis en place un groupe ayant pour but de définir la politique à adopter concernant la fécondation "in vitro" avec transfert d'embryon chez l'homme.

- Les premières règles de conduite adoptées en 1979 ont été révisées en 1982, à la suite de l'élargissement du groupe à des personnalités extérieures, et publiées (British Medical Journal 1982 vol 285 p 1480). Dans ce cadre, le conseil a continué de subventionner des recherches relatives à la fécondation "in vitro" parmi lesquelles celles destinées à l'élaboration d'un test permettant de déterminer lequel des pré-embryons "in vitro" est le plus sain (400.000 L ont ainsi été versées à l'équipe du Pr Baird à l'université d'Edimbourg).

- En outre, dans le débat qui a entouré la réalisation de telles recherches, il est intéressant de noter que l'équipe Edwards-Steptoe n'a reçu à l'origine aucune subvention directe du MRC.

Ces mesures d'ordre interne n'ont cependant pas pu empêcher que le débat sur la recherche ne s'amplifie dans l'opinion publique et que soit clairement posée la question de savoir si des règles législatives ne s'imposaient pas dans ce domaine.

## B - La question législative

Au delà de la nature réelle des travaux scientifiques en cours et malgré leur nombre limité, c'est l'ensemble des recherches sur l'embryon, dans la mesure où elles impliquent la mise au point de procédés de micro-manipulation qui a mis en doute la nécessité d'une liberté scientifique absolue.

Fécondation entre espèces, utilisation d'embryons humains pour l'expérimentation des médicaments, ectogénèse (1), parthénogénèse (2), clonage (3), biopsie embryonnaire, substitution de noyaux, prévention des défauts génétiques ont peut être été annoncés un peu vite comme constituant des perspectives intéressantes et prochaines. Toujours est-il que la présentation qui en a été faite par les médias, au demeurant plus portés sur le sensationnel que sur l'information objective, ainsi que par certains scientifiques eux-mêmes a tout naturellement conduit à créer dans l'opinion publique un sentiment d'inquiétude et une volonté d'imposer des limites aux chercheurs.

### 1) La prise en compte de l'opinion publique :

Les réactions très vives mais en même temps très diverses de l'opinion publique sur ces sujets se sont manifestées dès que les techniques de procréation artificielle ont été largement connues. Si la naissance du premier enfant résultant de la fécondation "in vitro" en juillet 1978 a suscité dans la société britannique un sentiment de fierté pour avoir trouvé un nouveau moyen de vaincre la stérilité, un certain malaise devant un progrès scientifique qui apportait la possibilité de "manipuler" dès son origine le développement humain est très vite apparu.

(1) gestation d'un embryon en milieu artificiel.

(2) processus de reproduction par lequel un gamète produit un nouvel individu sans fécondation.

(3) production d'un ou plusieurs individus génétiquement identiques.



- C'est pour répondre à ce contexte que fut instituée en juillet 1982 la Commission d'enquête sur la fécondation et l'embryologie humaines, appelée Commission Warnock.

Pendant la durée de ses travaux jusqu'en juillet 1984, la Commission a constitué un pôle d'attraction du débat public qui s'est ainsi organisé autour de son activité.

Les différents courants d'opinion ont pu très complètement s'exprimer devant la Commission qui a en effet entendu près de 300 témoignages provenant des milieux les plus divers (milieux scientifiques et médicaux, églises, syndicats et partis politiques, professionnels du droit, associations familiales et de protection de l'enfance, représentants des femmes et des minorités sexuelles, travailleurs sociaux, universités). 700 lettres de particuliers lui sont en outre parvenues.

- Le débat ouvert dans l'opinion publique sur la recherche, canalisé durant les travaux de la commission, a par la suite acquis une dimension polémique et politique qui rend difficile la recherche d'une solution équilibrée.

\* Une partie du développement ultérieur de ce débat est la conséquence directe des conclusions de la Commission qui peuvent se résumer de la façon suivante :

. Une autorité indépendante doit agréer les centres de recherche,

. des sanctions pénales doivent être instituées pour réprimer notamment l'utilisation d'embryons humains en dehors des règles fixées par l'autorité indépendante,

. la fécondation entre espèces, le transfert d'un embryon humain dans l'utérus d'une autre espèce doivent être interdits,

. la vente ou l'achat non autorisé de gamètes et d'embryons humains doivent faire l'objet de sanctions pénales.

Les recommandations formulées ont prêté à une double discussion. Le choix qu'elles font de donner un cadre à la recherche tout en accordant de larges pouvoirs à un organisme de contrôle ne donne satisfaction ni aux partisans de la liberté de la recherche ni à ceux de son interdiction.

En particulier, la limite du 14<sup>e</sup> jour en deçà de laquelle des expérimentations peuvent être permises et la possibilité laissée aux chercheurs de créer des embryons uniquement à des fins de recherche ont fait l'objet de vives critiques.

\* Par ailleurs ce débat a été l'occasion de remettre en discussion le problème du "statut de l'embryon" et du droit à la vie.

Suivant en cela l'évolution qui s'est produite aux Etats-Unis, les groupes se réclamant de la "majorité morale" ont en effet acquis au Royaume-Uni un certain poids. Une importante campagne de pétitions "pour protéger la vie" a permis de recueillir plus de 2 millions de signatures.

Sur le plan parlementaire, un groupe appelé "Progrès et humanité" a été créé pour rendre illégal l'utilisation de l'embryon humain. Il a notamment apporté son soutien aux propositions de loi déposées en 1985 et 1986 par M. E. Powell et K. Hargreaves relatives à la protection de l'enfant à naître. Celles-ci visent à interdire la création ou la conservation d'embryons humains à des fins de recherche.

Elles ont fait l'objet à deux reprises d'un vote parlementaire favorable mais faute de temps, le processus législatif n'a pu aboutir à son terme.

Le Gouvernement est resté neutre au cours du débat, sachant que pour cette raison procédurale, les propositions ne pourraient voir le jour.

Cette inertie législative a laissé ainsi un peu de répit aux partisans de la recherche pour s'organiser. Un groupe, "Progrès", a été mis en place fin 1985 par trois parlementaires (P. Turnham, conservateur, J. Richardson, travailliste et D. Wigley, gallois). Il a reçu le soutien de nombreuses personnalités et organisations parmi lesquelles la "British Medical Association" (B.M.A.) et le planning familial. Toutefois son action se limite pour le moment à empêcher le vote de la proposition E. Powell.

La nature de ce débat montre à l'évidence qu'il est difficile de prévoir qu'une législation équilibrée sur la recherche sera prochainement adoptée.

Cette opinion que partagent également des membres de la Commission Warnock conduit en fait à laisser "temporairement" le champ de la recherche à une réglementation professionnelle mieux aménagée.



## 2) La normalisation éthique :

Face à cette impasse législative, le "Medical Research Council" et le "Royal College of Obstetricians and Gynaecologists" ont installé en 1985 la "Voluntary Licensing Authority". Ces deux institutions qui souhaitaient que soit créé, ainsi que l'avait suggéré le rapport Warnock, un organisme indépendant chargé de réglementer la recherche et d'agréer les centres de procréation artificielle, ont en effet pris conscience que cette recommandation mettrait un certain temps à être votée par le Parlement.

Aussi leur action s'inscrit-elle comme une mesure temporaire visant à agréer les centres de fécondation "in vitro".

- Sur 14 membres, l'autorité comprend 7 médecins ou scientifiques, désignés soit par le M.R.C., soit par le R.C.O.G., et 7 non professionnels dont le président de la V.L.A.

Le mandat de la VLA lui assigne trois missions principales : établir un code déontologique pour la recherche, agréer les centres qui acceptent de se soumettre à son contrôle, informer le MRC et le RCOG mais aussi l'opinion publique sur le résultat de ses activités.

- Après une année de fonctionnement (7 réunions ont été tenues), la VLA a publié en avril 1986 son premier rapport.

Y figurent notamment les directives relatives aux applications cliniques ou à des fins de recherches de la FIV.

Ces directives s'inspirent en grande partie des recommandations du rapport Warnock notamment quant à la notion de pré-embryon et quant à la possibilité d'expérimenter sur celui-ci jusqu'à 14 jours de développement. Elles prennent également en compte les travaux menés depuis 1978 au sein du MRC et le rapport du RCOG sur la FIV.

Plusieurs points font l'objet d'utiles précisions :

\* La recherche sur le pré-embryon humain doit être une procédure subsidiaire ; elle doit être liée à l'étude de problèmes cliniques ou à celle de la contraception.

*\* Le transfert d'un pré-embryon ayant fait l'objet d'expérience peut être exceptionnellement admis quand le but de l'expérience est précisément d'améliorer le succès de la grossesse d'une femme.*

*- Des conditions strictes sont définies pour s'assurer du consentement des donneurs à l'utilisation de leurs gamètes ou embryons.*

*\* L'existence d'un comité éthique local est requise pour l'examen des protocoles.*

*En outre, la VLA a procédé à la visite de 25 centres parmi ceux qui ont sollicité son agrément et qui constituent, à une ou deux unités près, la totalité des centres existant au Royaume-Uni. Sur ce nombre 24 ont obtenu l'agrément (dont 10 centres de recherche), un seul a été ajourné.*

*Il est vraisemblable que cette situation de la recherche, fût-elle précaire, perdurera encore quelques temps (2).*

*Officiellement, la question d'une législation reste, en raison de la pression de l'opinion publique, à l'ordre du jour. En pratique, le temps gagné permet aux partisans de la recherche de s'organiser comme groupe de pression (1) et à la VLA de prendre conscience de la durée potentielle de son rôle (certains centres agréés seront à nouveau visités en 1987). Elle pourrait ainsi bénéficier d'un important crédit aux yeux de l'opinion publique dans la mesure où tous les centres accepteraient volontairement de se soumettre à son autorité. Atteindre cet objectif constituerait sans doute un pas significatif dans un pays qui par principe sait se satisfaire de solutions pragmatiques.*

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*(1) Le second vote favorable à la proposition E. Powell a remporté moins de voix que le premier.*

*(2) Nous joignons en annexe un résumé des nouvelles directives que la V.L.A. vient d'adopter dans son second rapport.*



Si le pragmatisme a l'intérêt de permettre de répondre à des situations qu'il serait difficile de résoudre autrement, force est cependant de constater qu'il n'a pas encore permis de résoudre en Grande-Bretagne de façon satisfaisante le cas des couples stériles. Les délais d'attente trop longs, les disparités de coût, les taux de succès variables et incontrôlables s'estompent difficilement. A celà, il convient d'ajouter les "cadeaux empoisonnés" d'une jurisprudence qui pour être limitée n'en est pas moins lourde de symboles (1).

Ce contexte explique sans doute que le Gouvernement britannique, soucieux de montrer qu'il ne méconnaît pas ces difficultés, ait en décembre 1986 lancé une nouvelle consultation publique (2) et déposé en février 1987 un projet de loi visant à considérer comme né du mariage l'enfant issu de l'insémination artificielle de la femme sauf à prouver que l'époux n'a pas consenti à cet acte.

(1) Après l'affaire de baby Cotton, la "High Court" a rendu le 11 mars 1987 une décision validant "a posteriori" une adoption d'un enfant né d'une mère porteuse.

(2) "Legislation on human infertility services and embryo research, a consultation paper, dec. 1986".

ELIZABETH II



# Surrogacy Arrangements Act 1985

1985 CHAPTER 49

An Act to regulate certain activities in connection with arrangements made with a view to women carrying children as surrogate mothers. [16th July 1985]

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) The following provisions shall have effect for the interpretation of this Act.

(2) "Surrogate mother" means a woman who carries a child in pursuance of an arrangement—

- (a) made before she began to carry the child, and
- (b) made with a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as practicable) by, another person or other persons.

(3) An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.

(4) In determining whether an arrangement is made with such a view as is mentioned in subsection (2) above regard may be had to the circumstances as a whole (and, in particular, where there is a promise or understanding that any payment will or may be made, to the woman or for her benefit in respect of the carrying of any child in pursuance of the arrangement, to that promise or understanding).



(5) An arrangement may be regarded as made with such a view though subject to conditions relating to the handing over of any child.

(6) A woman who carries a child is to be treated for the purposes of subsection (2)(a) above as beginning to carry it at the time of the insemination or, as the case may be, embryo insertion that results in her carrying the child.

(7) "Body of persons" means a body of persons corporate or unincorporate.

(8) "Payment" means payment in money or money's worth.

(9) This Act applies to arrangements whether or not they are lawful and whether or not they are enforceable by or against any of the persons making them.

2.—(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—

- (a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,
- (b) offer or agree to negotiate the making of a surrogacy arrangement, or
- (c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements ;

and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.

(2) A person who contravenes subsection (1) above is guilty of an offence ; but it is not a contravention of that subsection—

- (a) for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or
- (b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or to cause such an act to be done.

(3) For the purposes of this section, a person does an act on a commercial basis (subject to subsection (4) below) if—

- (a) any payment is at any time received by himself or another in respect of it, or
- (b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.

In this subsection "payment" does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.

(4) In proceedings against a person for an offence under subsection (1) above, he is not to be treated as doing an act on a commercial basis by reason of any payment received by another in respect of the act if it is proved that—

- (a) in a case where the payment was received before he did the act, he did not do the act knowing or having reasonable cause to suspect that any payment had been received in respect of the act; and
- (b) in any other case, he did not do the act with a view to any payment being received in respect of it.

(5) Where—

- (a) a person acting on behalf of a body of persons takes any part in negotiating or facilitating the making of a surrogacy arrangement in the United Kingdom, and
- (b) negotiating or facilitating the making of surrogacy arrangements is an activity of the body,

then, if the body at any time receives any payment made by or on behalf of—

- (i) a woman who carries a child in pursuance of the arrangement,
- (ii) the person or persons for whom she carries it,
- or
- (iii) any person connected with the woman or with that person or those persons,

the body is guilty of an offence.

For the purposes of this subsection, a payment received by a person connected with a body is to be treated as received by the body.

(6) In proceedings against a body for an offence under subsection (5) above, it is a defence to prove that the payment concerned was not made in respect of the arrangement mentioned in paragraph (a) of that subsection.

(7) A person who in the United Kingdom takes part in the management or control—

- (a) of any body of persons, or
- (b) of any of the activities of any body of persons,

is guilty of an offence if the activity described in subsection (8) below is an activity of the body concerned.

(8) The activity referred to in subsection (7) above is negotiating or facilitating the making of surrogacy arrangements in the United Kingdom, being—

- (a) arrangements the making of which is negotiated or facilitated on a commercial basis, or



(b) arrangements in the case of which payments are received (or treated for the purposes of subsection (5) above as received) by the body concerned in contravention of subsection (5) above.

(9) In proceedings against a person for an offence under subsection (7) above, it is a defence to prove that he neither knew nor had reasonable cause to suspect that the activity described in subsection (8) above was an activity of the body concerned; and for the purposes of such proceedings any arrangement falling within subsection (8)(b) above shall be disregarded if it is proved that the payment concerned was not made in respect of the arrangement.

3.—(1) This section applies to any advertisement containing an indication (however expressed)—

(a) that any person is or may be willing to enter into a surrogacy arrangement or to negotiate or facilitate the making of a surrogacy arrangement, or

(b) that any person is looking for a woman willing to become a surrogate mother or for persons wanting a woman to carry a child as a surrogate mother.

(2) Where a newspaper or periodical containing an advertisement to which this section applies is published in the United Kingdom, any proprietor, editor or publisher of the newspaper or periodical is guilty of an offence.

(3) Where an advertisement to which this section applies is conveyed by means of a telecommunication system so as to be seen or heard (or both) in the United Kingdom, any person who in the United Kingdom causes it to be so conveyed knowing it to contain such an indication as is mentioned in subsection (1) above is guilty of an offence.

(4) A person who publishes or causes to be published in the United Kingdom an advertisement to which this section applies (not being an advertisement contained in a newspaper or periodical or conveyed by means of a telecommunication system) is guilty of an offence.

(5) A person who distributes or causes to be distributed in the United Kingdom an advertisement to which this section applies (not being an advertisement contained in a newspaper or periodical published outside the United Kingdom or an advertisement conveyed by means of a telecommunication system) knowing it to contain such an indication as is mentioned in subsection (1) above is guilty of an offence.

(6) In this section "telecommunication system" has the same meaning as in the Telecommunications Act 1984.

