Reproductive Technology- Who Owns What?

by

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An address delivered at a meeting of the Medico-Legal Society
at the Australian Club held on 7 May 1999.
The Chairman of the meeting was Dr. Gabriele Medley.

DR MCBAIN. We live in changing times; mum, dad and the kids is still the bulwark of our society, I would suggest, but there are differences, there are secular changes a' foot which would shock our parents and our grandparents and indeed, probably shock some of us. But it is all changing and we have to understand why it is changing and what it is changing into, and the people who are agin' it, and why.

The Infertility Treatment Act of 1995 was meant to be an improvement of the Infertility Medical Procedures Act of 1984. The reason we have an Act at all, I believe, is that the Government and particularly the Cabinet was a bit sniffy about the advances in reproductive medicine and it thought it would have an advance as well. It came up with the pioneering law which would regulate reproductive medicine and we had to live with that until 1995 when it was repealed in favour of this new Act. And this new Act, the first thing any of the great number of top specialists in the Monash group at the Mercy Hospital for Women and the Royal Women's Hospital in Melbourne IVF heard about this, was in its second reading speech, when it was set in concrete and not a single thing could be done about it. The unfair thing the Government then did was to make the Act policed by some particularly nice people. Louis Waller, I know is a great man in the legal community and as a great man, requires and gets respect. So for us it's a case of love the sinner, hate the sin.

I want to run through a number of things in contention; what are the things that one might own and who are the potential owners and what are the permutations? Not in too sensational a way but to highlight some of the dilemmas which we face every day in reproductive medicine. This Act came up with some guiding principles for the community and for the community of reproductive medicine specialists. They are very proud that they have an Act which regulates the provision of infertility services and research into infertility. And the authority's role in regulation and administration of these matters is governed by what it calls four guiding principles which are contained in the Act. And this is an Act which was set up to discriminate. This is an Act which was set up in the full knowledge of the Commonwealth Equal Opportunity provisions. This is an Act which has been set up wilfully by the Victorian State Government, and is still there.

It takes into account these four important things; the welfare and the interests of any person born or to be born as a result of a treatment procedure are paramount. There are now two different types of people being conceived, there are the people without any protection, in normal

intercourse at 3 a.m. in King Street, coming out of a nightclub, between people who have never met before. This reminds me of the Glasgow midwife who, delivering Mrs McGillicuddy of her large, redheaded infant said, "What a lovely bairn with its lovely red hair. Was his father red-headed?" She said, "I don't know, he never took his bonnet off" - so these things have been going on for quite some time. Then there are special people; the people who are conceived through infertility treatment. Now, the authority's view is that "Human life should be preserved and protected." Of course it should be preserved and protected. Who is going to say "No, human life shouldn't be preserved and protected"? That is a guiding principle number two. Now, no-one tells the people in the various major institutions and private clinics who perform 80,000 pregnancy terminations a year that there is a guiding principle that says human life ought to be preserved and protected. And they go to some substantial trouble and pain to protect and preserve the life of a one, two or four cell embryo but are blinkered to the other things which happen as part of our everyday life.

"The interests of the family should be considered." This is principle three. This is the sort of Act which, until something overturned it, still thought in 1995 that de facto relationships weren't good enough, weren't solid enough, even though they make up 20 or 25 per cent of relationships in Victoria, to allow access to in vitro fertilisation technologies using the man's gametes and the woman's gametes, his sperm and her eggs.

"Infertile couples should be assisted in fulfilling their desire to have children." That is point four. And this is to be read in descending order of importance. This is to promote the better understanding, the improvement in the lot of the infertile couple.

I know that Max Haverfield is here and Mac Talbot and some of my good mates in reproductive medicine and gynaecology, but for those of you who don't know very much about reproduction, here are some of the actors in the drama about to unfold. Here are the testes where the sperm is stored. This is a penis and the sperm coming all the way through this to the point of ejaculation are his, but after that point of ejaculation these abandoned sperm, to whom do they belong? And here is the spermatozoa itself, a micro-organism if ever there was one, but one with vitality and life, which can exist within the female reproductive tract for up to seven days. It usually doesn't but it may. And here are the other actors, the vagina, the uterus, the fallopian tubes and the ovaries. The ovary is the reservoir and the source of the

woman's gametes, that's where her eggs are ripened and released. The fallopian tube is where fertilisation takes place.

