



The Linacre Centre

Friends Newsletter

Autumn 2006

Issue 21

The Linacre Centre, 38 Circus Road, London NW8 9SE. Tel 020 72667410. Reg. Charity No. 274327
e-mail: admin@linacre.org website: www.linacre.org

The Irish Frozen Embryos Case (M.R. v. T.R. and Others)

Patrick Carr

Mr Justice Brian McGovern had an unenviable task in deciding the recent case brought by a woman seeking to have her frozen embryos implanted in her womb against the wishes of her estranged husband. It required him to consider questions which have never before been decided by an Irish court relating to matters for which successive governments have negligently declined to legislate. The judge rightly resisted making new law, but his efforts to interpret the existing law have created a glaring lacuna in the protection of human life afforded by *Bunreacht na hEireann*, the Constitution of Ireland.

The fundamental flaw in Justice McGovern's reasoning arises from his belief that the question of when human life begins "depends on issues other than science and medicine. For example, it is a matter which may be determined by one's religious or moral beliefs and, even within different religions, there can be disagreements as to when genetic material becomes a 'human being.'" If this were so, the Judge could be forgiven for refraining from choosing

between "competing religious and moral beliefs," but it is not so. The question of when human life begins is, in fact, a scientific question.

Why is it that the Church now teaches not only (as she has always taught) that abortion is gravely wrong, but that human life begins at conception? It is not something that we can deduce with certainty from Divine Revelation. The Catholic Church teaches that it is always gravely wrong to destroy an innocent human life. This is surely unexceptionable, and many non-Catholics would readily accept its truth. To put this teaching fully into practice, it is necessary to know what constitutes a human life, and preferably when human life begins. To answer this question we turn to science, for it is science which is competent to provide the answer. The Church teaches that it is wrong to destroy an early embryo above all because science indicates that this embryo, from the moment of conception, is a human life.

Science's understanding of the process of development of the embryo has grown enormously in recent decades, particularly in the light of a growing understanding of the human genome. The more we learn about human embryology, the clearer it becomes that once sperm entry is completed during the process of fertilisation, a new and distinct human life is present. The genetic

code of this new embryo is different from that of the man and the woman whose gametic cells united to create it. It is the same genetic code as that of the baby who, in the natural course of events, will be born nine months later. Fertilisation initiates a process of growth and development which continues until death. There is no non-arbitrary point at which the embryo changes from one type of being into another. In the words of Justice Hederman in the famous X case, cited by Justice McGovern, “[o]ne cannot make distinctions between individual phases of the unborn life before birth or between unborn and born life.” The embryo, from the beginning, is a distinct, separate, self-ordering organism, so it is not “just a ball of cells” as is sometimes claimed, or mere “genetic material”, in the words of Justice McGovern. It is a human organism, and it is alive. In other words, it is a human life.

There are, of course, scientists who deny this, and the fact that there is disagreement among scientists weighed heavily in Justice McGovern’s deliberations. The obvious (perhaps subconscious) motive for this denial by scientists and others is that to accept that the early embryo is a human life would be inconvenient for some people - it would have implications, imposing restrictions whether in relation to sexual behaviour or in relation to what may be done with and to human embryos *in vitro*. (Such concerns were evident in the submissions on behalf of the Attorney General who was fearful that recognising the humanity of the pre-implantation embryo would have implications for the use of the “morning-after pill.”) It is interesting to note that those who deny that life begins at fertilisation seem unable to reach consensus on when it *does* begin. The scientists who accept that the early embryo is a human life do so because that is what the science tells them. What motive could inspire the many eminent embryologists and other scientists (including those who gave abundant and persuasive evidence in this case) who say that human

life begins at conception, if this is not, in fact, true?

The key legal consideration in this case was whether the term “unborn” or “*beo gan breith*” in Article 40.3.3 included within its scope the embryo outside the womb. It may be fair to say, as the Judge concluded, that the intention of the people of Ireland in adopting the Eighth Amendment was to prevent the legalisation of abortion and that they had no explicit thought at that time of embryos created *in vitro*. It is worth noting, however, that the Irish text of the Article, which in the event of a dispute would have priority, seems to be somewhat more precise than the English word “unborn.” “*Beo gan breith*,” although not further defined in the Article, in legislation, or in authoritative legal rulings, literally means “alive without birth,” a description which could certainly be applied to embryos *in vitro*.