**4.—(1) A person guilty of an offence under this Act shall be Offences. liable on summary conviction—**

**(a) in the case of an offence under section 2 to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 3 months or both,**

**(b) in the case of an offence under section 3 to a fine not exceeding level 5 on the standard scale.**

**In this subsection “ the standard scale ” has the meaning given by section 75 of the Criminal Justice Act 1982.**

**(2) No proceedings for an offence under this Act shall be instituted—**

**(a) in England and Wales, except by or with the consent of the Director of Public Prosecutions ; and**

**(b) in Northern Ireland, except by or with the consent of the Director of Public Prosecutions for Northern Ireland.**

**(3) Where an offence under this Act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and is liable to be proceeded against and punished accordingly.**

**(4) Where the affairs of a body corporate are managed by its members, subsection (3) above shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.**

**(5) In any proceedings for an offence under section 2 of this Act, proof of things done or of words written, spoken or published (whether or not in the presence of any party to the proceedings) by any person taking part in the management or control of a body of persons or of any of the activities of the body, or by any person doing any of the acts mentioned in subsection (1)(a) to (c) of that section on behalf of the body, shall be admissible as evidence of the activities of the body.**

**(6) In relation to an offence under this Act, section 127(1) of the Magistrates’ Courts Act 1980 (information must be laid within six months of commission of offence), section 331(1) of the Criminal Procedure (Scotland) Act 1975 (proceedings must be commenced within that time) and Article 19(1) of the Magistrates’ Courts (Northern Ireland) Order 1981 (complaint must be made within that time) shall have effect as if for the reference to six months there were substituted a reference to two years.**



**5.—(1) This Act may be cited as the Surrogacy Arrangements Act 1985.**

**(2) This Act extends to Northern Ireland.**

# Family Law Reform Bill [H.L.]

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1987

## EXPLANATORY MEMORANDUM

This Bill gives effect to the recommendations of two Law Commission Reports. The first Report, published in 1982 (Law Com. No. 118), made a large number of recommendations designed to reform the law so as to remove, so far as possible, the legal disadvantages of illegitimacy so far as they affect the illegitimate child. The second Report (Law Com. No. 157, Cmnd. 9913), published in October 1986, was principally concerned with changing the structure of the Bill in the light of the Law Reform (Parent and Child) (Scotland) Act 1986. It also recommended a number of minor changes of policy.

### PART I

#### GENERAL PRINCIPLE

*Clause 1* lays down the general principle that, in the absence of a contrary intention, a relationship between two persons is to be construed without regard to whether either of them, or any person through whom the relationship is deduced, is or is not legitimate. This principle is applied to the provisions of this Bill and to all future enactments and instruments.

### PART II

#### RIGHTS AND DUTIES OF PARENTS

*Clause 2* applies the principle established by clause 1 to specific existing enactments relating to the allocation of parental rights and duties. One effect of this clause is to make it clear that the principle that, in custody and related proceedings, the child's welfare is the first and paramount consideration applies to proceedings affecting illegitimate as well as legitimate children.

*Clause 3* extends to all parents, whether married or not, and whether divorced or not, the right to make agreements about the exercise of parental rights while the parents are separated.

*Clause 4* enables the father of an illegitimate child to apply to share with the child's mother all the parental rights and duties, thus putting him in the same legal position regarding the child as if he had been married to the child's mother.

*Clause 5* allows applications for the court's direction to be made in relation to an illegitimate child where the parents disagree on a question affecting its welfare, provided the father has rights to custody or care and control over that child.

*Clause 6* provides for the father of an illegitimate child, who has rights to custody or care and control over it, to become a guardian on the death of the mother, to appoint a testamentary guardian and to have the right to object to a testamentary guardian appointed by the mother.

[Bill 70]



PART VI

MISCELLANEOUS AND SUPPLEMENTAL

*Miscellaneous*

Artificial  
insemination.

27.—(1) Where after the coming into force of this section a child is born in England and Wales as the result of the artificial insemination of a woman who—

- (a) was at the time of the insemination a party to a marriage (being a marriage which had not at that time been dissolved or annulled); and
- (b) was artificially inseminated with the semen of some person other than the other party to that marriage,

then, unless it is proved to the satisfaction of any court by which the matter has to be determined that the other party to that marriage did not consent to the insemination, the child shall be treated in law as the child of the parties to that marriage and shall not be treated as the child of any person other than the parties to that marriage.

(2) Any reference in this section to a marriage includes a reference to a void marriage if at the time of the insemination resulting in the birth of the child both or either of the parties reasonably believed that the marriage was valid: and for the purposes of this section it shall be presumed, unless the contrary is shown, that one of the parties so believed at that time that the marriage was valid.

(3) Nothing in this section shall affect the succession to any dignity or title of honour or render any person capable of succeeding to or transmitting a right to succeed to any such dignity or title.

Children of void  
marriages.  
1976 c.31.

28.—(1) In subsection (1) of section 1 of the Legitimacy Act 1976 (legitimacy of children of certain void marriages), for the words “the act of intercourse resulting in the birth” there shall be substituted the words “the insemination resulting in the birth or, where there was no such insemination, the child’s conception”.

(2) At the end of that section there shall be added the following subsections—

“(3) It is hereby declared for the avoidance of doubt that subsection (1) above applies notwithstanding that the belief that the marriage was valid was due to a mistake as to law.

(4) In relation to a child born after the coming into force of section 28 of the Family Law Reform Act 1987, it shall be presumed for the purposes of subsection (1) above, unless the contrary is shown, that one of the parties to the void marriage reasonably believed at the time of the insemination resulting in the birth or, where there was no such insemination, the child’s conception (or at the time of the celebration of the marriage if later) that the marriage was valid.”

Evidence of  
paternity in civil  
proceedings.  
1968 c.64.

29.—(1) Section 12 of the Civil Evidence Act 1968 (which relates to the admissibility in evidence in civil proceedings of the fact that a person has been adjudged to be the father of a child in affiliation proceedings) shall be amended as follows.

(2) For paragraph (b) of subsection (1) there shall be substituted the following paragraph—

**B I L L**

[AS AMENDED IN COMMITTEE]

**INTITULED**

An Act to make further provision with respect to surrogacy arrangements and to amend the Surrogacy Arrangements Act 1985.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. Any arrangement which is a surrogacy arrangement is void and unenforceable whether made with a view to payment or not.

2. A child born to a surrogate mother in pursuance of a surrogacy arrangement shall for all purposes in law be regarded as the child of that mother.

3.—(1) The Surrogacy Arrangements Act 1985 shall have effect subject to the amendments specified in Schedule 1 to this Act.

(2) Schedule 2 to this Act sets out sections 1 and 2 of the said Act of 1985 as amended by this Act.

4.—(1) This Act may be cited as the Surrogacy Arrangements (Amendment) Act 1986.

(2) In this Act "surrogate mother" and "surrogacy arrangement" have the same meanings as in the Surrogacy Arrangements Act 1985.

(3) This Act extends to Northern Ireland.

(141)



## SCHEDULE 1

### AMENDMENTS TO THE SURROGACY ARRANGEMENTS ACT 1985

1. In section 1 of the Surrogacy Arrangements Act 1985 (meaning of "surrogate mother" and other terms) subsection (9) is repealed.
- 2.—(1) In section 2 of that Act (negotiating surrogacy arrangements on a commercial basis, etc.) in subsection (1)—
  - (a) in paragraph (b), leave out the word "or" in the second place where it occurs; and
  - (b) after paragraph (c), insert the following paragraph—

"or  
(d) assist or take part in the establishment of a pregnancy knowing that it is in pursuance of a surrogacy arrangement;"
- (2) In subsection (2) of that section, leave out the words from "but it is not a contravention" to the end.
- (3) In subsection (3) of that section—
  - (a) in paragraph (a) leave out the word "or" in the second place where it occurs, and insert the words "or in respect of any other act performed by him in relation to the surrogacy arrangement, or";
  - (b) in paragraph (b) at end insert the words "or in respect of any other act performed by him in relation to the surrogacy arrangement"; and
  - (c) leave out the words from "In this subsection" to the end.
- (4) In subsection (4) of that section—
  - (a) after the words "in respect of the act" wherever they occur insert the words "or in respect of any other act performed by him in relation to the surrogacy arrangement"; and
  - (b) after the words "in respect of it" insert the words "or in respect of any other act performed by him in relation to the surrogacy arrangement".
- (5) For subsection (5) of that section, substitute the following subsection—

"(5) Where—

  - (a) a body of persons or a person acting on behalf of a body of persons takes any part in negotiating or facilitating the making of a surrogacy arrangement in the United Kingdom, and
  - (b) negotiating or facilitating the making of surrogacy arrangements is an activity of that body,

then, whether or not the body at any time receives any payment in respect of that activity, the body is guilty of an offence.”.

(6) Subsection (6) of that section is repealed.

(7) In subsection (8) of that section, for paragraphs (a) and (b) substitute the words “arrangements which are in contravention of subsection (5) above”.

(8) In subsection (9) of that section, leave out the words from “and for the purposes of such proceedings” to the end.

3. In section 4 of that Act (offences) in paragraph (a) in subsection (1) leave out the words “level 5 on the standard scale” and insert “£20,000”.

## SCHEDULE 2

### SECTIONS 1 AND 2 OF THE SURROGACY ARRANGEMENTS ACT 1985, AS AMENDED BY THIS ACT

*[In this Schedule the words inserted by the Bill are printed in bold type and words omitted are underlined]*

1.—(1) The following provisions shall have effect for the interpretation of this Act.

(2) “Surrogate mother” means a woman who carries a child in pursuance of an arrangement—

(a) made before she began to carry the child, and

(b) made with a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as practicable) by, another person or other persons.

(3) An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.

(4) In determining whether an arrangement is made with such a view as is mentioned in subsection (2) above regard may be had to the circumstances as a whole (and, in particular, where there is a promise or understanding that any payment will or may be made to the woman or for her benefit in respect of the carrying of any child in pursuance of the arrangement, to that promise or understanding).

(5) An arrangement may be regarded as made with such a view though subject to conditions relating to the handing over of any child.

(6) A woman who carries a child is to be treated for the purposes of subsection (2)(a) above as beginning to carry it at the time of the insemination or, as the case may be, embryo insertion that results in her carrying the child.

(7) “Body of persons” means a body of persons corporate or unincorporate.

(8) “Payment” means payment in money or money’s worth.



(9) This Act applies to arrangements whether or not they are lawful and whether or not they are enforceable by or against any of the persons making them.

2.—(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—

(a) initiate or take part in any negotiations with a view to the making of a surrogacy arrangement,

(b) offer or agree to negotiate the making of a surrogacy arrangement, or

(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements, or

(d) assist or take part in the establishment of a pregnancy knowing that it is in pursuance of a surrogacy arrangement;

and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.

(2) A person who contravenes subsection (1) above is guilty of an offence, but it is not a contravention of that subsection—

(a) for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or

(b) for any person, with a view to a surrogate mother carrying a child for him, to do such an act or to cause such an act to be done.

(3) For the purposes of this section, a person does an act on a commercial basis (subject to subsection (4) below) if—

(a) any payment is at any time received by himself or another in respect of it, or

(b) he does it with a view to any payment being received by himself or another in respect of making, or negotiating or facilitating the making of, any surrogacy arrangement.

In this subsection "payment" does not include payment to or for the benefit of a surrogate mother or prospective surrogate mother.

(4) In proceedings against a person for an offence under subsection (1) above, he is not to be treated as doing an act on a commercial basis by reason of any payment received by another in respect of the act if it is proved that—

(a) in a case where the payment was received before he did the act, he did not do the act knowing or having reasonable cause to suspect that any payment had been received in respect of the act; and

(b) in any other case, he did not do the act with a view to any payment being received in respect of it.

(5) Where—

(a) a person acting on behalf of a body of persons takes any part in negotiating or facilitating the making of a surrogacy arrangement in the United Kingdom, and

(b) negotiating or facilitating the making of surrogacy arrangements is an activity of the body,

then, if the body at any time receives any payment made by or on behalf of—

(i) a woman who carries a child in pursuance of the arrangement,

(ii) the person or persons for whom she carries it, or

(iii) any person connected with the woman or with that person or those persons,

the body is guilty of an offence.

For the purposes of this subsection, a payment received by a person connected with a body is to be treated as received by the body.

(5) Where—

(a) a body of persons or a person acting on behalf of a body of persons takes any part in negotiating or facilitating the making of a surrogacy arrangement in the United Kingdom, and

(b) negotiating or facilitating the making of surrogacy arrangements is an activity of that body,

then, whether or not the body at any time receives any payment in respect of that activity, the body is guilty of an offence.

(6) In proceedings against a body for an offence under subsection (5) above, it is a defence to prove that the payment concerned was not made in respect of the arrangement mentioned in paragraph (a) of that subsection.

(7) A person who in the United Kingdom takes part in the management or control—

(a) of any body of persons, or

(b) of any of the activities of any body of persons,  
is guilty of an offence if the activity described in subsection (8) below is an activity of the body concerned.

(8) The activity referred to in subsection (7) above is negotiating or facilitating the making of surrogacy arrangements in the United Kingdom, being—

(a) arrangements the making of which is negotiated or facilitated on a commercial basis, or

(b) arrangements in the case of which payments are received (or treated for the purposes of subsection (5) above as received) by the body concerned in contravention of subsection (5) above.

arrangements which are in contravention of subsection (5) above.



(9) In proceedings against a person for an offence under subsection (7) above, it is a defence to prove that he neither knew nor had reasonable cause to suspect that the activity described in subsection (8) above was an activity of the body concerned, and for the purposes of such proceedings any arrangement falling within subsection (8)(b) above shall be disregarded if it is proved that the payment concerned was not made in respect of the arrangement.

A  
**B I L L**  
 TO

Make provision relating to human embryos produced by  
*in vitro* fertilisation, and for connected purposes.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) Except with the authority of the Secretary of State under this Act, no person shall—

- (a) procure the fertilisation of a human ovum *in vitro* (that is to say, elsewhere than in the fallopian tube or uterus of a woman), or
- (b) knowingly have in his possession a human embryo produced by *in vitro* fertilisation.

Provided that this section shall not apply to an embryo after it has been inserted into a woman.

(2) The Secretary of State's authority—

- (a) shall be given expressly for the purpose of enabling a specified woman to bear a child by means of embryo insertion, and not for any other purpose,
- (b) shall be given in writing and only when applied for, in the prescribed form, by a registered medical practitioner, and
- (c) shall specify—
  - (i) the persons by whom, or under whose directions the procedures of *in vitro* fertilisation and embryo insertion are authorised to be carried out,



(ii) the place or places where any such procedure is to be carried out, and

(iii) the persons who may, in pursuance of the authority, have possession of embryos produced by such fertilisation.

(3) Where an application is duly made to the Secretary of State for his authority under this Act, he shall not refuse to give it on any ground connected with the woman to whom it relates; but if he is not satisfied as to the suitability of any of—

(a) the persons proposed by the applicants as those by whom, or under whose directions, the procedures of *in vitro* fertilisation and embryo insertion will be carried out,

(b) the place or places so proposed as the place or places where any such procedure will be carried out,

(c) the persons so proposed as those who are to be allowed, in pursuance of the authority, to have possession of embryos produced by such fertilisation,

(d) the manner of disposal of any such embryo which for any reason is not inserted,

he may refuse to give his authority or give it but specify different persons or places.

(4) Where the Secretary of State gives his authority under this Act, that authority expires at the end of the period of 4 months beginning with the date of the authority but may be extended for a further period of 2 months, on application made within that period of 4 months.

(5) The Secretary of State may by regulations made by statutory instrument make provision as to—

(a) the information which is to be furnished in, or in connection with, any application for his authority under this Act, and

(b) the confidentiality of such an application and of any information furnished in, or in connection with, it,

(c) powers to inspect the place or places in which the procedures mentioned in subsection (3)(b) are carried out,

and any statutory instrument containing regulations under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) A person who contravenes subsection (1) above shall be guilty of an offence and shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine of any amount, or to both.

(7) In any proceedings for an offence under this Act it shall be a defence for a person charged to prove that at the time of the alleged commission of the offence he honestly and reasonably believed that he was acting with the authority of the Secretary of State.

2.—(1) This Act may be cited as the Unborn Children (Protection) Act 1986.

(2) In this Act, "prescribed" means prescribed by regulations under section 1(5).

(3) This Act extends to Northern Ireland.

(4) This Act shall come into force on a day appointed by the Secretary of State by order made by Statutory Instrument.



*The only decision in the United Kingdom is a Scottish case ; MacLennon v MacLennon, 1958 S.C. 105 (as quoted by Cusine, D.J., 1976) where the decision was that A.I.D. without the husband's consent did not amount to adultery.*

JUDGMENT

LATEY J.

RE. AN ADOPTION APPLICATION: SURROGACY

Mr. and Mrs. A apply to adopt a little child, now aged 2 years and 4 months.

The child's mother (whom I shall call the Mother) is Mrs. B.

The child was conceived as a result of a surrogacy arrangement, as it is described, between Mr. and Mrs. A and Mrs. B and her husband Mr. B.

As the result of that arrangement Mr. A and Mrs. B had sexual intercourse on a few occasions and in due course the child was conceived. It was in no sense a love affair. It was physical congress with the sole purpose of procreating a child. As soon as there was conception intercourse ceased.

What led up to this arrangement was this: Mr. and Mrs. A are a devoted couple. To complete and fulfil their union they dearly wanted a child. For medical reasons Mrs. A was and is unable to have a baby. They did everything they



Re. An Adoption Application: Surrogacy

could with medical help and advice, including surgery, to overcome this but to no avail. They then tried to adopt a child both in this country and abroad, again to no avail. As to this country, the principal reason given was their ages. This is surprising. At that time Mr. A was barely 40, and Mrs. A in her mid-30's, well within the normal age of parenthood, I would have thought. Another and subsidiary reason may have been that it was their second marriage, each having been divorced. But there is no doubt that their marriage is solid and stable, especially now that they have the baby, or toddler, as it now is.