The ovary contains follicles at varying stages of maturity. The ten-week female foetus safely inside her mother has 8 million eggs or follicles. By the time she's born she's lost her first 6 million. She only has 2 million and by the time she's 13 and starting to menstruate she's down to 300,000. By the time she's 40, still having regular periods but infertile, she's only got 20,000 left. By the time she's 55 and menopausal for five years, she's still perhaps got about 1,000 follicles deep and inactive within the ovary. When we store pieces of reproductive tissue, when we store ovarian slices for young women about to undergo life saving hopefully, but fertility destroying chemotherapy or radiotherapy, it is these early primordial and smaller follicles which we store. When we take an egg from a mature follicle and store it in liquid nitrogen because the woman doesn't have a partner, these are not successful things to do; they are punts against future developments. These are not part of technology, these are what young women hope the technology will be able to deliver for them some time over the next 10 years when they're alive, well, and hoping to conceive with their stored gametes or ovaries. They hope we will be able to turn on the clock for their further development.

We talk about the fertilisation process that turns an egg into a fertilised egg and then into an embryo - embryo comes from a Greek combination of words which give the meaning to grow and swell. It was terribly important to the Victorian legislature some years ago when it wrestled with its conscience that it could possibly - allowing that 80,000 terminations of pregnancy a year to take place, allow a biopsy or a destructive test on a four cell human embryo. It was all right because they had not as yet fused. It was like a boy and a girl sitting - well, maybe the sperm of where the boy and girl were sitting at the opposite sides of the room at the school dance, when they approach to ask each other for a dance or the girl goes to ask a boy for the dance, that's where the sperm is in that way. Who knows what happens after that?

These are the things which may be owned by other people. I am talking about Victoria now; I'm not talking about anywhere else in the world. We are Victorians; we have to find solutions for Victorians. A couple involved in reproduction under the Infertility Treatment Act must be male and female and they must be a couple. They could be a donor couple who are giving their embryos to another couple, they could be a woman who is giving her egg to a couple, they could be a man who is giving his sperm to a couple, male and female. They could

be the donor woman who is giving her egg, and her spouse, the donor man and his spouse - "spouse" is now a de facto by the way, and the spouse is not the person who he was with at the time when the decision was made. "Spouse" is who he is with now; for how long doesn't seem to matter.

The other potential owners are the State, the courts, the church, the hospital and business. And the things that may be owned in reproduction are the vagina, the uterus, the fallopian tubes and the ovaries. Somatic cells must come into that list nowadays because if cloning is going to take off, one of the things which will go into reproduction will be a somatic cell; it may be from the buccal mucosa, it may be from anywhere. I don't know where it's going to be from, even a scraping of a fingernail or something like that. The more conventional ones, the oocyte, the embryo, the foetus and the newborn are also on the list. Where do we say that's enough? How far do we go? That is for another day however. The man owns the penis, the testes. No-one has ever, I think, contested the ownership of the prostate. He owns the spermatozoa and his own somatic cells too.

The woman clearly owns her vagina. Now, the lawyers will have to tell me, what does ownership imply? Ownership means licence to - yes, you can use it, but in Victoria she requires a permit to benefit materially from it; her use is regulated, in that way. She can evict the occupant at short notice. It is almost like property law in that sense because she can withdraw consent at any time. But if she fails to withdraw that consent, if consent continues up to the point of ejaculation and he abandons his sperm within her vagina, who owns them? Let us say that she is a really good-looking sort who can act as an agent for less good-looking sorts to get spermatozoa ejaculated into her which she will then take to some rogue reproductive medicine clinic, out of Victoria of course, where the sperm will be taken, and each sperm potentially used to develop an embryo.

I shouldn't pause too long on that, I'm sure I'll give the ITA some ideas on how they can further regulate coition. If he ejaculates into a condom, does it make any difference if he owns the condom or she owns the condom? If, seriously, they are a religious couple, she doesn't have complete ownership of her vagina because she may be required to provide conjugal rights. And I understand that up until the Federal Family Law Act, a woman was required to provide conjugal rights or be looked upon unfavourably in the courts at the time of a divorce settlement.