Generally speaking, it is encouraging that Justice McGovern attached so much weight to the intentions of the people in adopting constitutional provisions. He refers to the recent opinion of Chief Justice Murray that “it is reasonable to consider whether there is any history or background to the enactment of the Constitution capable of elucidating what was in the contemplation of the framers.” This may serve as a useful precedent in future cases. This is despite Justice McGovern’s citing of other precedents justifying interpretation in the light of “changing values,” and even changing concepts of “prudence, justice and charity.”

References to earlier rulings on the rights of the unborn referred to the unborn in the womb, for that was what was at stake in these cases. In 1961 the Civil Liability Act clearly means by “unborn,” the child in the womb, but at that time “unborn” could have had no other meaning. The first baby created by *in vitro* fertilisation was not born until 1978. Even in 1983, when the Eighth Amendment was passed, IVF was a new and

rare technique. It is unlikely that at that time there were any IVF children in Ireland and it is almost certain that the procedure had never been carried out here. The present case therefore treats of a situation which, from the point of view of the Court, is a novel one, and is not subject to clearly needed legislation. Despite the lack of explicit reference to unborn human life outside the womb, it seems that protection for these embryos could be readily construed or implied in the intentions of the people of Ireland in 1983 who sought, by amending the Constitution, to copperfasten the legal protection afforded to human life in its earliest, most vulnerable form. It certainly seems easier, from a logical point of view, to extend this protection than to create a situation where one class of human beings has no status whatsoever in the eyes of the Constitution.

The refusal of the Court to extend the rights accorded to the unborn child in the womb to embryos outside the womb has brought about precisely this deplorable situation. This fact is recognised by Justice McGovern, for “[i]f the frozen embryos are not ‘unborn’ within the meaning of Article 40.3.3 of the Constitution and are not given protection by the Constitution they do not have ‘personal rights’ under the Constitution.” Furthermore, “in the absence of any rules or regulations in this jurisdiction embryos outside the womb have a very precarious existence.”

The question of how best to resolve the fate of those many human embryos condemned to a state of suspended animation is a difficult one. At present, the Code of Practice of the Irish Medical Council protects *in vitro* embryos from “deliberate and intentional destruction.” The Code also requires that “any fertilised ovum *must be used for normal implantation* and must not be deliberately destroyed” (emphasis added), a requirement which seems to be widely ignored. It is clear that we cannot continue to rely upon guidelines that “do not have the force of law and offer only such limited protection as derives from the fear on

the part of a doctor that he might be found guilty of professional misconduct.”

There is a considerable danger that any proposed legislation to regulate assisted conception and the treatment of embryos *in vitro* will be along the lines recommended in the 2005 Report of the Commission on Assisted Human Reproduction (CAHR). There will certainly be considerable lobbying for legislation of this form, rather than tighter regulation or - better still - selective banning, rather than “control”, of harmful activities in this area. The members of CAHR seem to have been heavily influenced by the deeply unsatisfactory UK regulatory model which, it should be noted, is very different from the European norm. The British Human Fertilisation and Embryology Authority (HFEA), despite claiming to operate a strict regulatory system, interprets its seemingly elastic guidelines with ever-increasing permissiveness. A majority recommendation of CAHR was that “the embryo formed by IVF should not attract legal protection until placed in the human body, at which stage it should attract the same level of protection as the embryo formed *in vivo*.”

In addition to other forms of abuse, this would leave the human embryo *in vitro* exposed to the possibility of the sort of lethal experimentation in which the present British Government aspires to be a world leader. Even if one concludes that, for the majority of frozen embryos, there is no hope of their being given the opportunity to be implanted and allowed to develop, this does not justify subjecting them to destructive experimentation. The argument that “they are going to die anyway” would rightly be repudiated if it were used as justification for lethal experimentation on the elderly terminally ill or on prisoners condemned to death. Most other EU member states have regulations considerably more restrictive than those in force in the UK or those proposed by CAHR. Irish legislators should look beyond our nearest neighbours for

guidance in this matter.