Then they heard a radio programme, and Mrs. A saw a TV programme, about surrogacy, and they saw it as their last chance.

In the meanwhile, Mr. and Mrs. B had 2 children of their own. They decided at that time to have no more (though recently they have had a third child).

Mrs. B is one who enjoys pregnancy, despite sickness and back-ache.

She too heard, saw and read about surrogacy. She was deeply and genuinely moved about the plight of childless couples. There is no question about her sincerity about this. After much thought she decided to embark on this path. She discussed it with her husband who was not, at first, enthusiastic but acquiesced and later supported her.

Re. An Adoption Application: Surrogacy

She put an advertisement in a magazine.

Mr. and Mrs A saw it and answered it. They met and the arrangement was made.

Finance entered into it and this aspect of it is at the heart of whether an Adoption Order can be made in this case and, if it can be, whether it should be made. This is because of the terms of certain statutory enactments which I will come to shortly.

The Mother, Mrs. B, was in full-time employment. She and her husband, Mr. B, earned a joint income which enabled them and their children to live in comfort.

If she became pregnant it would mean giving up her job and earnings. It would mean incurring other expenses. She had responses from other couples - one couple in particular who offered a very large sum of money.

This was not what she wanted. She agreed with Mr. and Mrs. A to act as a surrogate mother because as she says: "I wanted to help a childless couple. My own children are very precious to me and I sympathised greatly with any couple who were unable to have children of their own, so much so that I was willing to have another pregnancy in order to give someone else that joy".



And she wanted a couple with whom she could be friendly, empathise, have a rapport. She and Mr. and Mrs. A found each other and she declined the others, including the couple offering the very large sum.

The two couples agreed a global sum of £10,000. The Mother says this: "The money represented only my loss of earnings, expenses in connection with the pregnancy, and emotional and physical factors. I emphasise that I did not go into the arrangement for commercial reasons, nor did I accept the money to hand [the child] over. I would have done that in any event. In fact, overall, I was marginally worse off. This does not bother me since my motive was not financial".

In his report the Guardian ad litem says:

"The Mother does not appear to have been primarily motivated in entering into the arrangements by financial considerations. She appears to have felt strongly that through a surrogacy arrangement she could offer an important service to a childless couple and to have regarded the money mainly as the equivalent of compensation for loss of earnings while pregnant." And later:

"Her interest in surrogacy the Mother attributes to a particular pleasure she has in having babies and a great sympathy for women who are unable to experience joy of having and caring for a baby. The public discussions and debates she heard about this subject struck a special chord for her, thus her initiative in advertising herself."

Re. An Adoption Application: Surrogacy

I have heard the Mother, Mrs. B, speak about this in her evidence. I am left in no doubt that it is the plain, unvarnished truth.

Mr. and Mrs. A paid her £1,000 when she was some months pregnant, and £4,000 shortly after the baby was born. The balance of £5,000 was due some months later, but the Mother refused to accept it. This was because she and a professional writer as co-author wrote a book: "Surrogate Mother. One Woman's Story", from which she made money. That book has been put in as part of the material in this case. It was written pseudonymously and with care to conceal the identity of the child and those connected with the child. I have tried to do the same in this judgment. In the interest of the child nothing must be published which might point to the child's identity with serious consequences to the child later in life, if it were publicly known. Mr. and Mrs. A's close circle know the facts. They accept and love the child. Mr. and Mrs. A are very intelligent people who adore the child. They have already worked out what and when they are going to tell the child, and done so admirably, as it seems to me. But for any public publicity to happen about this child as it grows up would certainly damage its emotional development and might be disastrous.

Re. An Adoption Application: Surrogacy

If the word "commercial" has any bearing on what has to be decided in this case and if it connotes a profit or financial reward element there was nothing commercial in what happened. There was no written contract or agreement; no lawyers were consulted until after the baby was born. The arrangement was one of trust which was fully honoured on both sides.

The rest of the history can be told briefly. The child was born in hospital with Mrs. A present at the birth and Mr. A joining them almost immediately. Two days later the Mother and child went to Mr. and Mrs. A's home. The four of them spent a week together. The Mother went back to her own home. Mr. and Mrs. A and the child have been together since. The child has thrived. The three of them have been and are supremely happy. The Mother and Mr. B and Mr. and Mrs. A have kept in contact.

The Mother and Mr. B have had a third child. They are closer than they ever have been.

Leaving aside questions of morality and ethics it is now a happy story, though all four of them went through many anxious, distressing and embarrassing moments, which I will mention briefly later.



Re. An Adoption Application: Surrogacy

The questions are whether in law an Adoption Order is permissible; and, if it is, whether it is a correct exercise of the discretion to make it.

I am indebted to counsel for their most helpful arguments. Counsel for Mr. and Mrs. A and for the child's Guardian Ad Litem, who strongly supports the application for adoption, while properly advancing their clients' cases, were careful to appraise me of anything I should know which pointed in the opposite direction.

On my invitation the Attorney-General instructed counsel, Mr. Holman, to appear as amicus curiae.

Mr. Holman stressed that there was no public policy formulated regarding surrogacy arrangements other than as enshrined in the Surrogacy Arrangements Act, 1985, which illegalises commercial surrogacy agencies and negotiations and advertisements; and <sup>save in</sup> so far as it may be already enshrined in the Adoption and Children Acts.

The 1985 Act had not been enacted when the arrangement in the instant case was entered into and carried out.

Otherwise, as Mr. Holman said, there is no public policy in existence. There is active consideration and consultation

Re. An Adoption Application: Surrogacy

with the public being carried out by the Government and its advisers. A Consultation Paper "Legislation on Human Infertility Services and Embryo Research" was presented to Parliament in December 1986 which includes among several other topics the wider implications of surrogacy. It needs no saying that there is no more difficult and sensitive subject. Presumably when the consultations and considerations are complete, policies will be formulated and put before Parliament. It is there, in my opinion, that questions of morality and ethics should be weighed. There is no requirement in the instant case for the Court to weigh them, which it is not equipped to do and should not attempt. I agree fully about this with counsel for the Attorney-General who also has the benefit of advice from a senior member of the legal staff of the D.H.S.S.

Whether or not an Adoption Order can and, if it can, should be made, falls to be considered in the light of the relevant provisions of the Adoption and Children Acts. As I had hoped he would, Mr. Holman advanced the arguments against the making of an Order. Counsel for the applicants and the child's Guardian Ad Litem put the arguments in favour.

The relevant sections are:

S.50 of the Adoption Act 1958 subsection (1) enacts:

"(1) Subject to the provisions of this section, it shall not be lawful to make or give to any person any payment or reward for or in consideration of -

(a) the adoption by that person of a child;

- (b) the grant by that person of any agreement or consent required in connection with the adoption of a child;
- (c) the transfer by that person of the actual custody of a child with a view to the adoption of the child; or
- (d) the making by that person of any arrangements for the adoption of a child."

Sub-section(2)sets out the penalties for any contravention.

Sub-section (3) enacts (omitting words immaterial to the present case):

"(3) This section does not apply ..... to any payment or reward authorised by the Court to which an application for an adoption order in respect of a child is made."

Next there is S.22 (5) of the Children Act 1975 which enacts:

"(5) The Court shall not make an adoption order in relation to a child unless it is satisfied that the applicants have not, as respects the child, contravened section 50 of the 1958 Act (prohibition of certain payments in relation to adoption)."

Then there is S.57 of the Adoption Act 1958 (interpretation section) sub-section (2):

"(2) For the purposes of this Act, a person shall be deemed to make arrangements for the adoption of a child or to take part in the arrangements for the placing of a child in the actual custody of another person, if (as the case may be) -

- (a) he enters into or makes any agreement or arrangement for, or for facilitating, the adoption of the child by any other person, whether the adoption is effected, or is intended to be effected, in pursuance of an adoption order or otherwise; or



Re. An Adoption Application: Surrogacy

(b) he enters into or makes any agreement or arrangement for, or facilitates, the placing of the child in the actual custody of that other person;

or if he initiates or takes part in any negotiations of which the purpose or effect is the conclusion of any agreement or the making of any arrangement therefor, or if he causes another to do."

Lastly, there is S.3 of the Children Act, 1975, which provides:

"In reaching any decisions relating to the adoption of a child, a court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due regard to them, having regard to his age and understanding."

The first question is whether in the present case there has been "any payment or reward" within the meaning of S.50 - "for adoption"; to put it conveniently albeit imprecisely.

This is a question of fact to be decided on the evidence. Mr. and Mrs. A and Mrs. B have all given evidence. All are transparently honest. They did not make notes. They did not take legal advice. Not surprisingly, their recollection of the precise sequence of events and what was discussed and when is not clear.

Re. An Adoption Application: Surrogacy

What does come out strongly is that what was wanted was a baby and that Mr. and Mrs. A should have it from birth to care for and bring up. And that it was upon this that they were all concentrating. It was only after the payments had been made and the baby was born that any of them began to turn their minds in any real sense to adoption and the legalities.

In my judgment there was no payment or reward within the meaning of S.50.

But if I am mistaken about this and the payments do rank as payments or rewards within the meaning of the section, is that the end of the matter? Is there an absolute prohibition against adoption regardless of the adverse affects on this child and its family?

Much of the argument has been directed towards this question. It turns on the interpretation to be given to S.50 which provides that the prohibition shall not apply "to any payment or reward authorised by the court ....."

Can such authorisation be given only in advance of the making of a proposed payment or giving of a reward? Or can it be given for a payment or reward already made or given?

Re. An Adoption Application: Surrogacy

In his role (already described) Mr. Holman advanced the arguments in favour of the former interpretation. If that is the correct view the results, as he acknowledges, would be draconian indeed. It would mean, for example, that any payment, however modest and however innocently made, would bar an adoption and do so however much the welfare of the child cried aloud for adoption with all the security and legal rights and status it carries with it: And that, be it said, within the framework of legislation whose first concern is promoting the welfare of the children concerned.

I do not believe that Parliament ever intended to produce such a result (nor, anticipating, has it done so in my judgment). The result it intended to produce is wise and humane. It produced a balance by setting its face against trafficking in children, on the one hand, but recognising that there may be transactions which are venial and should not prohibit adoption, on the other hand.

Nor in my judgment does the language of the section compel the draconian interpretation. What does "authorise" mean in this context? Counsel have been unable to find any reported cases on the point, perhaps because none is necessary. In the Oxford Dictionary "authorise" is described variously as:

- 'To set up or acknowledge as authoritative';
- 'To give legal force to';
- 'To give formal approval to';



'To sanction, countenance';

'To justify'.

To my mind, in plain language, there is nothing in "authorise" or its synonyms to suggest that authorisation can only be given prospectively. On the contrary, it can equally well be given retroactively. Mr. Baker, the Deputy Official Solicitor, has been in Court during the argument and with his wide experience he informed me through Mr. Holman that authorisation is much more likely to be called for for something which has happened than for something which is in future contemplation.

For these reasons the correct interpretation is the second one, with the result that Parliament has produced the result it intended to.

It follows that in each case the Court has a discretion whether or not to authorise any payment or reward which has already been <sup>made</sup> or may be contemplated in the future.

In exercising that discretion the Court would no doubt balance all the circumstances of the case with welfare of the child as first consideration against what Mr. Levy well described as the degree of taint of the transaction for which authorisation is asked.

Re. An Adoption Application: Surrogacy

If the matter were to reach that stage Mr. Holman with evident pleasure and relief submitted that authorisation be given and an Adoption Order made.

The evidence and the full and balanced reports are all one way. This little child is thriving and it and its family are supremely happy.

It is all accurately and clearly summarised in the Guardian Ad Litem's report and I cannot do better than quote from it.

"Mr. and Mrs. A appear both to be sensible, warm and open people. Their relationship with the child is loving and appears a very normal parent child relationship ..... Both the doctor and Health Visitor are entirely happy with the care the "A's" give the child and are entirely happy with the child's physical, social and emotional development ....."

"In all aspects the care the child receives from Mr. and Mrs. A appears excellent. The child has lived with Mr. and Mrs. A since two days after birth. [The child] has known no other home or parents."

"It is also most desirable that Mr. and Mrs. A feel fully responsible for the child now and into the future. Anything other than adoption will leave them with some fear that at some future date their care of the child may be interfered with or even [the child] be removed from them. Such a fear, given the existing background

anxieties could, in my view, have a corrosive affect on their feelings of commitment to the child. If the parents feel less than fully secure in their rights, duties and responsibilities to the child then this insecurity will communicate itself to the child affecting, in turn, its feelings of security with them which would be to its detriment."

I agree unreservedly with every word of that. If I am mistaken in my finding that the payments did not fall within the prohibited ambit, I should without hesitation exercise discretion by authorising them and making the Adoption Order.

For all these reasons the Adoption Order is made.

For the sake of completeness I should add that the Mother consents. At a preliminary hearing I declared paternity, and approved the placement with a view to adoption.

This being the first case of its kind to come to Court in this country I was invited by counsel to make some further remarks and it may be helpful to do so.

Other than those outlawed by the Surrogacy Arrangements Act, 1985, surrogacy arrangements are not against the law as it stands.

But those contemplating taking this path should have their eyes open to the kind of pitfalls, obstacles and anxiety that they are likely to meet. Mr. and Mrs. A, a devoted and very nice couple, encountered many of them. So too did Mr. and Mrs. B. And they found themselves caught in a



tangled web of family and social embarrassment and deception, including the deception of doctors and others, from which they could not escape. There was not, I stress, any illegality. They went to all lengths within their power and knowledge to avoid any illegality. To give just one example, Mrs. B declined medical and other benefits to which in the ordinary course she would have been entitled and which she could have had and no one the wiser. I shall not go into detail in this case. It is enough to say that all the way through they have had to find ways to get over obstacles, and they have had to resort to all manner of shifts and stratagems. The expense has been heavy. And there have been these proceedings. These people have had three years of unremitting anxiety and many moments of distress, though I know that it has all been worthwhile for them in the end.

Last and very far from least there is the fact that in other cases it might well not end up happily. In the nature of things those who undertake the role of surrogate mother are those with very strong maternal instincts. The likelihood must be there that when the baby arrives the mother cannot bear to part with it. The trauma and turmoil then for all needs no describing.

Re. An Adoption Application: Surrogacy

One cannot sit in these courts and hear all the multitude of professionals and others without knowing well the depth of longing in couples, devoted to each other, who cannot have a child through no fault of their own. But before they go down the path of surrogacy they should know and know fully what it may entail. It is not a primrose path.

Latey J.  
11th March 1987

J U D G M E N T

LATEY J.

Royal Courts of Justice

15-1-1985

In re a baby (Wardship)

These are wardship proceedings concerning a baby girl born on Friday, 4th January. Just 10 days ago.

Baby's provenance is unusual - indeed novel in this country, it is said. Understandably, the case has attracted a good deal of public interest and publicity. The publicity occurred before the baby was made a ward of court and has been legitimate, so far as I am aware.

It is a case where it is appropriate that the judgment should be given in open Court.

Baby's father is Mr A, as I will describe him. He and his wife are in their thirties and have been married for several years.

Mr A is fertile.

Mrs A has a congenital defect which prevents her from ever having children.

Both dearly wanted a baby.

In their home country adoption is slow and a child is usually aged 4 to 5 at adoption.



They wanted a baby to bring up from birth.

They made enquiries.

In 1983, the father contacted an Agency in America and entered into a contract whereby he paid a sum of money and the Agency undertook to find a surrogate mother to bear his child. She would also be paid.

In England there is a similar Agency. A surrogate mother was found, Mrs Cotton.

In 1984, the father came to England by arrangement for the sole purpose of providing seminal fluid for insemination of the surrogate mother.

It was so arranged that he provided his semen to a qualified nurse and it was introduced into the mother. The father and mother did not meet and have not met.

The insemination was successful resulting in conception.

The agreement was that the baby on birth was to be handed over to the father and his wife to be theirs to care for and bring up.

The father and his wife came to this country in anticipation of the birth.

On 4th January, 1985, baby was born.

On the same day the Local Authority, the London Borough of Barnet, obtained a Place of Safety Order. Baby remained at the hospital cared for by the nurses.

On Tuesday, 8th January, 1985, the father issued a Wardship Summons.

On the same evening there was a hearing before me, when the father was represented by Counsel and Solicitors and the London Borough of Barnet was represented by Counsel and its Legal Department. The father and his wife were present.

At that time the Social Services Department had already carried out a good deal of its enquiries but still had some to complete.

It was a fairly lengthy hearing and I made interim orders and directions.

The Social Services Department thought that they could conclude their enquiries by Friday last and I directed that the matter be restored for hearing on that day.

They did complete their enquiries and the matter was heard on Friday last.