The woman owns her uterus and its contents, and she owns it up to 20 weeks gestation at least. No-one can force her to have a termination of pregnancy. No-one can stop her from having a termination of pregnancy, at least up until 20 weeks. I am not suggesting that this is a thing that a woman would do whimsically, but if a woman is determined to have a pregnancy termination, up until 20 weeks in Victoria, she'll get it and no-one will stop her doing it. After that it's a different thing and all other sort of forces come into play. Once the foetus is born, it enjoys a protection which is given to each of us. She may not use her uterus commercially, in Victoria. Overseas she may. She may dispose of that uterus whenever she likes, whenever she can talk some gynaecologist into it unless she has the misfortune to be subject to the Guardianship Board and she may then wilfully menstruate all over the house without the parents being able to get the Guardianship Board to agree to her having a hysterectomy.

The woman owns her fallopian tubes. But at the Women's Hospital and most other places, we like the consent of the husband. We don't have to have it but we are a bit snippy about it if it's not there. The woman owns the ovary. She may have bits of it taken off and frozen as she chooses and these bits are discarded when she dies. The woman owns the oocyte until she gives it to another woman and then that woman owns it once it becomes fertilised with her husband's sperm. It can be stored and held by the hospital or a clinic but a storage fee would apply. Now, if she had it stored by a hospital or clinic and wanted to stop paying the storage fee, it's a considerable amount, $120 a year, can we discard it? It is her property and she is being miscreant and delinquent in not fulfilling her side of the bargain. Or is there something special about genetic reproduction or female reproduction?

The embryo belongs to the man and woman for whom it has been developed. Who knows what happens to it, who it belongs to when it is in the fallopian tube? It belongs to her, of course it does, and she can do what she likes with it. But if the couple asked for infertility help through reproductive medicine, in particular *in vitro* fertilisation, the eggs, which have been fertilised by sperm and turned into these early embryos, are surely owned by the man and the woman. If they separate, in Victoria, and the man says she can't have her embryo back, then she can't have that embryo back because he can withdraw his consent. She may have been 36 when she had it made, now at 39 she wants to use it and he says, "No, you can't have that one, you'll have to have some others", but she doesn't have any others because her ovaries have stopped working efficiently at that age and it's not going to work for her.

The embryo may be donated to another man or a woman. This is a new thing; I believe it is one month old. In the past, if the embryo was made with the woman's eggs and with sperm from a donor because her husband had no sperm, and if that embryo was stored because the first treatment had been successful and the woman had one or two children, and some years later when she had recovered both emotionally and financially, and was ready to become pregnant again, that donor had divorced and had married or formed a *de facto* relationship with another woman who learned that he had been a sperm donor she could say, "Oh, that's a terrible thing, I don't like that, I'm quite against that." And he may have said, "Well, it's something that happened a long time ago, not much we can do about it." And she said, "No, no, I've done the legal studies and there is this wonderful new Act which says that you can withdraw your consent to the use of an embryo which contains your sperm. If you don't do that I know that I can withdraw my consent to the use of your sperm five years ago to make this embryo for this woman who now wants to have our child." And she could do that up until a month ago. It has taken us three years to get that view of the law changed. But if that same 35 year-old woman had these embryos made and we are unlucky enough to find out four years later that the donor, not her husband who is the social father, the birth certificate father of her children from that first twin pregnancy, if we find out that that donor has died four years later, these embryos must be discarded because how can you possibly explain to a child that it came from donor sperm where the donor had died? Now, why you'd bother telling it in the first place, but nonetheless, there are things for and against these various aspects. But here I would suggest there is a double standard. It is the same woman, it is the same man, it is the same embryo, it is the same social parents, and it's the same family in development, yet the law will now look at it differently.

You may wonder how people in Queensland and New South Wales manage without the protection of this wonderful law. They just seem to manage.