The very least that may be said of the human embryo is that it is a human organism and that the life of this organism is objectively qualitatively different from mere cellular life. What is a human being if not a human organism? The nature of its being is not altered by its location. If it is not a human being prior to implantation, it will not suddenly become a human being later. The fact that a pre-implantation embryo needs to be implanted in order to develop further does not alter the fact of what it is. A 20-week-old foetus needs to remain in the womb in order to develop further. Likewise a newborn child needs to be nurtured, and a disabled person may need ongoing support. This dependence does not determine the status of the dependent human being.

I hope that, in the public interest, Justice McGovern's ruling will be appealed to the Supreme Court, and that the Justices of that Court will "defend and vindicate" the right to life of the unborn child regardless of whether that unborn child has the good fortune to be safe inside his mother's womb.

An earlier version of this article was published in the Irish Catholic.

Bad News for Babies

Anthony McCarthy

After much comment in the press, the Nuffield Council has produced its long-awaited Report: "Critical care decisions in fetal and neonatal medicine: ethical issues". Publication was preceded by a number of media stories, including one on the submission made to the Council by the Royal College of Obstetricians and Gynaecologists. The College asked the Council to consider allowing for "deliberate intervention to cause the death of an infant." Aware that this amounts to an endorsement

of active homicide, the RCOG Ethics Committee hastily added that it "does not have a view that we would like euthanasia to be discussed, but do feel that it has to be covered and debated..."¹ Presumably the feelings of the Committee differ from its views!

In the context of recommendations for the deliberate active killing of newborn babies, many were relieved to hear that the Nuffield Report² "unreservedly rejects the active ending of neonatal life even when that life is 'intolerable'". (2.37). But as we keep learning, such feelings of relief can be premature.

In the first instance, the Report is quite clear that it "regards the moment of birth...as the significant point of transition not just for legal judgements about preserving life but also for moral ones". (2.19). The rights of unborn children not to be given lethal injections (what the Report calls feticide) are in no way defended in the Report – quite the reverse. Despite claims that a moral discussion of abortion was outside the remit of the Report, it tellingly informs us that "Feticide is not always considered *necessary* if a fetus has an unequivocally fatal condition and will die during or soon after birth" (4.15) (my emphasis). Later the Report explicitly recommends that "Parliament should not accede to suggestions to grant legal status to the fetus." (8.4).

Perhaps more worrying, however, is the section of the Report that deals with the killing of newborn babies. If we look again

¹ Response of the Ethics Committee of the Royal College of Obstetricians and Gynaecologists to the Nuffield Council on Bioethics consultation document *The ethics of prolonging life in fetuses and the newborn*, 11 July 2005. The submission has curiously been removed from the Royal College's website at www.rcog.org.uk but is still available at http://web.archive.org/web/20060118200428/http://www.rcog.org.uk/resources/Public/pdf/nuffield_prolonging_life_in_fetuses_newborn.pdf

² http://www.nuffieldbioethics.org/fileLibrary/pdf/CC_D_web_version_8_November.pdf

at the statement at 2.37 we find the word “intolerable” crying out for a definition. According to the Report there are treatments which should be withheld because they impose an “ ‘intolerable’ existence, even in the absence of evidence of great pain or distress.” (2.13).

The Report goes on to state that “clinical evidence” may “indicate that any future existence for the baby will be a life bereft of any of those features that give meaning and purpose to human life (for example, being aware of his or her surroundings or other people)”.(2.13). So, there are people who have lives not worth living, according to “clinical evidence”. And these people have lives not worth living because they lack certain valuable functions.

The crucial point missed here is that these valuable functions belong to a living whole (the human organism/person), that must itself have a valuable overall function which unifies its other valuable functions. It is this overall function – that which makes a human being a human being – which these other functions serve.

By making the value of a human being rest only on certain features, rather than on the human being’s existence itself, the Report allows that those who have a life not worth living - an “impossibly poor” life - should not be given treatment. Doctors, the Report says, have a duty so to act that such a life is not preserved.