The enquiries which were deposed to in evidence were very full and covered every relevant matter. They established that the father, Mr A, is the natural father of the baby; that the natural mother has voluntarily relinquished all parental rights in the child; and that she in fact left the baby in hospital a some hours after birth and has not seen her since. The evidence deals in the fullest detail with Mr and Mrs A and their health, living and family circumstances and their suitability as parents, about which I will say a little more in a moment.

In the result, the Local Authority supports to the full the application that the baby be given into the care and upbringing of Mr and Mrs A.



First and foremost and at the heart of the prerogative jurisdiction in Wardship is what is best for the child or children concerned. "That and nothing else.

Plainly, the methods used to produce a child as this baby has been and the commercial aspects of it raise difficult and delicate problems of ethics, morality and social desirability. Those problems are under active consideration elsewhere.

Are they relevant in arriving at a decision on what now and, so far as one can tell, in the future is best for this child?

If they are it is incumbent on the Court to do its best to evaluate and balance them.

In my judgment, however, they are not relevant. The baby is here. All that matters is what is best for her now that she is here and not how she arrived. If it be said - though it has not been said during these hearings - that because the father and his wife entered into these arrangements it is some indication of their unsuitability as parents I should reject any such suggestion. If what they did was wrong (and I am not saying that it was) they did it in total innocence.

It follows that the moral, ethical and social considerations are for others and not for this Court in its wardship jurisdiction.

So what is best for this baby?

Her natural mother does not ask for her.

Should she go into Mr and Mrs A's care and be brought up by them?

Or should some other arrangement be made for her such as long-term fostering with or without adoption as an end?

The factors can be stated briefly.

Mr A is the baby's father and wants her as does his wife. The baby's mother does not want her.

Mr and Mrs A are a couple in their thirties. They are devoted to each other. They are both professional people highly qualified. They have a very nice home in the country and another in a town. Materially they can give the baby a very good upbringing. But far more importantly they are both excellently equipped to meet the baby's emotional needs. They are most warm, caring, sensible people and highly intelligent. When the time comes to answer the child's questions they will be able to do so, with professional advice if they feel they need it.

Looking at this child's well being, physical and emotional, who better to have her care? No one.

which I made on Friday evening,  
Accordingly, the orders, <sup>L</sup>are that the wardship will continue until further order; the Care and Control of the baby is committed to Mr and Mrs A until further order; on their undertaking to return the child to the jurisdiction if the Court should so order (an unlikely contingency in this case)

there is leave for them to take her to live outside the jurisdiction. There are further orders that Order 63 rule 4 shall not apply and that no one may search for, inspect or take a copy of any of the documents filed in these proceedings without leave of the Court; and an order to similar effect regarding the the documents in the possession of the Social Services Department without leave of the Court.

TAKE IN "A" →

Some further matters I should mention:-

The case has been handled both by the Barnet Social Services Department and their legal advisers and by the father's legal advisers with skill, speed and sensitivity in a way which is admirable and I am glad to have the opportunity to say so. There has been the fullest co-operation between the parties and their advisers.

There has been, I believe, here and there some criticism of the London Borough of Barnet's action in obtaining a Place of Safety Order. By Act of Parliament heavy responsibilities and duties are laid on Local Authorities and their Social Services Departments where children are at risk. When this baby was born they knew nothing about Mr and Mrs A. They might have been anyone, any kind of people, people buying babies for exploitation, perhaps. If the Authority had not taken steps to protect the child while necessary enquiries were made it would have been in neglect of its duties imposed on it by statute.

TAKE IN "B" →



Lastly, publicity and the media.

The over-riding rule is that where a child is a ward of Court there must be no publicity save with leave of the Court. This has been well understood through the decades. But time moves on and new generations come into the media, the legal profession and other concerned areas and the rule and its reasons can usefully be re-stated from time to time.

The Family Division over many years has had valuable help from the media in the publicity they have given in particular cases, especially those in which children have been kidnapped and cannot be found. There have been many cases where children have been found where without the help of the media they would not have been.

To those more recently engaged in this work it must seem scant recognition of that help that these embargos are imposed. The reason is in fact simple. There are two major public interest involved and they are in contradiction. One is that in an open society there should be freedom of information and publication. The other is that the well-being of children is of paramount importance. Save in exceptional circumstances, the law of this country is that the latter public interest prevails over the former. Hence the rule that where a child is a ward of Court

nothing may be published without the leave of the Court, though if there is some innocuous publication it is for the Court to decide whether or not it should be regarded as a contempt. All this is clearly and accurately set out, as I think, in an article in last Thursday's Times by its legal affairs correspondent.

Nor save in very exceptional circumstances should the media approach the Judge direct.

What makes this case different from most is this: In most cases there is nothing published before a child is made a ward of Court.

In this instant case a great deal had already been published (legitimately, I think) before this baby was made a ward. This meant that the media were left in a genuine quandary about what they could properly write or say after the wardship came into being. I received many telephone calls on that precise question and thought it right in this particular case to receive them and give such help as I properly could. But this must not be regarded as a precedent.

Now that this judgment has been given there must be no more such approaches.

Finally, I issued a specific order that there must be no disclosure or publicity which might lead to the identification

of Mr and Mrs A. The reasons for this are or should be self-evident. Is this baby to grow into childhood, adolescence and adulthood with the finger pointed at her as "this is the girl who.....?" It is unthinkable that it should be so. Were it otherwise the injury to her mental and emotional health might be grave indeed. The wardship continues and with it that specific order. Any breach of it would be a very serious contempt

TAKE IN "C" →



"A"

I also approved arrangements for the immediate hand-over of the baby to Mr and Mrs A. These were worked out with the object, among others, of avoiding the identification of Mr and Mrs A.

"B"

The usual step is to obtain an immediate Place of Safety Order as Barnet did. With hindsight in an unusual and complex case such as this it might have been better to have issued a Wardship Summons straightaway. The High Court in its wardship jurisdiction has very wide powers and resources to call upon which the Juvenile Court does not. They include facilities to deal urgently with an urgent case - within hours or sometimes minutes on the telephone, if need be. But this is with hindsight. Barnet had very little time and in the events which have happened no time has been wasted. What I have just been saying does not subtract at all from the tribute which I have earlier made.

"C"

It is inconceivable that leave ever will be given to publish the identities of Mr and Mrs A. That being so, it would be kind and compassionate to discontinue any enquiries which may be on foot and leave this couple to bring up their child in peace and quietness of mind. Whatever of this judgment may or not be published, I hope that this appeal will be; and that it will not fall on deaf ears.

A v C

Family Division

Comyn J

20 June 1978

Court of Appeal

Stamp, Cumming-Bruce and Ormrod LJJ

18 July 1978

*Child - Custody and access - Artificial insemination - Agreement between donor and mother to have child by artificial insemination - Child to be handed over to donor and his wife - Mother resiling from agreement - Father applying for access - Whether access should be granted - Factors to be considered*

The father had been living with a divorced woman and her daughter. The woman was unable to have any more children. They were free to marry but both wanted the father to have a child of his own before they considered marriage. They embarked upon a plan to achieve that object by finding a woman whom they would pay to have the father's child by artificial insemination. The mother, who was aged 19, was found. An agreement was entered into that, for a fee, she would be artificially inseminated with the father's seed. This was done at a clinic run by a doctor. During her pregnancy the mother changed her mind and after the child was born she refused to hand it over to the father. The father commenced wardship proceedings seeking custody of the child. He and the woman with whom he had been living now married, and they had regular access to the child.

The father's application came before Comyn J. At the hearing the father, acting on advice, reluctantly withdrew his application for custody. The judge indicated that he could not have contemplated giving care and control to the father who, he found, had acted in a most selfish, irresponsible, and obsessive manner.

The father applied for access. This was opposed by the mother who was supported in her opposition by the Official Solicitor acting as guardian ad litem of the child. The judge held that in a consideration of the question of access the interests of the child were paramount but that, prima facie, a parent should have access to his child unless there was a very good reason to the contrary. He therefore granted access to the father.

The mother appealed.

**Held** - allowing the appeal - There was no bond between the father and child except the mere biological one. There was no relationship between the father and the mother except a sordid commercial bargain, and no good would be done by keeping such an artificial and painful tie in existence. Access would only trouble the mother and progressively the child also. The judge had not found any positive reason, apart from the mere fact of paternity, for granting access. There was no advantage to the child continuing to be in contact with the father. Therefore, the judge had exercised his discretion wrongly and the court was entitled to interfere. The mother's appeal would be allowed and access would cease immediately.

*Per Cumming-Bruce LJ:* The fact that a child was conceived through artificial means, as compared to natural methods of conception, could have no effect on the duty of a court to seek to afford the child a life as would best promote the child's welfare.

**FAMILY DIVISION**

20 June 1978

**Case referred to in judgment**

*M v M (Child: Access)* [1973] 2 All ER 81

*J.C.J. Tatham* for the father;

*Eleanor Platt* for the mother;

*Shirley Ritchie* for the guardian ad litem.

**COMYN J:** As this case concerns a minor and that it would greatly prejudice his interest if the identity or location became known, I urge upon the press and the law reporters, with their customary co-operation, to refrain from publishing anything which would breach this necessity for anonymity.

This is a ward of court case and a heart-breaking story concerning the wardship, care and control of, and access to, a baby boy now just over 1 year old who was born as a result of artificial insemination. The artificial insemination was between a man and woman who were not then, nor when the child was born, married to each other or to anybody else. The man has since married another woman. The woman remains unmarried.

I will not give the date of the artificial insemination or of the birth since they might aid identification. They are well-known to all concerned and were on the poor side.

The story is an astonishing one which has left in its wake nothing but worry for all concerned. It raises questions of law which I have to decide, and in the light of them practical problems which I have to try and solve.

The facts can conveniently be divided into two parts: (1) the undisputed facts which cover most of the ground and (2) disputed issues of fact. The undisputed facts: In 1976 Mr A, a bachelor of 27, a professional man employed in London, was living with a Mrs B, a woman some 5 years older who had divorced her husband. She, confusingly, was calling herself Miss T. This is all the stranger when one knows that they had living with them the younger of her two daughters by her marriage, a little girl who was then aged 8. Mr A and Mrs B could have married each other. She was divorced, he was a bachelor, but they did not do so because he passionately wanted a son of his own, and Mrs B could not then bear children. Both of them (and I stress 'both') wanted him to have a child of his own before they considered marriage. A child, moreover, who would come into their family and be brought up by them. Eventually, Mr A and Mrs B decided to pick a prostitute and offer her virtually their whole life's savings of £3,500 to conceive a child by Mr A and to carry, give birth to and then deliver over to Mr A and Mrs B the born child. It would be done, they decided, by artificial insemination. Since, they told me, Mr A was loath to have sexual intercourse with anyone for whom he had no true feelings. They had read somewhere that artificial insemination could be effected for a fee at a place run by a doctor in the West End of London. It would be done, at least ostensibly, on the footing that the parties to it were man and wife.

The first step which Mr A and Mrs B took in furtherance of this design was an extraordinary one in an already astonishing case. It was that she, Mrs B, attended at Bow Street magistrates court one day in about June



1976 to pick a suitable prostitute from those parading to pay their regular fines. She chose a woman who in fact declined the offer but who agreed for an agency fee, subsequently fixed at £500, to procure somebody who would accept it. Thus Mr A and Mrs B became introduced to Miss C who was only 19. She had a background and environment as far removed from Mrs B and Mr A as it is possible to imagine. Whether she was a prostitute or not has been debated before me. She was involved, at least to some degree, in the world of prostitution because she had two recent convictions for obtaining money from men by deceiving them into believing that she would have sexual intercourse with them when in fact, having obtained some money in advance or as a deposit, she then disappeared. This, she told me, was known as being a 'clippie'.

At any rate, she accepted the proposals of Mr A and Mrs B, which was now for the sum of £3,000, £500 having gone on the agency fee. She accepted the proposals to be impregnated by Mr A, and having given birth to the child to hand it over. As additional benefits she was during her pregnancy allowed to occupy with a girl-friend a flat owned by Mrs B and to have her pregnancy needs seen to. This was all carried into effect. Miss C was artificially inseminated with Mr A's seed at the establishment I have mentioned.

It would seem that no inquiry or no sufficient inquiry was made as to whether they were husband and wife. They could produce no evidence that they were, for each was unmarried.

Pursuant to the proposals, she utilized the flat which I have mentioned, and then pursuant to arrangements went into a hospital nominated by Mr A for her confinement. During the pregnancy she showed some signs of wanting to keep the child she was carrying, but indications were given that Mr A would not readily stand for that. During her pregnancy her views on the subject changed from time to time.

When the baby was born, on a Friday, she became quite certain that she could never part with the child. This is of course a well-known and frequent occurrence with regard to hitherto unwilling mothers.

Mr A and Mrs B came to the hospital with the money. She said to them that she had changed her mind. They argued with her, and in the course of the argument Mr A and Mrs B offered her his second-hand car worth about £850 as an additional inducement to part with the child.

When the baby was 3 days' old, that is to say, on the Monday, Mr A and Mrs B obtained possession of him. I use that particular phrase because they say that it was because the mother had relented in her view, while she says that they in fact kidnapped the child. They had the child for 11 days. Before the court in which proceedings had by then been brought by the father (although there was care and control to the mother) he was granted access and has had access to the little boy ever since.

About a fortnight later Mr A and Mrs B married each other. They, both of them, had regular access to the little boy. This has been going on twice a week for an hour at a time and it comes in total to nearly 100 times.

The father now drops his present claim for care and control (and I underline the word 'present'), because, of course, care and control is only always until further order. He drops his present claim to care and control reluctantly, saying that he does so solely under advice. It is, if I may say so with respect, wise advice, because I could not contemplate giving this

father and his now wife, Mrs B, care and control of this child.

But I still have to approve and consider the terms of any care and control which I may award to the mother. And then the father wants access and the mother wants none. She wants a clean break, and this question of access is a bitterly contested matter before me.

Mr A and Mrs B, whom I shall henceforth call Mr and Mrs A, because at this stage of the story they are now married, are now living in a house of their own. Miss C is living with her mother but is seeking a council tenancy elsewhere and nearby. So much for the undisputed facts.

The disputed questions of fact. I traverse my findings on them by saying that I do not think they add very much to the quite extraordinary story which I have just related, but they have had to be dealt with. I will give them in the form of questions. Is Mr A undoubtedly the father of the child? This question arises because Miss C was at one stage saying that a Mr W could equally well have been the father because she was having sexual relations with him at the relevant time. Suffice it to say that he did not attend to be blood-tested. A court order made provisions for a blood test but in respect of him not a mandatory order. It was an order that he should be blood-tested if he so consented. He did not attend. The blood test which took place accords with Mr A being the father. That Mr A is indeed the father is also, I think, of sound inference from the history of Miss C's acceptance of accommodation. I think this question was one which she very understandably but incorrectly raised in a final effort to sob off Mr and Mrs A. I have no doubt whatever of the paternity of this child. I have no doubt that Mr A is the father of the child.

Next question: Did Mr A attempt to have a child by an 18-year-old girl shortly before the events with Miss C? This question goes to his reliability and responsibility and also to that of Mrs A, who is said to have been involved. It is said that Mr A told the mother that he had originally intended to achieve his object by actual sexual intercourse with a girl of 18 who had lived with them at the flat for a short time, that sexual intercourse had taken place with that girl but this had not been successful. They, Mr and Mrs A, deny that any such thing ever happened and deny that they ever said anything to Miss C to such effect. I found Miss C, young though she was and humble as her background was and little, perhaps, as her education was, an extremely impressive witness. That they told her this I have no doubt whatever. She gave her account of it in considerable detail, detail quite beyond any power of invention on her part, so I find, as a fact, that Mr A and Mrs A told her this in considerable detail. On that I have insufficient information so as to make any findings. It could be explained by being a fantasy; it could be explained as a form of pressure, for example, by jealousy on Miss C.

The next question: Is Miss C a prostitute? On her own admission she was in the world of prostitution, but I do not believe that she is now. I am as satisfied as one can be that she no longer is in the world of prostitution. I am as satisfied as one can be that she will not revert to it. I think that the baby has made all the difference.

In the care and control order, which I am shortly to make in her favour, there will be a supervision order addressed to the local authority. If her conduct in the future reverts to that of the past, she is liable to lose the child - I hasten to add immediately not to Mr A and his wife, because that



is an eventuality that is only contemplated for the future is a most exceptional change of circumstances, but she will lose it probably to the local authority.

Is she, as has been somewhat incongruously alleged, a lesbian? This allegation rests solely on the evidence of Mr A and his wife as to what they allege she said and what they allege they saw in respect of a girl-friend who occupied the flat with her. I reject their evidence on this in its entirety and I reject the allegations completely.

Next question: Did they agree to hand over their house as a final inducement to Miss C to part with the baby? She says they did. They say they did not. And they point to the large mortgage on that house as a serious practical objection. I have thought about this a lot. I believe Miss C. I believe that the offer of this house or of some other house was made. It was in full accord with what had gone before, and I do not think Miss C capable of inventing so bizarre a story.