The man owns the testes until his death. It is a funny thing but I remember seeing *The Last Emperor* when the eunuch was terribly worried about having his testes in a small purse buried with him. Now we do it the other way around. If a man has died tragically in an accident there can be an order from a court that his testes may be sequestered and taken away and stored in the Royal Women's Hospital or Monash Medical Centre. It is *reductio ad absurdum*, which is a term we gynaecologists use a fair bit, to imagine a woman being looked upon

unfavourably by her family when her husband has died tragically in a motor car accident, that clearly she didn't love him enough to apply to the Supreme Court to have his testes stored so that she might have his child in the future. The Supreme Court can tell a willing clinic who are champing at the bit to be in page three of "The Sun" to go along and take the testes and freeze them, but can the court compel an unwilling hospital to do the same thing?

Spermatozoa are owned by the man until ejaculated into the vagina. They can be stored and held by the hospital; again with the egg storage fees applied, and may be donated to another woman and man in Victoria. They can't be donated to a single woman. They certainly can't be donated to a lesbian couple not under medical supervision with appropriate screening and treatment.

As for pregnancy, the woman has all these wonderful rights and the right to termination, but she does not have the right to access 2RU486, a simple, early abortion-inducing drug which would stop this gross misuse of public funds in the performance of 80,000 terminations a year. She does not have access to a simple over-the-counter, post-coital pill. It is as if the woman is being set up to fail in contraception in difficult circumstances and is then given stark options.

We live in a changing world as I have mentioned. The changes are measurable in our vital statistics. You see them in births in Australia from the Australian Bureau of Statistics. From a median age of 22 in Australia 25 years ago, first births have crept up to close to 27. That is good. There are many good things about this. We want our daughters to be mature, to be in good relationships, to have the opportunity for education and career when they set about the important task of starting a family. There's a range around the median age and that's creeping up all the time.

The growth in the birth rate if there is any growth in the birth rate in Australia, is in the over-35s. That has substantial implications for reproduction and fertility. Mac Talbot said that 20 years ago the causes of infertility were 30 per cent tubal, 30 per cent sperm, 30 per cent ovulation and 10 per cent unknown. It's these old women, women who biologically should be grandmothers, the 38 year-old women who, having started to menstruate at 13, were sexually mature at 16, should have had a child then and should have a 22 year-old child who herself has a six year-old child. The ovary doesn't know about these changes. The ovary doesn't know how we have progressed in our humanity and our treatment of daughters. And yes, men and women are having second

and third families too, and that means they are getting older when they want to have these second and third families. There is a deterioration in fertility over these years. 50 per cent of regularly menstruating women are infertile just because they are 40. And that reduction is due to a reduction in the number and the quality of their eggs.

Let us look at the status of children from donated gametes. With egg donation or sperm donation the other partner makes 50 per cent contribution to the genetic identity. With embryo donation, you might think of that as pre-natal adoption, that is, genetically, although the child is gestated by the mother and cared for and loved by the father, genetically that child is a foreigner; it comes from another family altogether.

The parents of children from donated gametes are courtesy of the Status of Children Amendment Act of 1984 which amended the 1974 Act. They are the parents, so the donor has no rights nor has he or she, mostly he, any obligations to that child. If a woman has no partner or there are two female partners and they use donor sperm, the law so far does not allow, I believe, two females to be on the birth certificate. That means where sperm was donated there is no protection for that sperm donor courtesy of the Status of Children Amendment Act

I have undergone a trip to Damascus in terms of my attitudes towards the parenting skills and the legitimacy of the requests of lesbian couples to have access to donor sperm in an environment where we have a Premier and anyone else who will talk about it, says, "We need to have more children. We have to have more children." It is not quite "populate or perish" but there is an acknowledgment that we are a selfish lot and we are just not having children. Well, some of us are shining examples to the contrary. But nonetheless, most people are not having the children. There are people in Victoria who want to have children, who from everything which is measurable beyond prejudice, are at least as good parents as those who are conceiving naturally, but they are shunned, they are not able to have access to that technology, to these resources, to these opportunities, by that discriminatory, disgraceful Infertility Treatment Act. So what do they do? They get unsafe sperm from the gay community. I am sure the gays who give the sperm are doing the right thing and wouldn't give the sperm if they had unsafe sex or are using drugs, but it is not good enough for the heterosexual community to have that assurance. The Human Tissue Act lays down that there must be 6 months quarantine of gametes or sperm in particular, before they can be used. These are people who are