However, if we were to accept the idea of “impossibly poor” lives, it becomes difficult to see what is wrong with “active” euthanasia – i.e. intentional killing of a human being by an active intervention (e.g. a lethal injection). After all, death is a “benefit” for such people, on this view. And indeed, there is no important moral difference between deliberate killing by lethal injection and deliberate killing by withholding treatment (the Report’s authors are aware of this point (8.40) but make no argument against it), though it might be

argued that active euthanasia will at least be quicker and more humane than deliberate killing by omission. Euthanasia enthusiasts are well aware that euthanasia by omission, once accepted, will lead the way to active euthanasia, and this Report, apparently unwittingly, helps their cause.

The Report does recognise that there can be treatments that are genuinely burdensome *as treatments* and which offer such a limited benefit to the patient that they should not be provided. By sliding from sensible talk about treatments that are overly burdensome to talk about intolerable human existence, the authors undermine the basic principle that there are no lives so lacking in value that they may be ended on those grounds. Such confusion undermines the good features of the Report and makes its condemnation of active euthanasia incoherent, while, tragically, making its effective endorsement of euthanasia by omission all too coherent.

At the slick launch of the Report, I asked one of the authors, moral philosopher David Archard, whether he endorsed euthanasia by omission, and asked him whether he believed that there were lives not worthy of life. He said yes twice. Not only that, but he seemed rather shocked that anyone might disagree. This is worrying, especially as Archard is on record as saying that we ought to “deny the baseless and bogus rights of parents to dictate what is, and what is not, taught to their children”.³ As views such as these gain ascendancy, the culture of death quietly extends through our hospitals and schools. In the words of T.S. Eliot, “This is the way the world ends/Not with a bang but a whimper.”

An earlier version of this article was published in the Universe.

³ David Archard, Children are not Products <http://www.guardian.co.uk/commentisfree/story/0,,1834587,00.html>, 1 August 2006.

News from the Centre

The Linacre Centre has been considering our long-term future, as it is unclear how long we will be able to remain at the Hospital, particularly in view of the rent proposed for us in two years' time. It is possible that we may move out of London altogether within the next five years. We should have a clearer idea by next year of the feasibility of such a move, although it would depend on the success of a new and dedicated fundraising venture. At present we are struggling even to meet our short-term needs (for example, the salary of our new Education Officer, who begins work next September). We are most grateful to those of our Friends who have made donations to us recently; any contributions which our other Friends may be in a position to make would be especially welcome at this time.

As we reported in our previous Newsletter, **Patrick Carr**, our current Education Officer, will be leaving the Centre shortly to live and work in the US. Again, we wish to say how grateful we are to Patrick for his invaluable help and support over the past two years. Patrick's recent work for us has included drafting a forthcoming CTS leaflet on *Infertility*, and writing an article on 'The Irish Frozen Embryos Case' for the *Irish Catholic* (an expanded version of this is published in this Newsletter). He spoke on 'The Catholic Foundations of Healthcare Ethics' at St Bernard's School, Slough, on Cloning and on 'Foundations for a Catholic Approach to Healthcare' at Gumley House School, Isleworth, and on 'Foundations for a Catholic Approach to Healthcare' at Cardinal Vaughan Memorial School, Kensington. He also spoke on Euthanasia to Weybridge Deanery, and on 'The Theological Basis of Healthcare Ethics and Treatment' to the Knights of Our Lady.

We are very happy to report that an Education Officer has now been appointed to succeed Patrick: **Stephen Barrie**, who is currently completing an MA in Philosophy

at Manchester University. Stephen is also working part-time for ReachOut!, a youth mentoring charity. His MA dissertation is on the Principle of Double Effect, which is, of course, highly relevant to bioethics, and he should prove an asset to the Centre when he joins us in September next year. We are extremely grateful to the anonymous donor who has supported the Education Officer post over the past three years, and who will be meeting a quarter of the cost of Stephen's salary.

Anthony McCarthy continues to research the topic of contraception and the marital act for his PhD thesis; he also wrote an article for the *Universe* (reprinted in this Newsletter) on the Nuffield Council report on 'Critical care decisions in fetal and neonatal medicine: ethical issues'. He attended the launch of the Nuffield Report, and spoke on the Report to Premier Christian Radio; other media work included an interview with Sky News on the cervical cancer vaccine. He taught an ethics module on Medical Ethics to a group of seminarians at Ushaw, and spoke on AIDS prevention to Hull Faith Forum and to the Summer Forum of the John Paul Centre in Dulwich.