The next question is: Was any money actually paid to Miss C? She says No. They say that £500 in money was paid between her and her girl-friend. They also say that they paid rent and rates for the flat. Quite plainly, a receipt was given for part of the money by the girl-friend, but there is no documentary evidence or other corroboration that that money found its way to Miss C or that Miss C received any money herself. In my judgment, Miss C did not receive any money. So much for the facts.

I now turn to the main questions of law and I make the following finding:

(1) The agreement between the parties I hold as being against public policy. None of them can rely upon it in any way or enforce the agreement in any way. I need only give one of many grounds for saying this, namely that this was a purported contract for the sale and purchase of a child. As to culpability in regard to this pernicious agreement, by far the largest part must rest on Mr and Mrs A. It is to be remembered that he was at the time a professional man of 27 years of age and that Mrs A was a few years older. Miss C, on the other hand, coming from the background which I have indicated, was only 19. She cannot escape some responsibility for what she did, but the major part of the culpability for it rests squarely on Mr and Mrs A.

(2) I must take account of the agreement to this extent, that it is a fact and circumstance which must be borne in mind when considering the case.

(3) I hold that the baby is illegitimate, virtually certain of never being legitimated and probably unlikely to become adopted.

(4) Accordingly, my jurisdiction is finally under the Guardianship of Minors Act 1971. Section 9 of that Act provides for orders for custody and maintenance or access on the application of a mother or father. By s. 14, that applies to the father of an illegitimate child who can claim custody, care and control or access.

My first finding is that under that Act I hold, by reason of s. 1, that in all matters aforementioned I shall have regard to the welfare of the minor as the first and paramount consideration and shall not take into consideration the various other points of view concerning the father in favour of the mother or vice versa.

(5) Section 1, rather oddly, does not mention access, but speaks about the custody and upbringing of a minor. I hold that it inevitably includes the question of access.



(6) Under that Act, and for the purpose of my present jurisdiction, I hold that nobody has any rights whatever in respect of custody, care and control or access. It is not a question of rights. If there are any rights, it is in the child. The child's birthright is that it has two parents living together to bring him up, having brought him into the world. If he cannot have that by reason of death, divorce or separation, he is entitled to have the next best thing. In some cases it is said there has been talk of access as being the right of the child. I do not think that that is strictly the right way of approaching the question. I think the right way of approaching it is that the child's interests are paramount and the court must do what it thinks is in the interests of the child.

(7) On care, control and access, I hold that the views or wishes and interests, capabilities and intentions, proposals of father and mother have to be taken into account, but they have got to be taken into account in the context of the child's best interests. At times, of course, the child's best interests will coincide with those of one of the parents, for example in the case of a young girl where the care and control is given to the mother as she wants it. This is done not because she wants it, but because it is the natural and right thing to do. In fact, conduct in its widest sense, sufficient to cover what happened here, is to be taken into account. I feel that I will have to decide access when I come to it.

I come now to the first of the orders I make. They are all, of course, until further order. It is the question of care and control. On this and all questions, I think it is of very great benefit that the Official Solicitor represents the child, Miss Ritchie and Miss Solley being present throughout the whole case.

(1) I order that the child remains a ward of court until majority or further order.

(2) I commit his care and control to his mother until further order with a supervision order addressed to the local authority attached to that care and control order. I express here my own views which, of course, will in no way bind any other judge who may deal with this matter in the future, but I can only contemplate the father having care and control of this child in exceptional and much changed circumstances. The reason I say that is that I think that both he and the lady who is now his wife behaved in a most selfish and irresponsible manner in pursuing obsessively this scheme which has seen chances of happy success but many chances of wilful disaster.

(3) I direct that the child's Christian name (he has not yet been Christened) shall be that of his mother's choice.

(4) I direct that, in the special circumstances of this case, his surname be that of his mother. I am not to be tempted by that as considering, as a general rule, that the child should have his custodian's surname. I am simply saying that in the special circumstances of this case the child should bear his mother's surname and follow it. By saying 'follow it' I mean that if she marries he shall take the name of the man.

(5) I direct that unless maintenance payments for this child are agreed within 28 days, the matter be then referred to the Department of Health and Social Security, and failing a satisfactory outcome the matter do come back to the court for the registrar to fix a sum for the maintenance of this little boy. It is not the kind of money that was talked of before. It is money to which the child is entitled.

Since (and I appreciate that this is a most unusual order) this is something of an elaboration of it, I direct that none of the parties by themselves their servants or agents, shall disclose to the child or to anybody else without the leave of the court the circumstances of his conception or birth. In explanation, I would say that I think it would be nothing but damaging to the child to know at any stage that I can foresee, in so far as one has had experience of children, to test their curiosity as to whether they have a father or a mother or a grandfather or grandmother. I do not personally know that a child's curiosity goes to the circumstances of conception and birth. But it is to guard against anybody disclosing those circumstances that I make this order. And it is no idle order for this court would quickly act if it were breached and, in my judgment, this court would take an exceedingly severe view. I, of course, envisage this little boy being told that he has a father. But I see no reason for anybody to go into details of his birth.

Lastly, I come to the question of access. What are the legal principles? First, they are now that an illegitimate father can have access in a proper case. Times have changed. Thankfully, the legal and social stigma of illegitimacy have been loosened. They are not yet, alas, finally broken.

Two, I find that it is necessary for me to attempt for the purposes of this case a definition of access, omitting, as I think must be omitted, the question of whether it is anybody's blood. Access, in my judgment, is the opportunity given by people, or by order of the court, to a parent relative or other person in respect of a child to keep in contact with that child, to see and pay visits to him, to have him to stay and to have him to take away temporarily on holiday. It is not a right but an opportunity, as I see it, and the opportunity can be carried into effect by agreement between the parties. If they cannot agree and want to carry it further, it has got to be decided by the court.

Three, what considerations are to come into play in regard to access? First, foremost and all the time the interests of the child are paramount. Is it in his interest that there should be access? If so, what type of access? That is the question.

Four, one must take account, for the reasons I have already given, of the wishes, intentions and so forth, of the parents or other guardians.

Five, their wishes, intentions and so forth have got to be considered in the context of the paramount interests of the child.

Prima facie (this is the next proposition, I would have thought), a parent should have access to his child. I put it forward as a proposition for this reason and in this way: I believe there are socially two points of view on this question of access, one being that there should always be a complete break, the other being that everything of the child's free time should be as nearly equally shared between the parents as possible. I do not sit here, and I state this very particularly in this case, to give effect to personal reasons. I sit to administer the law as I understand it. As I understand it, the law is that, prima facie, the parents shall have access to his or her child and that that shall be unless there is very good reason to the contrary. It is not a right, it is a privilege. It is always up to the judge to decide what is the best interests of the child.

It is in accordance with those principles that I now give directions on this question of access. On behalf of the mother, may I here thank Miss



Cass for all the assistance she has given to the court. On behalf of the mother, and also on behalf of the child's guardian, the Official Solicitor, I repeat my thanks to Miss Ritchie and Miss Solly. In their view there should be a complete break. Access can only trouble the mother and, professedly, the child also. It would endanger care and control. The background is such that the father should give up the child completely to the mother. It shows him, and his now wife, to be unstable, unreliable, unsuitable and obsessive. They also say that there is a gulf between the respective environments that can only unsettle the child.

What also impressed me greatly was Miss C's mother. She will not mind me saying that she was a delightful example of a typical, honest, down-to-earth cockney. I found her an extremely impressive witness. I know that she will be a good grandmother. I mention that here for this reason, she says that she would have considered this incredible if it had not actually happened. She likens it to science fiction. She said that she did not know what had hit her. But for the present purposes it is what she said towards the end when we were discussing the question of access. She saw the other point of view, but she said: 'Bearing in mind what they had done, whatever will they do next?' I think that sums up that part, which is contentious, of the mother and the Official Solicitor. But why is he most concerned with the effect that access might have in endangering care and control?

On behalf of the father, Mr Jeremy Tatham, in his most persuasive way, says that Mr A is the father. In the extraordinary circumstances he says that it is an ordinary case of illegitimacy or, at any rate, sufficiently close to it to have the father entitled to be treated as the father of the illegitimate son. The father, he says, wants to and can contribute to the child's upbringing. The child ought to know and see his father.

It is not lightly that I can pass over the views of the Official Solicitor in a case such as this. He will be the first to recognize that I accept that he puts forward, through counsel, his considered view. The responsibility does not stop there, but must stop here where I am. In support of what I say about control and access to his father, I cite the judgment of Latey J in the case of *M v M* [1973] 2 All ER 81 stating that it is an access case, an appeal against the refusal of access. It is not necessary to recite the facts because Latey J's words fit completely in the context of virtually any access case. His words at p. 88 are these:

'When a court has to consider whether the parent not having the care of the child should have access to the child, should there be any difference in principle? I cannot for the life of me see any reason at all why there should be any such difference, and I do not believe that there is. Where one finds, as one does for example in *S v S and P* [1962] 1 WLR 445 a reference to the basic right of a parent to access to the child, I do not accept that the meaning conveyed is that a parent should have access to the child although such access is contrary to the child's interests, and when one reads *S v S and P* in conjunction with the more recent decisions of the Court of Appeal, I agree entirely, and as emphatically as I can, that what is meant is this: where the parents have separated and one has the care of the child, access by the other often results in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long-term advantages to the child of



keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turn against the parent who the child thinks, rightly or wrongly, has deprived him, and so the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent by its companionship and otherwise would make.'

I do not want to jeopardize the care and control of this child in any way. I want this father to understand that the access that I propose to give him controls the way I propose to give it. He is not to confuse the purpose of access with the care and control of the child. It is so that he can fulfil what he says is in him to fulfil his duties to the child and in this particular case the extra duties to the child which is his behaviour at school.

The access which I propose to give, and, of course, it is until further order, is that for 2 years from today's date he, and with him his wife, shall have access to the little boy for 2 hours on a Saturday. Hitherto his access has been twice a week for an hour. I think that is far too much for everyone. That will be for 2 years or until such further order, and that to be at the maternal grandmother's place, if she accepts. I think she will. Alternatively, at such other place as may be agreed or in the absence of agreement fixed by the court. At the end of 2 years I think it may be possible for access to be agreed. If not, it must come back to the court. I believe that if it is successful during the next 2 years there might be access at the father's and step-mother's premises. Looking further ahead, I envisage that if there were success all along the line there might be some liberty of staying.

The mother expressed the fear in her evidence that if he had the child with him he might in some way spirit the child out of the country. I do not think that that is a real risk but it is one of the matters in the mother's mind, make up and approach that I have in mind in deciding that for the first 2 years the access should be at the grandmother's place.

I only end by saying this: I can make monetary provisions. I can suggest the question of maintenance of the child. I do not see why the State should support this child as the father has a reasonable income.

The only other matter that I would like to add is this: if he has his child's best interests at heart and wishes to keep a continuing interest in the child and to make some reparation for the child for the wrong he has caused him, he might consider regular deposits of money in the child's name in some savings group or in the bank.

These are my orders in this exceedingly sad, difficult and anxious case. I would like to thank all counsel concerned for their assistance. I may be right or may be wrong - at least I am sure of what I am saying.

## **COURT OF APPEAL**

18 July 1978

### **Cases referred to in judgment**

*J v C* [1970] AC 668; [1969] 2 W.L.R. 540; [1969] 1 All ER 788

*M v M (Child: Access)* [1973] 2 All ER 81

*Lionel Swift QC and Eleanor Plau for the mother;*  
*J.C.J. Tatham for the father;*  
*Shirley Ritchie as guardian ad litem.*

**STAMP LJ:** I will ask Ormrod LJ to deliver the first judgment.

**ORMROD LJ:** This is an appeal from an order which was made by Comyn J on 20 June 1978 under which he gave care and control to the mother of a child born about a year ago and made an order for access by the father to the child covering the next 2 years or until further order. He also made a supervision order in favour of the local authority.

The judge gave judgment in open court, asking that the press should take all the necessary steps to avoid identifying the parties and it is quite plainly a case in which that same course should be followed in any report of this appeal.

The fact that the judge gave judgment in open court makes it unnecessary and, in my view, undesirable to recapitulate the quite deplorable story which lies behind this case. It is only necessary to say in the barest outline what happened.

The father, who is in a position to know very well how to behave, found himself in a position of some difficulty, because he was living, unfortunately for him, with a lady who, through no fault of her own, could not have any more children. He appears to have become obsessed with the idea that it was essential to his future happiness that he should be able to be the father of a child himself and have the pleasure and the privilege of bringing that child up as his own child. It is a state of mind which is very easy to understand and sympathize with. It is very unfortunate for both men and women when they find themselves in a situation where they are unable to have that very natural satisfaction.

The only difference between this father and the others is that the others try to accept it, whereas this father embarked upon the most extraordinarily naive plan to achieve his object - simply to find a woman who was prepared to be artificially impregnated with his semen to produce a baby which would then be handed over to him and the lady with whom he was living (and to whom he is now married) for adoption. It is a simple, logical, but totally inhuman proceeding, and shows, in my view, very grave defects in his character and, indeed, in the characters of all three participants, because the lady with whom he was living was definitely involved in the plan, no doubt now to her great regret. One can feel very sorry for her in that she must feel that it was her fault in a sense that the father was in the position in which he was, so that she felt obliged to help him and take part in this most extraordinary and irresponsible arrangement. It is unnecessary to make any more comment on the irresponsibility shown by all three of the adults in this case, which is perhaps only rivalled by the irresponsibility of the person who performed the insemination on the mother. Having said that, so far as the background is concerned, I do not propose to say any more about it.

The judge gave, if I may say so with respect, a most careful and lucid judgment and one in which he has found all the necessary facts with great clarity. He has avoided none of the difficulties which arose on the disputed facts. Since we are only concerned here with an appeal against that part of



the order which provides for access, I do not think that it will be useful to travel over this sad and miserable story any more. It is enough to say that the mother, at a fairly early stage in the pregnancy, began, quite naturally, to feel grave doubts about the course which she had embarked upon and by the time the child was born she had plainly made up her mind that she could not possibly go on with such a bizarre and unnatural arrangement and she forewent the substantial sum of money which she was to be paid in the event of her handing over the baby.

The judge has described the mother's situation and her background and the father's. It is quite apparent that there is a wide gulf socially and culturally between them and that the future contains nothing at all except bitterness for their future relationship. We are dealing here with two people who have never had any sort of relationship together at all, not even a relationship amounting to one single isolated act of intercourse taking place casually on some occasion and never to be repeated. Here we have nothing but the clinical fact that the father has contributed the necessary male sperm to the conception of this child. That is the sum total of his contribution to this child.

He now finds himself reluctantly in the position of having to accept – and we are told that he only accepted it with difficulty before the judge – that there could be no possible question in the circumstances of his having care and control of this very small child, and it may well be that he finds difficulty now in accepting that situation. That is one of the factors which, very naturally, has greatly concerned the Official Solicitor who is the guardian of this little boy.

In the course of his very careful and clear judgment, the judge directed himself, in my judgment, in law perfectly correctly, with one slight exception. He took the point at an early stage in the judgment, when he came to deal with the law, that it was a mistake to talk, in relation to access, in terms of rights, and he was undoubtedly, in my judgment, correct in what he said. The word 'rights' is a highly confusing word which leads to a great deal of trouble if it is used loosely, particularly when it is used loosely in a court of law. So far as access to a child is concerned, there are no rights in the sense in which lawyers understand the word. It is a matter to be decided always entirely on the footing of the best interests of the child, either by agreement between the parties or by the court if there is no agreement. The judge very properly directed himself in accordance with the law, particularly as it is laid down in *J v C* [1970] AC 668 in the House of Lords, that the first and paramount consideration was the welfare of the child, bearing in mind, of course, the wishes and feelings and so on of the respective parents and other people concerned with the child, but always bearing in mind that the decision must rest in terms of the best interests of the child, having taken all these other factors into account. That is exactly as the judge put it.

The only possible criticism of his judgment, so far as the law is concerned, occurs – and I think this may be more a matter of expression than anything else – where he said:

'Prima facie (this is the next proposition, I would have thought), a parent should have access to his child.'



I would differ from that only to this extent: while it is a correct statement of the general practice, it is always a little dangerous in these cases when judges talk in terms of presumption and burden of proof. It leads to many very false conclusions if it is pressed too far. It is simply a statement of common sense that in the ordinary way, as society today is constituted, both parents should be in contact with their children, even if they have parted. It is no more than that and I would deprecate any idea that there is a presumption either way in these matters or an onus either way.

The other comment I would make on this part of the judgment is a sentence which I will not read out, but it leads me to think that it may well be that the judge's own personal view about this case does not, in fact, differ very much from the view that I shall be expressing in the course of this judgment. I rather think he found that his personal view was to some extent at odds with what he thought the law required him to do.