abandoned by our legislation. They are people who are forced into the shadows of reproduction, rather than coming along fair dinkum to an infertility clinic and saying, "This is what we want. My girlfriend and I want to have kids," and going through the assessment that everyone else does and see no difference between them and anyone else, and then having safe medical treatment. But no, they are forced to have unsafe treatment or to go across the Murray to the saner side of the Murray in New South Wales where they can then get anonymous donor treatment. Now, remember, how red-hot that Act was and its guiding principles, about the person who had the greatest rights. The greatest rights were with the child, except if you are a child of a single woman or a gay lesbian couple. Your rights are less because in New South Wales you are never going to find out who the sperm donor was. And what couple more than the ones where there is no identifiable male social parent, needs to know the identity of the other half, the male side? In Victoria it is part of our Infertility Treatment Act that the 18 year-old product of donor sperm or donor embryos or donor gametes or donor eggs, will be able to find out the identity of the donor. That is great. Everyone knows the rules, they'll get into it and they'll have their own reasons for donating or using that sort of technology. In New South Wales, those who would benefit from it most in Victoria are forced into a situation where they cannot have access to the identity of that sperm donor. No male name is present on the birth certificate. You may say, "Well, he's protected by legislation," protected every bit as much as the relinquishing mothers in New South Wales were when caught up by that shameful retrospective regulation and legislation in New South Wales which allowed the 18 to 25 year-old relinquished child to come banging on their door. And because they are not protected, that altruistic Act may lead to their serious detriment in the future.

Surrogacy. You can do surrogacy in Victoria and we will hear a bit about it this weekend because the Kirkmans are being paraded in terms of reproduction and the success of surrogacy. It is a pity that we have to keep on bothering the Kirkmans, wonderful people that they are. How willing they are to advance this cause. What stops it happening in Victoria is that there is no payment to anyone. You say, "Well, that's fine, the woman shouldn't be paid." But there is no payment to the hospital, there is no payment to the doctor, there is no payment to anyone. With the interpretation of the law it has to be done gratis by everyone. And once it is done gratis the surrogacy contract is null and void. The reflex is to say, "Yes, well, it would be all right as long

it is altruistic." I don't believe there is such a thing as altruism when gestating for nine months. I think that is work. I think work should be rewarded. I think we should look towards the United States where they are open about it, where they have commercial surrogacy contracts. I believe, in the same way as people in this room benefit from the talent of their brains, there are people who benefit from their talents of their uterus and their reproductive tract. There are people who write to us who say, "I would love to be a surrogate. The only thing I've ever been able to do is reproduce well. I don't see it as if I'm being exploited. And to get 30 to $50,000 for the delivery of a live baby would be the only possible thing to help me escape from the poverty trap in which I and my children find ourselves." But no, it is not nice. There is very little about this that is nice. It is judgmental, it is partial, it is discriminatory, and at the end of the day it is just silly. We say, "But look at the problems in the States, look at baby M." Yes, there are 0.5 to 1 per cent of these contracts which go wrong. I would say if you want to ban anything, ban marriage. If you want to be fair dinkum about the odds, if you want to get into something where your children are very concerned that things go wrong, go for the big, meaty part of the problem rather than this nonsense.

I met some of these principles in this society because I'm the subject of an anti discrimination action because I obeyed the Victorian law. I took some *de facto* couples to Albury to have in *vitro* fertilisation using their own gametes; his sperm and her eggs. Some of them thought, well, we could make a bit of money out of this, so the Victorian Equal Opportunity people are currently pursuing me for obeying Victorian law. I don't mind being done by the Feds, that seems sensible, but when the Victorians are doing me I think there is a bit of double jeopardy at play there. Now, one of them is aggrieved because she went to Albury and had two embryos transferred and on the way home from Albury, outside Glenrowan, the train hit a bump and she lost one of them. This is a subject which I love; it has much joy and excitement about it.

We have a healthy cooperation and competition with our sister units and clinics in Victoria, we are always elbowing each other out of the way, but at the end of the day what we are trying to do is improve things. We are trying to make things better for the people who come to see us to help them achieve a family, and we have to bob and weave and duck so that we can do it without being sent off to some corrective farm.