Dr Helen Watt has been working on various projects, including preparations for the Linacre Centre Conference in July 2007 (see below). She spoke on the work of the Linacre Centre to the Healthcare Reference Group, on 'Ethical issues around the end of life' to a Lancashire Diocese Clergy Ongoing Formation Conference at Ushaw, and on Euthanasia to a meeting of Southwark hospital chaplains. She also participated in a debate on euthanasia at the National Conference of the British Geriatrics Society. She was interviewed on IVF for Australian and New Zealand television, and on cloning and stem cell research for BBC World Service, BBC Five Live, BBC Southampton, Vatican Radio and Premier Christian Radio.

Professor Luke Gormally has been working on a scoping study on the future of

the Linacre Centre, and on other projects, including a paper for the Pontifical Academy for Life on 'Personal and social responsibility in the context of the defence of human life: the question of cooperation in evil'. He spoke on Euthanasia to a meeting of the Bath and Bristol Branches of the Guild of Catholic Doctors, and also to a national conference for clinicians involved in palliative care.

The next **Linacre Centre Conference** will be held from **5-7 July 2007** on the topic of ***Incapacity and Care: Moral Problems in Healthcare and Research***. Archbishop Mario Conti has kindly agreed to open the Conference, and Fr Benedict Groeschel has agreed to give the keynote address. Topics to be covered include non-voluntary euthanasia in Belgium and the Netherlands, sterilisation of mentally disabled women, research on those unable to consent, and responding to the Mental Capacity Act, which comes into force in April 2007. Two talks followed by a panel discussion on the Act will be held on Saturday 7 July. Please see the back page of this Newsletter for some initial publicity for the Conference. We are now taking tentative bookings; a full programme will be posted on our website at www.linacre.org in a few weeks time.

The Linacre Centre is the main (and the sole UK) distributor for ***Who Am I? Experiences of Donor Conception***, a collection of personal histories of donor-conceived adults recently published by the Idreos Education Trust, with commentary from Dr Alexina McWhinnie. See opposite for a description of this publication. Copies of the book have been distributed, at the request of the Trust, to all MPs, and a number of Lords, and will also be sent to various journals for review. Please contact us or our overseas distributors should you wish to place an order. A new leaflet in the CTS *Essentials* series on ***Prenatal Tests*** has just been published, and another on ***Infertility*** will be published in January. Our most recent list of publications is enclosed with this Newsletter. ■

Who Am I? Experiences of Donor Conception £6.95 + P&P

What is it like to grow up knowing that one was conceived from donor sperm – or to find this out only much later in life? How does it feel to meet, for the first time, other children of one's donor father – or to continue to search for the identity of the donor and of other relatives? In this book, three adult offspring conceived by donor insemination share their experiences. Dr Alexina McWhinnie, a social researcher who has worked extensively in the area of assisted conception, reflects further on their stories and those of other donor-conceived adults. This collection of essays was commissioned by the Idreos Education Trust to raise awareness of the impact of donor conception on the offspring, and on his/her social family.

"This book brings to life the many unanticipated problems experienced by the donor-conceived person. Each author in her own way describes feelings of evasion, confusion and discomfort within their families compounded by secrecy and unanswered questions. These touching stories help the reader to feel the distress experienced by the child and adult who seems to have an intuitive feeling of being different."

Ruth Wilson, grief counsellor, SANDS Lothians

"Just as infertility is grieved, because people grieve the loss of having and raising their own genetic children, so too can that loss be mirrored by not knowing or being raised by one's own genetic parents."

Joanna Rose, contributor

"The joy I felt upon learning my identity reminds me of the intense relief which ensues when an illness or pain finally passes."

Louise Jamieson, contributor

"It is more than time that the voices and experiences of DI offspring should be recognised and listened to. They are as much 'stakeholders' in the contemporary debate as clinicians, scientists and would-be parents."

Dr Alexina McWhinnie, contributor