He then went on to consider the factual situation, having made his findings of fact, which I do not now repeat. He recorded in the judgment the submissions which had been made by Miss Platt on behalf of the mother, and by Miss Ritchie on the part of the Official Solicitor, which were that there should be no further access and that there should now be, in the peculiar circumstances of this case, a complete break between the father and this child. The main point put forward by counsel for the mother and the Official Solicitor was: 'Access can only trouble the mother and progressively the child also. It would endanger care and control all through the minority.' The background, they say, is such that the father should yield up the child completely to the mother. It shows him and his now wife to have been, and to be, 'unstable, unreliable, unsuitable and obsessive.' He noted the gulf between the respective environments of the father and the mother and the child which could only unsettle the child. There can be no doubt, in my judgment, that the judge was entirely justified in all those comments and they are very important factors in considering what the right conclusion should be on the question of access.

He recorded a comment by the grandmother of the child which has a ring of solid common sense about it. She said, when asked about the father and his present wife: 'Bearing in mind what they have done, whatever will they do next?' It seems to me a relevant question.

On the other hand, Mr Tatham submitted that his client is the father of the child and that overrides the extraordinary circumstances in which the child was conceived. The fact that he is the father of the child is an important fact, but the question that we have to ask, and the only question, is: Is it or is it not going to be in the interests of this child that there should be continued access by the father to him?

When the judge came to deal with this part of the case he read a passage from the judgment of Latey J in *M v M* [1973] 2 All ER 81, which dealt with adopted children and does not, with respect to the judge, seem to have very much application to the facts of this case. Latey J's observations are observations with which all of us would agree and with which all of us have agreed for many years. I do not think they add anything to the general principles of practice which are normally followed by this court.

But when the judge came to assessing the advantages to be obtained or derived by this child from continuing to see the father, his reasoning begins to break down. He did not, in fact, find any positive reasons, apart from

the mere fact of paternity, for continuing access, but I think that he felt obliged somehow, in the light of Latey J's judgment, to make an order for access in spite of, perhaps, his own natural inclination.

I can summarize the view to which I have come quite shortly. The question of access as between mother and child, and father and child, raises different considerations. There is always a close physical bond between mother and child which tends to get closer from the time of birth onwards for some considerable time and then, perhaps, to slacken off a little as the child gets older. The bond between father and child operates in the opposite direction. At first it is very slight indeed, but gradually, as association between father and child increases and lengthens in time, the bond becomes more and more real and lasts, sometimes, longer - not always. In this case we have a situation where there is no bond between the father and the child except the mere biological one. There has never been any association, except of the most exiguous character, between the father and the mother. There has never been anything between them except a sordid commercial bargain. The father has only had the intermittent contact provided by access to a very young child over the past year. He has been very assiduous in maintaining that access, bringing with him his present wife, whose role in this case, as I have said before, fills me with sympathy. What her position can be in that house during periods of access, I find very hard to imagine. Her emotions must be very mixed and I feel sorry for her.

But what is the future? The mother is 21. She is almost certain, given the chance and a little peace from litigation or the strain of access, to marry and set up a family of which this child will be part. By far the best thing that can happen to this child is that he should become a member of a family just like other children. This will give him as normal a life as possible. Of course, it is possible that the mother may not marry. There have been all sorts of suggestions in this case - all extremely to her detriment - which the judge rejected. He may have been wrong. One does not know. But, so far as the material before the court at present is concerned, it seems most probable that, given a reasonable chance, she will marry and have a family, and this child will have a reasonably normal family life. At the moment no one seriously criticizes the situation in which the child is being brought up. Her own mother is keeping an eye on the situation and, no doubt, will continue to do so.

The judge took the view - no doubt quite rightly - that it is almost inconceivable that this child should ever be handed over to the care of the father and his present wife, given the characters which the judge found them to have. So what is the good of keeping this wholly artificial, painful tie going? My answer is: No good will be done whatever. It may be gratifying in some ways to the father. I suppose, in some ways, it might be said that it will enable him to deal with his guilt sense, which I hope he has in regard to this case. But there are many other ways in which he can assuage his guilt. To my mind, to permit access to continue in the circumstances of this case is to perpetuate the most artificial situation that one can possibly imagine.

Speaking for myself, I do not find comparisons very useful, but if we are to make comparisons we might as well make them accurately. There is a world of difference between the father of an illegitimate child who has been living with the mother for 2 years or 6 months, and this case. There is some



difference, but not much, between this case and that of a man who gets a girl pregnant in a casual act of intercourse on the way home from a pub one-night. But such fathers do not, even in these days, often apply for access to their children and, when they do, they do not as a rule find a very sympathetic court. There is a slightly romantic notion about these days that even the most casual of fathers is better than none, but that is a matter on which I think there may be room for more than one view.

I can see absolutely no advantage to this child in continuing to be in contact with the father, except possibly a financial advantage to which I attach no significance whatever, in this case. If the father is to continue to turn up in the mother's house or to keep meeting her somewhere to take over this child, or to meet some member of her family to take over the child and return the child, the whole of this sordid story will be revived weekly or monthly as the case may be. The mother's position will be handicapped, and the handicapping of her position handicaps the child.

For the reasons which I have given, I feel the only sensible thing for the court to do in this case is to accept the facts. This was a wholly artificial situation from the very beginning which should never have happened and which no responsible adult should ever have allowed to happen. But, it having happened, the court has to do the best it can to pick up the pieces, and the best way to pick up the pieces is to let the mother lead as normal a life as it is possible for a girl of her age with a small boy to do, and to let her lead it without interference from an obsessive father who is still passionately anxious to get care and control of the child and who has shown in these proceedings a quite extraordinary determination. The fact that he should have made an ex parte application when this child was about 3 days old and to have succeeded in persuading a judge to leave the child with him is astonishing. It shows how dangerous ex parte orders can be and how careful judges should be before they make them. The final extraordinary aspect of this case is that, we are told, 3 days after the judge had given his judgment, in which he had made it clear that the most vital thing so far as this child's welfare was concerned was that the details of this child's conception should never be discussed with anybody connected with the child, the father applied to the court for leave to sell the story to the press in order to raise some money for the benefit of the child.

It is unnecessary to say any more. To my mind, that is the only possible solution. Therefore, in spite of the fact that the judge dealt with this case in the most careful manner, I find myself differing from his conclusion and I am satisfied that the exercise of his discretion was wrong, and it would be right for this court to interfere and to allow the mother's appeal and direct that there should be no access by the father henceforward.

**CUMMING-BRUCE LJ:** Modern legislation has had as one of its aims the elimination of the handicaps in society previously suffered by children who have not been born in holy wedlock, and the situation of a child born to a girl who is not married is now this: such a child is entitled, if the future of that child has to be considered by the court, to exactly the same sort of consideration as any other child and the accident of a child's generation is not now allowed to interfere with the way the court does its best to see that orders that are made are those that can best be applied to the interests of that child. The fact that in any given case generation of a child has been



achieved by what is described as AID, as compared to natural methods of conception, can have no effect upon the duty of a court to try to afford that child such a life as will best promote the child's welfare.

So, the fact that in this case the child happened to have been generated as a product of artificial methods, I would have thought, has very little to do with the case, but the circumstances in which that arrangement for artificial impregnation of the mother came into existence has a very great deal to do with the case. What happened was that a girl aged 19, who manifestly at the time was already involved in considerable troubles, was procured by a man and a woman years older than herself to take part in a kind of baby-farming operation of a wholly distasteful and lamentable kind. The fact that the motives of the promoters, as seen through their spectacles, were fine motives designed to satisfy the father's eagerness for parenthood, is neither here nor there. The arrangement which they persuaded this girl of 19 to take part in was a guilty bargain which should never have been made and, before the baby was born, the mother was having second thoughts. After the baby was born, that operation of nature which is familiar in the case of a good many mothers came to life with the baby, and the mother from that moment was determined not to part from her little boy. She was faced with a terribly upset father because she tried to back out of the arrangement.

As far as the care and control of the little boy is concerned, after a year of legal vicissitudes in which she can have had hardly any peace, at last she is told by the court that, for the present, the father is not pursuing any application to take the child away from her, so for the present she can look forward to a period during which she will continue to have care and control of the little boy. So far, I think, she has only lost him to the father for a period of 11 days, beginning 2 days after the baby's birth.

Now, a child may reasonably expect to benefit by the love, affection and practical care of a father and a mother, and that is just as true of a child whose parents are bound in holy wedlock (so far as that is still fashionable) as a child whose parents are not married at all.

Mr Tatham below and in this court has submitted on behalf of the father that the only criticism that can be levelled against him is that he is too eager to fulfil his parental role and duty. He is mad about his little boy. He is eager to put himself to a good deal of trouble to rush over from where he lives and works in order to rock the cradle and croon to the child, and he is eager, as the years pass, to play his part as the boy's father, being the only father that the boy happens to have. The bargain that he made was wrong. It was very unfortunate, but things are what they are and consequences will be what they will be. The consequence of it all is that there is a little boy in his cot, and here is his father who wants to maintain his interest in his son. As there is no other father, from the child's point of view that must surely be the right answer, and the judge thought it was the right answer.

The judge had the discretion to decide what, if any, access there should be, and this court must respect the judge's exercise of discretion unless it is shown to have been plainly wrong or based on misdirection of law. I cannot find in this very careful judgment any sign of any misdirection in law. What grounds can there be for this court to upset the exercise of discretion in a case in which the judge manifestly took an immense amount of trouble

and did his utmost to identify the factors?

For myself, I am satisfied that the way in which the judge exercised his discretion can be shown to be wrong in this way. In cases in which the parents are married or have been married and both the parents have been living with the children, perhaps for years, from time to time it is necessary for the court, in the interests of the children, first to decide which of the two parents, if they have fallen out permanently, shall have the care and control of the children (doing its best to keep the children together) and, secondly, having decided that, to decide whether there is any such serious reason connected with the future of the children as to entitle the court – indeed, impose a duty on the court – to cut the children off from one of the parents altogether. It does sometimes happen. When such an order is made, it is because the continued sporadic visits of the access parent to the home are likely to have such a disruptive effect, either on the children or on the parent who is bringing the children up and so is in direct contact, that the damage in effect totally outweighs all the benefits that the children can expect to derive from the contact and affection of the second parent.

In my view, this is such a case. It is not a case of the type one often finds, where the divorced husband is very bitter and turns up on Saturday nights and throws bottles of Guinness through the window of the matrimonial home and upsets everybody. It is a much subtler case than that, though essentially, to my mind, a simple case. This girl, the mother, has got herself into a terrible fix by acceding to the lamentable commercial transaction pressed upon her by this now married couple. She regretted it before the baby was born. She has regretted it bitterly ever since. It was an unusual, unattractive kind of transaction, and it is important in the interests of the baby that not only shall the baby never know about it but also that the mother, so far as possible, can put that chapter of her life behind her altogether. The vital thing is that, as she organizes her life in the future, she can feel that she can arrange her life with her son without the shadow of that mistaken episode from the past still casting its darkness upon her way of life. The court does not know how soon, if at all, she will marry. Naturally, the court does not know what is going to happen to the young lady or how she is going to decide to organize her life. But she must feel that she has the right, in spite of this mistake, to lead her own life untroubled by the feeling that anybody is looking over her shoulder, and certainly untroubled by repeated visits under the court order by the father of the little boy. He must still retain his obsessive interest in the boy, though he has temporarily abstained from a continued effort to take the boy away from the mother, but the mother must reasonably feel that, if the opportunity is afforded to him, he will be back in the attack and that, if he has reason and discovers something that he thinks might be used to her discredit, he might well try to seize her child again, as once for 11 successive days just after the birth he did.

In my view, the effect of the access ordered by the judge must, inevitably, be to introduce such a disruptive factor into the mother's emotional life that it is bound to have an adverse effect upon the boy. The boy's interest in this case is identified with the mother's interest, and the boy must be given a mother free from the threat of repeated confrontation with a man with whom she has never had any sort of relationship at all, save one of sordid pecuniary advantage. In my view, any advantage that the father



could confer on the child is wholly outbalanced and obviously outbalanced by the disadvantage to the child of being brought up by the mother, who is subject to such a dangerous and persistent reminder of an episode in her life which, though she will never forget it, must be kept as completely in the background as possible.

For those reasons, I am satisfied that this court is entitled to interfere with the way in which the judge exercised his discretion in relation to access, and to substitute an order that there should be no access.

**STAMP LJ:** I, too, for the reasons given by Ormrod LJ, entertain no doubt whatsoever that it is in the interests of the child, who was the centre of this ugly little drama, that he should not have his relationship with his mother disturbed in the future by the father.

I, too, would allow the appeal.

*Appeal allowed with costs.*

Solicitors: *T. V. Edwards & Co.* for the mother;  
*Levinson, Gray & Collins* for the father;  
*The Official Solicitor.*



COLLEGE ROYAL DES OBSTETRICIENS  
ET GYNECOLOGUES

## R A P P O R T

### du comité d'éthique sur la fécondation in vitro et le transfert d'embryon (1983)

#### **SUMMARY**

1. The Committee supports the use of IVF and ER within "marriage". Para 3.
2. The doctor should retain the right to refuse treatment if in his judgment, and after suitable consultation, it is inappropriate for a couple. Para 3.5.
3. Ova may be obtained for donor purposes by appropriate techniques. Para 4.
4. Such donor ova may be made available for fertilisation and implantation into suitable infertile "married" women. Para 5.
5. IVF and either ER or ET should be used for single women only in exceptional circumstances. Paras 6.2 and 6.3.
6. The Committee is opposed to the involvement of surrogate mothers in IVF and ET. Para 7.
7. An international register should be established. Para 8.
8. Consideration should be given to the follow up of children born following IVF and ER or ET. Para 10.
9. Cryostorage of embryos should be permitted for a limited time and for specified purposes. Para 11.
10. Embryo division should be permitted for specific uses. Para 12.
11. The MRC's advice on research is endorsed. Para 13.
12. The legal aspects of AID, IVF and ET are considered and preliminary recommendations made. Para 14.

## RAPPORT

### sur le statut de l'enfant naturel(1982)

#### **The policy of the law**

We are satisfied, for the reasons given above, that the law should provide that where a married woman has received A.I.D. treatment with her husband's consent, the husband rather than the donor should, for all legal purposes, be regarded as the father of a child conceived as the result; and that such a child should therefore not be "illegitimate".

It will be noted that his recommendation only relates to the legal position of an A.I.D. child born to a married couple. This limitation may be criticised for being inconsistent with the general tenor of the reforms we have proposed whereby the legal position of the non-marital child is equated with that of the marital child. But we think this is inescapable. Where the woman undergoing A.I.D. is living in a stable union with a man who is not her husband (whether she is herself married or not), the question whether that man should be permitted to become the father of the A.I.D. child by consenting to the treatment raises complex issues relating to the rights of unmarried cohabiting couples, which are outside the scope of this Report.



COMMISSION D' ENQUETE SUR LA FECONDATION  
ET L'EMRYOLOGIE HUMAINES (1984)

## RECOMMANDATIONS

### A. L'ORGANISME DE CONTROLE ET SES FONCTIONS

Nous recommandons que :

1. soit mise en place une nouvelle autorité officielle de contrôle afin de réglementer à la fois la recherche et les services de stérilité dont nous avons recommandé qu'ils soient soumis à agrément.
2. l'organisme officiel dispose d'une représentation importante de non-spécialistes afin de réglementer la recherche et les services de stérilité et que le président soit un non-spécialiste.
3. tous les praticiens proposant les services qui, selon nos recommandations, devraient fonctionner uniquement avec une habilitation, et tous les locaux utilisés pour cette activité, comprenant notamment la fourniture de sperme frais et les banques pour la conservation des ovules, du sperme et des embryons humains congelés, soient soumis à l'agrément de l'organisme de contrôle.
4. l'IAD soit autorisée, sur une base structurée de manière adéquate et sous réserve du régime d'autorisation présenté au chapitre 13, pour les couples stériles pour lesquels elle pourrait être indiquée et, en conséquence, que la prestation de services de l'IAD sans autorisation à cette fin soit considérée comme un délit.
5. la FIV continue à être proposée sous réserve du même type d'autorisation et de contrôle que ceux que nous avons recommandés concernant la réglementation de l'IAD (Cf Chap.4).
6. le don d'ovules soit accepté en tant que technique reconnue dans le traitement de la stérilité, sous réserve du même type d'autorisation et de contrôle que ceux que nous avons recommandés pour la réglementation de l'IAD et de la FIV.

7. en conséquence, la forme du don d'embryon comprenant du sperme et un ovule donnés et mélangés in vitro soit acceptée comme étant un traitement de la stérilité, sous réserve des mêmes types d'autorisation et de contrôle que ceux que nous avons recommandés concernant la réglementation de l'IAD, de la FIV et du don d'ovule.

8. la technique du don d'embryon par lavage ne soit pas employée pour le moment.

9. l'utilisation d'ovules congelés dans les processus thérapeutiques ne soit pas entreprise tant que les recherches n'ont pas montré qu'elle ne comporte aucun risque inacceptable. Ceci devra être examiné périodiquement par l'organisme de contrôle.

10. l'utilisation clinique des embryons congelés continue à être mise au point sous l'autorité de l'organisme de contrôle.

11. les recherches menées sur les embryons humains in vitro et la détention de ceux-ci soient soumises à agrément.