MR FORREST. This is Dr McBain's favourite Act; he is probably the person who knows more about this Act than anyone else. It contains some 200 sections which deal with all sorts of rights and interests. Interestingly, in the definition section - and this perhaps demonstrates the purview of this Act - *de facto* relationship is defined as follows: "*De facto* relationship means the relationship of a man and a woman who are living together as a husband and wife" - this is the part that intrigues me - "on a genuine domestic basis." Now, being a good lawyer, I then searched for a definition of "genuine domestic basis"; there is none. And I note particularly that there is no definition of married couple, and certainly it is not interposed into a definition of married couple that they are living together on a genuine domestic basis.

The Act itself, interestingly, says absolutely nothing about the various rights that persons may have in relation to IVF treatment. There are some 200 sections. It's all to do with procedures, the manner in which donations are carried out and the like, but it says nothing about particular rights that donors, the couple or the child might have. It is an interesting omission, it's one that's not been replicated in some States in the United States, and it's one that leads us to a lot of problems, some of which I propose to illustrate tonight.

I propose to address a couple of topics, pose the questions; I'll then try and answer the questions. The best way to address it, I think, is to start at the end and that is, look at the child when the child is born. In Australia and the United Kingdom, and indeed in the United States, a foetus has no rights until it is born. When it is born, it has a legal right. It is not owned by anyone, it is not anyone's property; it is a child in its own right. The law says that as a foetus it had contingent rights and upon birth, those contingent rights in effect spring up. Subsequent to birth, let's say the foetus had been damaged in a car accident, or alternatively the foetus' natural father had died, its rights in respect of the injury, its rights in respect of inheritance spring up. So that foetus, that child by that time, can bring a claim. The intriguing question, or the question that can be addressed is this; is there any difference between the IVF child and the natural foetus? That was tested in Tasmania only two years ago, and the ultimate answer was no, there was not. The IVF child had exactly the same rights as the natural child. But the question that can be posed as a result of that is demonstrated by the Reos case, in which the parents died. The parents, that is, the biological parents who donated the fertilised egg, died. Is there, any right of inheritance in that egg if it is then borne by another woman and brought into existence

- does that child have a right of inheritance against the Roes' estate? The fact is that in the case of the biological parents bringing the child into the world, there is no problem. But otherwise, that has not been resolved. There is no answer in Australia, and one doubts whether there is an answer yet in other countries.

If one then goes back to the start of the reproductive cycle, there can be no doubt that the sperm is the property of the male and the ovum is the property of the female. But the question that becomes one of some difficulty after that is this, what happens once the egg has been fertilised? Who has the ownership over the egg, whether it is in the IVF test tube or whether it is then later impregnated into the particular mother?

That then raises the next question. What is the position in relation to the donor of the sperm? Does he have any rights? Or indeed the donor of the egg if that is the case. Does he or she have any rights ultimately in relation to the child that is born, assuming that they are anonymous donors? The reality is in this country there are no answers to this. It is not answered by this Act. This Act remains silent about those issues. It doesn't give us, despite its 200 sections, the answers that people like John McBain are going to search for.

There is not much doubt that once the sperm is donated and once the egg is donated, that that is a gift. The question then becomes in the concept of IVF technology, who has the responsibility or the ownership once there is a donation? Is it the hospital? The hospital doesn't get any immunity under this Act. What if something goes wrong during the course of fertilisation in the hospital? At the end of the day does the child have a right of action if it is born with some dreadful disability because someone at the hospital did something wrong? Do his or her parents have a right of action?

The answer is not to be found in this Act. That means that we have to go back to what is known or lawyers call "the general law", and even in this day and age it's impossible to find the answer. One can speculate, one can assume, I think, but in the situation where a hospital has been negligent in the course of treating that particular donation or working with it, there is a potentiality that the hospital might be sued by the parents. But the law would say probably that the child itself would not have a claim, you can't bring a claim as a matter of public policy for being born.

The problem becomes more complicated by the development of the particular foetus. It is acknowledged that the foetus has no rights, and

to give an example of that, one can't bring a claim on behalf of a foetus to prevent a termination, one can't bring a claim on behalf of a foetus to try and establish wardship if there's a concern about the way in which the foetus might be parented. What of the position when an IVF child is in utero? Who owns that child?

We know when a child is born that no-one owns a child. But what of the position when there is a fertilised embryo or the child is in utero. That was the problem that faced an American court about two or three years ago. They had to deal with a situation where parents had donated the sperm and the egg, and an embryo had been developed that was being stored and the parents had separated. The husband wanted to contend that the embryo in fact was property and that it ought to be part of a Family Law order. The wife, on the other hand, wanted to contend that it had its own being, had its own rights, and therefore did not form part of the property that should be subject to a court order. Now, the judge in that particular case found that it in fact was entitled to be treated as having its own rights, was not property, and accordingly, placed the embryo in the custody of the court and ordered temporary custody to the wife.

It's not at all clear what would happen in Australia, but it illustrates the dilemma that people such as John and others are going to face with the development of IVF technology. What of the position in terms of surrogacy? Who has the rights of ownership, property, custody or whatever, for the surrogate child? Forget this Act just for the moment because the easy answer is, as John has demonstrated, that the Act in effect, in virtually all cases, prevents surrogacy. Assume for the moment that we get round the Act, what happens next? Under the Status of Children Act, as I understand it, a birth mother effectively becomes the mother of the child. The Adoption Act would not allow adoption of the child to the surrogate family as it would have to be done within the scheme of the Act, and couldn't be done by private arrangement. You couldn't enforce a surrogate relationship because this Act prevents it.

In America again, which is the best testing place for these types of things, the problem has been illustrated in the case of a handicapped child who was born as a result of a surrogacy arrangement. Neither family - that is the surrogate family or the natural family - wanted to have the child. So what was the remedy? Well, as could only happen in America, the remedy was to go on a talk show. The paternity of the child was established to be that of the surrogate father, which shocked

everyone. That then meant of course, the lawyers got involved and to this day they are still fighting about invasion of privacy.

It demonstrates in an odd way the problems that can beset IVF technology from start to finish. There are no easy answers, there are no easy answers to ownership, because this Act doesn't tell us any more than we already know, and it means in effect the courts in this country are going to have to grapple with moral, theological and social issues for many years to come. Because the one thing that's certain is that this type of treatment has provoked extraordinary legal and medical interest overseas, and it's only a matter of time before it visits these shores. Thank you.

QUESTION: MS SKENE. Loane Skene, Melbourne University Law School. I greatly enjoyed both of the presentations and have great sympathy in particular for John McBain's position, but I think that we have to question the concept of ownership, and I think it doesn't bear up in either of the presentations.

I think that I no more own my uterus than John does his prostate. What we both have is a right of bodily autonomy so that we can refuse to have anybody do things to us. But if my uterus or his prostate is removed from our body there is no ownership, no property interest in that tissue. And similarly, looking at the legal issues in relation to what we have just heard from Jack about the responsibilities or duties of the hospital towards the gametes that are collected, we know that hospitals are liable in negligence if they mix up the gametes and give the woman the wrong ones and they can face exemplary damages in these circumstances.

I think that ownership is not the concept. This is one of the real issues where we might look at the guiding principles of the Infertility Treatment Act, and I'm by no means an advocate of this legislation. If you're thinking about what's going to happen with a child born from IVF procedures, where the parents don't want it and there's a dispute later, that is one area where we might really look at the best interests of the child.

MR FORREST. It is correct to question ownership because the end result is what are the rights that attach to these various procedures? What are the rights rather than ownership, and I agree that it is a very difficult issue. There is no doubt that at the end of the day when the child is born, the issue is what is in the best interest of the child? I think the issues that we're trying to address are what happen prior to that.

DR McBAIN. Yes, I played fast and loose with the rules for a bit of my own amusement if no one else's, looking at some of the scenarios. What I really mean by ownership is the right to use as you choose. Perhaps there was an echo of that in the use of the vagina in that way, and how the woman can evict at a moment's notice. But I was trying to build up to the woman's right, if she has a right, to use her uterus as she chooses in that way, not to be the owner, the seller.

IVF children are one per cent of the population. Why don't we start with the other 99 per cent? Why don't we make them all the same, why do we have to single out the children from people who had a gynaecologist or a reproductive biologist looking over their shoulder at the generation of their child? That's what I object to. I object to special cases.