12. aucun embryon humain vivant provenant d'une fécondation in vitro, congelé ou non congelé, ne puisse être maintenu en vie sans être transplanté chez une femme au-delà de quatorze jours après la fécondation, et ne puisse être utilisé comme sujet de recherche au-delà de quatorze jours après la fécondation. Cette période de quatorze jours ne comprend pas toute la période pendant laquelle l'embryon peut avoir été congelé.

13. il soit nécessaire d'obtenir le consentement pour utiliser ou supprimer des embryons "surnuméraires".



14. à titre de bonne pratique qu'aucune recherche ne soit entreprise sur un embryon surnuméraire sans l'accord donné en toute connaissance de cause par le couple pour lequel l'embryon a été conçu, lorsque cela est possible.

15. lorsqu'elle est utilisée dans le cadre d'un programme reconnu de thérapeutique de la stérilité ou pour l'évaluation ou le diagnostic d'une hypofécondité, la fécondation entre-espèces soit soumise à autorisation et que cette autorisation soit accordée à la condition que le développement de tout hybride obtenu soit interrompu au stade de deux cellules.

16. l'organisme de contrôle soit chargé de vérifier la nécessité des études de suivi des enfants nés grâce aux nouvelles techniques, et notamment la nécessité d'un registre centralisé de ces naissances.

17. la vente ou l'achat de gamètes ou d'embryons humains soient autorisés uniquement avec l'accord de l'organisme de contrôle et sous réserve des conditions prescrites par celui-ci.

#### B. CONDITIONS DE PRESTATIONS

Nous recommandons que :

18. à titre de bonne pratique, toute tierce personne faisant don de gamètes pour un traitement de la stérilité ne soit pas connue du couple avant, pendant et après le traitement, et que réciproquement la tierce personne ne connaisse pas l'identité du couple auquel elle vient en aide.

19. la consultation d'un conseiller soit proposée à tous les couples stériles et aux parties tiers à tout stade du traitement, aussi bien comme partie intégrante du service offert par le NHS que dans le secteur privé.

20. dans le cas de formes plus spécialisées de traitement de la stérilité, le consentement par écrit des deux partenaires soit obtenu si possible avant le début du traitement, à titre de bonne pratique. Tout consentement écrit devrait être obtenu selon une formule de consentement adéquate.

21. à titre de bonne pratique qu'un consentement écrit officiel des deux partenaires soit toujours obtenu avant le début du traitement par IAD. Un formulaire de consentement serait utilisé et expliqué avec précision aux deux partenaires.

22. pour l'instant, le sperme d'un même donneur ne puisse être utilisé pour engendrer plus de dix enfants.

23. dans les cas où ils refusent le traitement, les spécialistes fournissent toujours au patient un exposé complet de leurs motifs.

24. les numéros NHS de tous les donneurs soient contrôlés par les cliniques où ils effectuent leurs dons à partir d'une liste des numéros NHS des donneurs existants, établie au niveau central et distincte du registre central NHS.

25. une évolution progressive vers un système dans lequel les donneurs ne seraient remboursés que de leurs propres frais.

26. les principes de bonne pratique que nous avons déjà envisagés à propos de ces autres techniques soient appliqués, notamment ceux concernant l'anonymat du donneur ou de la donneuse, la limitation à 10 du nombre d'enfants conçus à partir des ovules d'une même femme donneuse, l'information de l'enfant concernant ses origines génétiques, la possibilité de recevoir des conseils pour toutes les parties, et le consentement donné en toute connaissance de cause.

27. proposer des dons de gamètes et d'embryon à ceux qui risquent de transmettre des anomalies héréditaires soit une pratique acceptée.

28. en conséquence, tous les tests d'usage individuel libre permettant la détermination du sexe soient soumis au contrôle prévu par la Loi sur les médicaments afin de vérifier que ces produits sont sûrs, efficaces et d'une utilisation acceptable.

29. soit poursuivi l'emploi de sperme congelé pour l'insémination artificielle.

30. il y ait des contrôles quinquennaux automatiques des dépôts de sperme et d'ovules.

31. soit de dix ans la durée maximale pour la conservation des embryons, délai au-delà duquel le droit d'utilisation ou d'élimination reviendrait à l'organisme chargé de la conservation.

32. lorsque l'un des membres d'un couple décède, le droit d'utiliser ou d'éliminer tout embryon conservé par ce couple soit transmis au survivant. Nous recommandons, en cas de décès du couple, que ce droit revienne à l'organisme chargé de la conservation.



33. en cas de désaccord au sein du couple, le droit de décider de l'utilisation ou de l'élimination d'un embryon revienne à l'organisme chargé de la conservation, à l'expiration de la période de dix ans.

#### C. FONCTIONNEMENT DES SERVICES

Nous recommandons que :

34. des fonds soient alloués pour la collecte de statistiques adéquates sur la stérilité et les services de stérilité.

35. chaque département de santé évalue les moyens dont il dispose pour l'étude et le traitement de la stérilité, et envisage la création, en dehors des services de gynécologie classique, d'une clinique spécialisée dans le traitement de la stérilité, qui ait des relations de travail étroites avec des unités spécialisées, notamment des services de consultation génétique, au niveau régional et suprarégional.

36. lorsqu'il n'est pas possible de disposer d'une clinique séparée, les patients consultant pour une stérilité soient reçus séparément des autres patients "gynécologiques" lorsque cela est possible.

37. la création au niveau national d'un groupe de travail composé des services de santé centraux et régionaux ainsi que de ceux qui se consacrent à la stérilité, afin d'élaborer des directives détaillées concernant l'organisation des services.

38. il soit prévu d'inclure des programmes pour les services de stérilité dans le cadre de la prochaine série de programmes de développement des services de santé.

39. la FIV continue à être proposée dans le cadre du NHS.

40. l'une des premières tâches du groupe le travail dont la création est recommandée au 2.17, soit d'examiner la meilleure organisation possible pour un service de FIV dans le cadre du NHS.

#### D. LIMITES LEGALES IMPOSEES A LA RECHERCHE

Nous recommandons que :

41. l'embryon de l'espèce humaine bénéficie d'une protection légale.

42. toute utilisation non autorisée d'un embryon in vitro soit considérée en elle-même comme un délit.

43. à la majorité d'entre nous, la législation prévoit que des recherches puissent être entreprises sur tout embryon résultant d'une fécondation in vitro, quelle que soit sa provenance, jusqu'à la fin du 14ème jour après la fécondation, mais sous réserve de toutes les autres restrictions qui peuvent être imposées par l'organisme de contrôle.

44. soit considéré comme un délit le fait de détenir ou d'utiliser comme sujet de recherche, au-delà de cette limite, un embryon humain vivant provenant d'une fécondation in vitro .

45. aucun embryon ayant été utilisé pour la recherche ne soit transplanté chez une femme.

46. toute utilisation non autorisée de la fécondation entre-espèces comprenant des gamètes humains soit considérée comme un délit.

47. le transfert d'un embryon humain chez une autre espèce soit considéré comme un délit.

48. l'organisme de contrôle proposé publie des directives sur les types de recherche, autres que ceux interdits par la loi, qui ne seraient pas susceptibles en tout état de cause d'être jugés acceptables sur le plan éthique, et qui en conséquence ne seraient pas autorisés.

49. en conséquence, la vente ou l'achat non autorisé de gamètes et d'embryons humains soit considéré comme un délit.

#### E. MODIFICATIONS DE LA LEGISLATION

Nous recommandons que :

50. l'enfant né par IAD soit, en droit, considéré comme l'enfant légitime de sa mère et du mari de celle-ci lorsqu'ils ont tous deux consenti au traitement.

51. une modification de la législation afin que le donneur de sperme n'ait aucun droit ou devoir parental vis-à-vis de l'enfant.

52. en accord avec la "Commission du droit anglais", il soit présumé que, sauf preuve du contraire, le mari a consenti à l'IAD.

53. la législation soit modifiée de manière à permettre au mari d'être enregistré comme étant le père.

54. la législation prévoit que lorsqu'un enfant est né d'une femme à la suite du don d'un ovule par une autre femme, la femme ayant donné naissance à cet enfant soit considérée en droit à tous égards comme étant la mère de ce dernier et que la femme ayant donné l'ovule n'ait aucun droit ni obligation vis-à-vis de celui-ci.



55. la législation proposée au § 4.25 et au § 6.8. soit applicable aux enfants nés à la suite d'un don d'embryon (Cf.les recommandations 53 et 54).

56. la mise en place d'une législation qui rende passible de poursuites pénales la création ou l'activité au Royaume-Uni d'agences dont le but comprend le recrutement de femmes en vue d'une "grossesse de substitution" ou de couples qui souhaitent utiliser les services d'une mère porteuse ; cette législation devrait être assez large pour couvrir les organismes à but tant lucratif que non lucratif.

57. cette législation soit assez large pour rendre passibles de poursuites pénales les actes des membres des professions libérales et d'autres personnes qui aident en toute connaissance de cause à provoquer une "grossesse de substitution".

58. il soit prévu par la loi que tous les accords en vue d'une "grossesse de substitution" sont des contrats illégaux qui ne peuvent par conséquent être exécutés par les tribunaux.

59. en cas de décès d'une personne au cours de la période de conservation ou d'impossibilité de contact avec celle-ci à la date du contrôle, le droit d'utiliser ou d'éliminer ses gamètes congelés revienne à l'organisme chargé de la conservation.

60. soient prises des dispositions législatives qui prévoient que tout enfant né par IAC qui ne se trouvaient pas in utero à la date du décès de son père ne soit pas pris en compte aux fins de l'héritage et de la succession de ce dernier.

61. des dispositions légales soient prises pour qu'il n'existe pas de droit de propriété sur un embryon humain.

62. aux fins de déterminer la primogéniture, la date et l'heure de la naissance, et non la date de la fécondation, soient les facteurs déterminants.

63. par conséquent, la législation prévoit que tout enfant qui est né par FIV grâce à un embryon qui a été congelé et conservé, et qui n'était pas in utero à la date du décès de son père ne soit pas pris en compte aux fins de la succession et de l'héritage de ce dernier.

**Royaume Uni,  
Medical Research Council\***

**Directives pour la recherche  
concernant la fécondation  
humaine et l'embryologie**

**I.** Une recherche scientifique solide impliquant des expériences sur le processus et les produits de la fécondation in vitro entre des gamètes humains est acceptable sur le plan éthique et doit être autorisée, à une double condition toutefois qu'il n'y ait aucun dessein d'implanter dans l'utérus un embryon résultant de telles expériences et aussi que le but de la recherche soit clairement défini et se rapporte à des problèmes cliniques, comme la contraception ou le diagnostic différentiel et le traitement de l'infécondité et des maladies héréditaires.

**II.** Un consentement éclairé à la recherche impliquant des ovules ou des spermés humains doit être obtenu dans tous les cas par le donneur(s) : le sperme provenant de banques de sperme ne doit pas être utilisé à condition d'être recueilli et conservé spécifiquement dans un but de recherche. L'autorisation pour une telle expérience doit être donnée par les comités scientifiques appropriés et les comités d'éthiques locaux.

**III.** Lorsque des ovules humains ont été obtenus et fécondés in vitro dans un but thérapeutique et ne sont plus exigés pour ce but, il serait éthique de les utiliser pour une recherche solidement motivée, à condition toutefois d'avoir obtenu le consentement éclairé des deux donneurs.

**IV.** Les ovules humains fécondés avec du sperme humain ne devraient pas être cultivés in vitro au-delà du stade de l'implantation, et ils ne devraient pas être conservés pour une recherche non spécifique.

**V.** Bien qu'il ne soit pas toujours possible d'extrapoler des résultats du travail sur l'animal à la situation humaine, les études de gamètes et d'embryons animaux sont utiles pour élucider les risques potentiels de la fécondation in vitro et de l'implantation d'embryon. Des tests d'embryons animaux sur des modèles animaux appropriés sont nécessaires avant qu'on puisse affirmer que la congélation et la conservation de l'embryon ne nuit pas à la conception.

**VI.** Des études sur la fécondation par hybridation servent à fournir des informations sur la capacité de pénétration et sur la quantité chromosomique du sperme de mâles sous-féconds. Elles doivent être soutenues. On ne doit pas autoriser le développement d'ovules au-delà du stade de la première division.

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\* *British Medical Journal*, 285, 20 novembre 1982.  
*The Medical research Council Advisory group.*



MINISTERE DE LA SANTE ET DE LA SECURITE SOCIALE

GUIDELINES FOR DOCTORS AND AI CLINICS  
(1986)

1. All potential donors should read the pamphlet 'Important Information for Semen Donors' before interview and agree to sign the consent form.
  
2. All donors should be tested for HTLV III/LAV antibody. As a positive HTLV III antibody test has serious implications, counselling of donors prior to carrying out the test is essential and further counselling must be offered if the test proves positive. If the test is negative, semen can be collected and stored (frozen). It should not, at this stage, be used for treatment.
  
3. All donors who are negative on preliminary testing should have a repeat antibody test for HTLV III/LAV after an interval of three months from the initial test. If the repeat test is negative:-
  - (a) the donor's previously stored semen can be used for treatment provided it has fulfilled the three months quarantine requirement
  
  - (b) if the clinic has no facilities for using stored semen, then fresh semen from the tested donor may be used. In such circumstances the risks of using this material must be explained to the patient and she and her partner must agree to such a treatment option. If there is an objection to the use of fresh semen then the couple should be referred to a clinic which has appropriate facilities for using frozen semen.
  
4. Further testing for HTLV III/LAV antibody should be performed at three monthly intervals for as long as the donor continues to attend the clinic and stored semen from this individual should only be released if the test is found to be negative and the stored semen has undergone the three months quarantine. If fresh semen is used, then the donor should have further testing for HTLV III/LAV antibody at monthly intervals and the result of tests should be available and found to be negative before further donations of semen are used for treatment.
  
5. Stored semen should not be used from donors who cannot be traced and checked for antibodies to HTLV III/LAV.



DEPARTMENT OF HEALTH AND SOCIAL SECURITY

To: The Chief Executive  
Non-Metropolitan County Councils )  
Metropolitan District Councils ) in England )  
London Borough Councils )  
The Common Council of the City of London ) for action  
Council of the Isles of Scilly )  
Directors of Social Services )  
  
Secretaries of approved adoption societies )  
National Council of Voluntary Child Care Organisations )  
Regional Health Authorities )  
District Health Authorities ) for information  
Special Health Authorities for the London Post-Graduate )  
Teaching Hospitals )  
Family Practitioner Committees )

3 May 1985

Dear Sir

RESPONSIBILITIES OF LOCAL AUTHORITY SOCIAL SERVICE DEPARTMENTS  
IN SURROGACY CASES

SUMMARY

The Government has introduced a Bill to make illegal commercial surrogacy agencies and the advertising of surrogacy services. When a baby is born as a result of a surrogacy arrangement, whether or not an agency has been involved, local authorities will need to consider whether the infant may be at risk. This circular reminds authorities of relevant legal provisions and the recent High Court judgment in the Baby Cotton case, to which they should have regard in these circumstances.

SURROGACY ARRANGEMENTS

1. For the purposes of this circular, a surrogacy arrangement is one in which a woman, whether for payment or not, has agreed to become pregnant with a view to handing over the baby to another couple, usually the child's father and his wife.

LOCAL AUTHORITY RESPONSIBILITIES

2. Where an authority knows that a baby has been, or is about to be, born in its area as a result of a surrogacy arrangement it will wish to make enquiries, particularly in the absence of information about the parties, so as to be satisfied that the baby is not, or will not be, at risk as a result of the arrangement. The authority's response should accordingly be the same as it would be in any other situation where it believes there is a possibility that a child may be at risk. These enquiries may need to cover the circumstances of the mother and of the couple wishing to receive the baby. Where, as a result of its enquiries, the authority believes the baby may be at risk or has been unable to satisfy itself in the time available that this is not the case, it will then need to consider what action to take, including the possibility of recourse to the Courts, in order to safeguard the welfare of the baby.

LEGAL ACTION

3. In an emergency, a local authority may apply to a justice for a Place of Safety Order under section 28(1) of the Children and Young Persons Act 1969 provided that it has reasonable cause to believe that one of the conditions necessary for such an order is met. An alternative approach, not requiring any specific statutory ground to be shown and which may be appropriate for surrogacy arrangements, is to issue a wardship summons. Annex A provides an extract from the judgment of 14 January 1985 in the High Court by Mr Justice Lately in the Baby Cotton case in which he commends the use of wardship in "unusual and complex" cases of that kind.



4. A wardship summons may be issued by some other person who has an interest in the child, for example, the father, before a local authority is able to act. The local authority should then consider whether it should apply to be joined as a party in the proceedings and, at the same time, apply to the Court to give interim directions for the care and control of the child if this has not already been done.

5. The High Court can give directions for information to be collected and reports made. In cases concerning infants it will want to reach decisions as quickly as possible. To that end it will help the Court if the local authority has already made or begun the necessary enquiries before issue of the wardship summons. The Court is likely to want as much information as possible about the persons seeking custody of the child. The authority should also report wherever possible on whether the arrangement between the parties provides for any payments to the surrogate mother or to any agency or third party involved in the arrangements. This may have a bearing on any subsequent adoption application.