QUESTION: MR MILSTEIN. My name is Bob Milstein, I'm a consultant with Phillips Fox. My question is for Dr McBain. I was the solicitor who represented the Royal Women's Hospital and Freemasons Hospital unsuccessfully before the Human Rights and Equal Opportunity Commission, in the case where several *de facto* couples alleged that the hospitals had unlawfully discriminated against them. That was the case which perhaps coincidentally, perhaps not, resulted in the amendment of the Act to extend to stable domestic *de facto* relations. My sense throughout that case was always that the legislature had felt that they had this knee jerk concern about the slippery slope, that there wasn't necessarily a fear of *de facto* couples but there was a fear of the next generation, if you like, of either single females or homosexual male or lesbian couples.

You have indicated your distaste for the legislation and the arbitrariness of the limitations placed upon it but do you think that there is a legitimate demarcation line that should be brought to bear on access issues? Or if the technology is capable of delivering a technological answer to a problem, should the technology be delivered regardless of those underlying social, moral, ethical or policy reasons?

DR McBAIN. I would answer you in one sentence; we should not discriminate. I think it is quite straightforward. Here we are in Australia in an enlightened society, with all the evidence around us if we want to look for it, particularly about single women and the way things have changed. This is the "Friends" and the "Seinfeld" generation. The relationships are different. There are support groups which would be strange to our parents. They are not formed around the church or the guild; they are loose, but they are supportive. There are

people who work in networks of support which have nothing to do with blood ties and they may change but they are for that time, supportive. I think that we should look across the border to New South Wales and to Queensland and say, where are these abuses that the people of New South Wales and Queensland are potential victims of because they are not protected by this wonderful legislation? Are we going to put an embryo inside a man to have it implant on his omentum so he can have an abdominal pregnancy and then he is going to be delivered by laparotomy and so on? I guess someone will do it some day but so what? There is not going to be an epidemic. There are terrible things happening in the world. I think there are worse things happening than that. If someone has to do it then do it and get it over with but it will not be a part of public policy. It will not be the way we want to see our species potentiated and our relationships strengthened.

QUESTION. As a lawyer who once sat on a Family Law Council about ten years ago when we grappled with some of these issues I felt totally unable to reconcile the competing interests. One of the greatest things that we have to deal with is the identity of the children that are produced. Societies are embarking upon an extraordinarily adventurous period where medical and other technology is going at a rate of change which we cannot cope with from either a moral or ethical or legal point of view. One of the most extraordinary challenges is what do you say to the child about who they are, where they come from and should it matter to them as to how they were conceived? Should they know who the donor sperm is or the surrogate mother, and what is their identity and antecedents? In your talk I don't know that you are really grappling with that issue. I agree that medical technology will continue as it will but at the end of the day the innocent victims in all of this will be the whole of humanity, the male, the female, the donor, the surrogate and the child. I don't think our society is grappling with any of that. So we are unleashing a monster for want of another word that we are not sufficiently wise or sophisticated to deal with, and our society will not necessarily be the better. I congratulate you on your courage in embarking on this but as a mere lawyer, as a woman, as the mother of two children, I am very grateful that I am not embarking upon it because I am totally and utterly dumbfounded and I don't know which way to turn.

DR McBAIN. Thank you very much, your words are wise and they are cautionary. I think however, we are suffering from a surfeit of post-Edwardian sentimentality towards children. I have got no idea where

this came from. Over the last five or ten years at medical conferences, anything to do about reproduction, all a speaker had to do was say "The rights of the child are paramount" and everyone would look up and sigh and then stop listening. All you had to do was say that mantra, "The rights of the child are paramount." The rights of what child? The rights of the IVF child, the one per cent? What about all the other ones who have been terribly abused? You talk about the knowledge of its antecedents. In Glasgow where I come from not everyone knows his biological father. It may be different here. There have been studies done looking at blood groups and because there are only about six of them some people probably get away with a bit of luck, but if the test is ever done with DNA fingerprinting of who the real fathers, I think that Pandora's box will be open and all the ills of the world will fall out in that particular village. Now, I can't argue with you about wanting things to be nice. I want them to be nice too. I don't want strange things; novelty frightens me. I want my children to grow up in a world which is familiar to me but I also want us to be open, frank and honest about these things.