6. Staff dealing with surrogacy cases will need to keep in mind the main statutory provisions concerning the custody of illegitimate children and the legal prohibition on the making of a payment or reward for the transfer of actual custody of the child with a view to adoption. These are set out in Annex B.

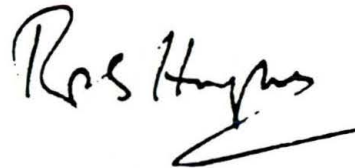
#### **PUBLICITY**

7. Local authorities should consider, according to the circumstances of the case, what steps may be necessary to safeguard confidentiality and handle Press enquiries, so as to protect the anonymity of the child and others who are involved.

#### **ACTION**

8. Authorities should ensure that this circular is drawn to the attention of staff who may be involved in handling cases where surrogacy arrangements are involved.

Yours faithfully



**R P S HUGHES**  
Child Care Division 2

#### **From:**

**Child Care Division 2B  
Department of Health and Social Security  
Alexander Fleming House  
Elephant and Castle  
LONDON SE1 6BY**

**Tel. 01-407 5522 Ext 7865**

**ZEN/46**

Further copies of this Circular may be obtained from DHSS Store, Health Publications Unit, No. 2 Site, Manchester Road, Heywood, Lancs OL10 2PZ quoting code and serial number appearing at top right-hand corner.

## AVIS

### donné à la commission d'enquête sur la fécondation et l'embryologie humaines (1983)

#### **SUMMARY**

- (i) Research into human fertilization and embryology may have one of the following purposes:
  - the improvement of IVF as a therapeutic procedure for the overcoming of certain kinds of infertility;
  - the extension of the IVF procedure so as to advance understanding of infertility and to tackle the problem of inherited genetic disease;
  - the acquisition of basic knowledge of human development and its disorders.
- (ii) There is a very considerable variation in the embryology of even closely related species. Although work on non-human species is of great value, accurate knowledge of human embryology ultimately can come only from work on human material.
- (iii) In all work with human embryonic material (eggs, sperm, fertilized eggs, early embryos), it is essential to maintain a rigorous distinction between material obtained for therapeutic purposes, which may be reimplanted in a patient, and material obtained for research purposes, which may *under no circumstances* be reimplanted.
- (iv) The consent in principle of the donor should always be obtained before human embryonic material is used for research purposes.
- (v) The development from early embryo through to fetus is a gradual and continuous process. The acceptability of particular experiments at various stages of this development is a question best handled by local ethical committees. In determining the duration of experiments, such committees should take account of whether maintenance in culture of normal embryonic organization is intended and of the value of the knowledge, for example about the teratogenic effects of viruses or drugs, that the experiments might yield.
- (vi) Generally, a degree of flexibility is advocated in the regulation of work on human fertilization and embryology.

### **Recommendations (1987)**

1 The Authority has recommended to its sponsoring bodies that it should continue until the Government has established an appropriate national body to advise on the issues relating to research on pre-embryos and IVF.

2 The Authority would recommend continued support for well-organised and well-documented research. Such research is needed both to improve the clinical efficacy of IVF and to develop new approaches to infertility and contraception; to develop efficient and accurate methods of pre-implantation diagnosis and to gain a better understanding of early human development.

3 Legislation is required to define the permissible limits to the use of IVF. Some centres are reluctant to undertake further development of clinical programmes or to initiate research projects until legislation has been enacted.



# Guidelines for both Clinical and Research Applications of Human *In Vitro* Fertilisation

(New guidelines and modifications to those published in 1986 are shown in bold type)

## Introduction

The purpose of these Guidelines is to set out the principles which the Joint Medical Research Council/Royal College of Obstetricians and Gynaecologists Voluntary Licensing Authority believes should guide those whose clinical practice or research involves the use of *in vitro* fertilisation with human gametes. They have been based on the recommendations of the 'Committee of Inquiry into Human Fertilisation and Embryology' under the Chairmanship of Dame Mary Warnock (the Warnock Committee), the Medical Research Council Statement on 'Research Related to Human Fertilisation and Embryology' (MRC Statement) and the 'Report of the RCOG Ethics Committee on *In Vitro* Fertilisation and Embryo Replacement or Transfer' (the RCOG Ethics Committee Report).

During their discussions the VLA considered it was important to define the term 'pre-embryo' used in these Guidelines. The term 'embryo' has traditionally been used to describe the stage reached in development where organogenesis has started, as shown by the appearance of the primitive streak and the certainty that thereafter a single individual is developing rather than twins or a hydatidiform mole, for example. To the collection of dividing cells up to the determination of the primitive streak we use the term 'pre-embryo'.

## Background

After many years of medical research the birth of the first child resulting from the technique of *in vitro* fertilisation took place in July 1978.

The Government established in 1982 the Warnock Committee and its Report was published in July 1984.

One of the recommendations made by the Warnock Committee was that urgent action be taken to control work involving *in vitro* fertilisation. Recognising that appropriate legislation would not be enacted immediately the Medical Research Council and the Royal College of Obstetricians and Gynaecologists agreed to set up a Voluntary Licensing Authority for Human *In Vitro* Fertilisation and Embryology (VLA) as an interim arrangement until the Government introduced a statutory licensing scheme.

As its first task the Joint MRC/RCOG VLA has prepared Guidelines which are consistent with the recommendations made by the Warnock Committee together with the MRC Statement and the RCOG Ethics Committee Report.

When preparing these Guidelines the Authority, in addition to referring to reports from various expert committees, was aware of the deep public concern that has been expressed about some aspects of *in vitro* fertilisation and the ethical and moral issues that the application of the technique has raised.

The Authority has agreed that soundly based clinical practice involving *in vitro* fertilisation should proceed and it should be regarded as a therapeutic procedure covered by the normal ethics of the doctor:patient relationship.

It has also been agreed that scientifically sound research involving *in vitro* fertilisation—where there is no intent to transfer the pre-embryo to the uterus—should be allowed to proceed if its aims are clearly defined and acceptable.

The Authority will consider research projects on a case by case basis but certain types will not be approved, e.g. modification of the genetic constitution of a pre-embryo: the placing of a human pre-embryo in the uterus of another species for gestation: cloning of pre-embryos by nuclear substitution.

#### Guidelines.

- (1) Scientifically sound research involving experiments on the processes and products of *in vitro* fertilisation between gametes is ethically acceptable, subject to certain provisions detailed in Sections 2-10 below.
- (2) Any application made to the Authority must give reasons why information cannot be obtained from studies of species other than the human.
- (3) The aim of the research must be clearly defined and relevant to clinical problems such as the diagnosis and treatment of infertility or of genetic disorders, or for the development of safe and more effective contraceptive measures.
- (4) Pre-embryos resulting from or used in research should not be transferred to the uterus, except in the course of clinical research studies designed to enhance the possibility of establishing a successful pregnancy in a particular individual.
- (5) Suitable signed consent to research involving human ova and sperm should be obtained in every case from the donors; sperm from sperm banks should not be used unless permission for its use in research has been obtained from the donor. Approval for each project should be obtained from the local ethical committee prior to seeking approval from the VLA.
- (6) When human ova have been obtained and fertilised *in vitro* for a therapeutic purpose and are no longer required for that purpose it would be ethical to use them for soundly based research provided that the signed consent of both donors was obtained, subject to the same approval as in the preceding section.
- (7) Human ova fertilised with human sperm should not be cultured *in vitro* for more than 14 days excluding any period of storage at low temperature (see Section 8) and should not be stored for use in research other than that for which local ethical committee and VLA approval has been obtained.
- (8) Where a pre-embryo has been preserved at low temperature, whether donated for research purposes at the time of preservation or subsequently, it may continue to be grown to the equivalent of 14 days' normal development provided that approval has first been obtained from the local ethical committee and the VLA. Storage of individual pre-embryos at low temperature should be reviewed after **two years** and the maximum storage time should be ten years.
- (9) The means of disposal of the pre-embryo should be carefully considered before the start of each project. At the end of a study steps must be taken to stop development of the pre-embryo and the appropriate disposal must be considered in discussion with the local ethical committee and details given to the VLA. The means of disposal will depend on the nature of the particular study that the pre-embryo has been used for. In view of the scarcity of the material, it would be inappropriate to discard any pre-embryo without thorough examination.
- (10) Studies on the penetration of animal eggs by human sperm are valuable in providing information on the penetration ability and chromosomal complement of sperm from subfertile men and are considered ethically acceptable provided that development does not proceed beyond the early cleavage stage.
- (11) The clinical use of ova stored at low temperatures, involving subsequent *in vitro* fertilisation should not proceed to transfer to the uterus until such time as scientific evidence is available as to the safety of the procedure.



- (12) Consideration must be given to ensuring that whilst a woman has the best chance of achieving a pregnancy the risks of a large multiple pregnancy occurring are minimised. For this reason:
- (a) if the IVF procedure is used no more than three pre-embryos should be transferred in any one cycle, unless there are exceptional clinical reasons when up to four pre-embryos may be replaced per cycle,
  - (b) if the GIFT procedure is used no more than three or exceptionally four eggs should be introduced to the fallopian tubes.
- (13) The following general considerations must be taken into account when establishing clinical facilities where *in vitro* fertilisation or GIFT is carried out:
- (a) each centre should have access to an ethical committee\*, and no procedure should be undertaken without the knowledge and consent of the ethical committee,
  - (b) detailed records should be kept along the lines recommended in the Warnock Committee Report, and should include details of the children born as a result of *in vitro* fertilisation; the records should be readily available for examination by duly authorised staff and for collation on a national basis for a follow-up study,
  - (c) where the director either does not have accredited consultant status, or the equivalent, or is a non-clinician full clinical responsibility must be assumed by a Consultant Adviser who takes an active role in overseeing the centre's treatment protocols and emergency procedures; all other medical, nursing and technical staff must have appropriate experience and training,
  - (d) specialist medical, surgical and nursing facilities appropriate for the specific techniques used for the treatment should be available,
  - (e) arrangements for emergency treatment should be made,
  - (f) there must be adequate arrangements, where appropriate, for the transfer of gametes and pre-embryos between clinical facilities and the laboratory;
  - (g) centres should have appropriate counselling facilities with access to properly trained independent counselling staff,
  - (h) all patients entering an IVF programme should be tested for hepatitis B and HIV antibodies,
  - (i) donor sperm should be obtained only from a bank where all appropriate screening tests are undertaken including those recommended by the DHSS AIDS Booklet 4, *AIDS and Artificial Insemination — Guidance for Doctors and AI Clinics* (CMO (86) 12),
  - (j) egg donors should remain anonymous and for this reason donation for clinical purposes from any close relative should be avoided.
- (14) The following general considerations must be taken into account when establishing laboratory facilities where *in vitro* fertilisation is carried out:
- (a) each centre should have access to an ethical committee (see footnote to para 13(a)),
  - (b) detailed records should be kept and should be readily available for examination by duly authorised staff,

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\*Refer to the Royal College of Physicians of London's 'Guidelines on the Practice of Ethics Committees in Medical Research'—revised edition November 1984—for details of appropriate committee structure. The Chairman of an ethics committee should have no financial interest in the centre for which that committee is responsible.



- (c) laboratory staff must have appropriate experience and training in the techniques being used,
- (d) laboratory conditions must be of a high standard (e.g. good culture facilities, facilities for microscopic examination, appropriate incubators and training in 'non-touch' techniques),
- (e) where gametes and pre-embryos are cultured and stored there must be a very high standard of security and of record keeping and labelling.

## **Recommendations (1986)**

1 The VLA should continue to operate until the Government has established an appropriate national body to advise on the issues relating to research on pre-embryos and IVF.

2 In order to improve IVF for clinical purposes, urgent research involving the use of pre-embryos to determine the nutritional requirements necessary for optimum growth should be continued.

3 Before pre-embryo freezing becomes widely established, further work on the conditions and safety of the technique should be done.

4 The many difficult ethical issues relating to the clinical use of frozen pre-embryos need further consideration before the technique becomes more widespread.

5 In the interests of all concerned, consent forms should be used; an example is provided in *Annex 4*.

6 Each centre should formulate a policy regarding the number of pre-embryos to be transferred. The Authority recommends that no more than three pre-embryos should be transferred in each cycle, unless there are exceptional clinical reasons, when up to four pre-embryos may be replaced per cycle.

7 Centres should have a written policy stating how they will dispose of 'spare' pre-embryos. The Authority recommends that these pre-embryos should be disposed of by exposure to air, water, alcohol or heat.

8 Legislation is required to define the permissible limits to the use of IVF. Some centres are reluctant to undertake further development of clinical programmes or to initiate research projects until legislation has been enacted.

9 Laboratory studies should be undertaken to determine the importance of certain factors such as light, incubation conditions and the sterility of working conditions in the development of the pre-embryo. Studies are also required to identify the best incubation media for the growth of pre-embryos and the appropriate quality control criteria that should be applied to the growth media.

10 IVF centres offering egg recovery on a day-care basis should ensure that patients are supervised on discharge from the centre and that they have the telephone number of the person to contact should an emergency develop.

11 IVF treatment should not be commenced as a clinical service unless adequate financial and other support is available in order to give patients a reasonable chance of success.

# Guidelines for both Clinical and Research Applications of Human *In Vitro* Fertilisation

## Introduction

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### **Guidelines**

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- (3) The aim of the research must be clearly defined and relevant to clinical problems such as the diagnosis and treatment of infertility or of genetic disorders, or for the development of safe and more effective contraceptive measures.
- (4) Pre-embryos resulting from or used in research should not be transferred to the uterus, except in the course of clinical research studies designed to enhance the possibility of establishing a successful pregnancy in a particular individual.
- (5) Suitable signed consent to research involving human ova and sperm should be obtained in every case from the donors; sperm from sperm banks should not be used unless permission for its use in research has been obtained from the donor. Approval for each project should be obtained from the local ethical committee prior to seeking approval from the VLA.
- (6) When human ova have been obtained and fertilised *in vitro* for a therapeutic purpose and are no longer required for that purpose it would be ethical to use them for soundly based research provided that the signed consent of both donors was obtained, subject to the same approval as in the preceding section.
- (7) Human ova fertilised with human sperm should not be cultured *in vitro* for more than 14 days (the end of the implantation stage in normal pregnancy), excluding any period of storage at low temperature (see Section 8) and should not be stored for use in research other than that for which local ethical committee and VLA approval has been obtained.
- (8) Where a pre-embryo has been preserved at low temperature, whether donated for research purposes at the time of preservation or subsequently, it may continue to be grown to the equivalent of 14 days' normal development provided that approval has first been obtained from the local ethical committee and the VLA. Storage of individual pre-embryos at low temperature should be reviewed after five years and the maximum storage time should be ten years.
- (9) The means of disposal of the pre-embryo should be carefully considered before the start of each project. At the end of a study steps must be taken to stop development of the pre-embryo and the appropriate disposal must be considered in discussion with the local ethical committee and details given to the VLA. The means of disposal will depend on the nature of the particular study that the pre-embryo has been used for. In view of the scarcity of the material, it would be inappropriate to discard any pre-embryo without thorough examination.
- (10) Studies on the penetration of animal eggs by human sperm are valuable in providing information on the penetration ability and chromosomal complement of sperm from subfertile men and are considered ethically acceptable provided that development does not proceed beyond the early cleavage stage.
- (11) The clinical use of ova at low temperatures, involving subsequent *in vitro* fertilisation and transfer to the uterus, should not proceed until such time as scientific evidence is available as to the safety of the procedure.

- (12) The following general considerations must be taken into account when establishing clinical facilities where *in vitro* fertilisation is carried out:
- (a) each centre should have access to an ethical committee<sup>4</sup>,
  - (b) detailed records should be kept along the lines recommended in the Warnock Committee Report, and should whenever possible include details of the children born as a result of *in vitro* fertilisation; the records should be readily available for examination by duly authorised staff and for collation on a national basis for a follow-up study being organised by the MRC and conducted by Dr V Beral,
  - (c) medical, nursing and technical staff must have appropriate experience and training,
  - (d) specialist medical, surgical and nursing facilities appropriate for the specific techniques used for the treatment should be available,
  - (e) arrangements for emergency treatment should be made,
  - (f) there must be adequate arrangements, where appropriate, for the transfer of gametes and pre-embryos between clinical facilities and the laboratory.
- (13) The following general considerations must be taken into account when establishing laboratory facilities where *in vitro* fertilisation is carried out:
- (a) each centre should have access to an ethical committee (see footnote to para 12(a)),
  - (b) detailed records should be kept and should be readily available for examination by duly authorised staff,
  - (c) laboratory staff must have appropriate experience and training in the techniques being used,
  - (d) laboratory conditions must be of a high standard (e.g. good culture facilities, facilities for microscopic examination, appropriate incubators and training in 'non-touch' techniques),
  - (e) where gametes and pre-embryos are cultured and stored there must be a very high standard of record keeping and labelling.