

TECHNOLOGY, LAW AND THE COURTS  
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Panel 2 - Legal Consequences of Scientific Advances  
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ABSTRACT

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LEGAL ISSUES IN PRENATAL TECHNOLOGIES

In a relatively short time the law on human reproduction has progressed from identifying pregnancy at "quickening" to making syngamy (combination of the genetic material of an ovum and the sperm that enters it) decisive (see the Infertility (Medical Procedures) Act, 1984, s.6(5) of Victoria, Australia and S. Buckle *et al.* "The Syngamy Debate: When Precisely Does a Human Life Begin?" 17 Law, Medicine & Health Care (1989) 174). Means exist to determine the genetic character and potential of a future human being from study of a cell removed from, for instance, an eight-celled pre-embryo, raising questions concerning not just deliberate wastage of a pre-embryo but also wrongful conception and wrongful birth actions by parents and wrongful life claims by or on behalf of children when diagnosis is negligently conducted or, for instance, not advised.

The discussion about the legal status of abortion in Canada is only one among many possible discussions regarding unborn life. In vitro fertilization has raised questions about custody and disposal of preserved pre-embryos, a matter considered best resolved by contractual agreements among IVF clinics and their patients before initiation of services and the creation of pre-embryos. The sensitivity of the issues of pre-embryonic loss, perhaps in research, is itself incongruous in view of common

acceptance of the fitting of interuterine contraceptive devices believed to induce the wastage of more developed pre-embryos or embryos than are stored in IVF clinics or are of interest to medical researchers studying infertility.

Fetal tissues are proving of considerable research and potentially therapeutic value in such areas as fetal organ transplantation, diabetes research and implantation of fetal brain cells into sufferers from Parkinson's disease and perhaps Alzheimer's disease. Success depends on use of organs or cells of sufficient gestational age, however, raising questions of how they are obtained. Since products of spontaneous abortion are likely to be immature or genetically or otherwise suspect, products of scheduled abortion are required, preferably from "normal" pregnancies. Asking women to delay their abortions in order to offer sufficiently mature fetal tissues presents as many ethical and medical as legal problems. The scenario also has arisen, however, of the so-called "designer fetus," produced when a woman plans a conception, perhaps through an intended recipient of tissues so that they are genetically compatible, in order to induce termination and supply tissues for transplantation or implantation. Legal accommodation of such procedures, and in particular legal defences against them, are coming under active concern in the contexts of research and therapy.

The status of fetal tissues is of independent legal interest. Their donation appears to be an inter vivos gift of the mother, but some treat access to the products of late conception by reference to post mortem provisions, although the outcome may be the same in that the mother controls disposition either because they are her tissues or because of her control of her stillborn fetus. Although in Canadian provinces such tissues cannot be

sold, there may be applications of the decision of the California Court of Appeal that a person may have a property interest in the materials of his or her body, and in commercial products that may be developed from them (Moore v. Regents of the University of California (1988), 202 Cal. App. 3d 1230).

Recent decisions, for instance of the British Columbia Court of Appeal and the Supreme Court of Canada, may limit the courts' potential to compel cesarean deliveries of children over their mothers' objections or to enjoin abortion. The question of fetal surgery remains problematic, however, not only when a mother refuses such surgery when it is indicated in the child's best interests, but when she consents to it. If the surgery is performed in vivo, ordinary civil provisions on the prenatal duty of care apply, but if the fetus is temporarily removed from the uterus for surgical or other care, additional provisions apply. The Criminal Code provides in s. 223(1) that

"A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not  
(a) it has breathed,  
(b) it has an independent circulation, or  
(c) the navel string is severed."

The question arises whether temporary removal satisfies the "completely proceeded" test; that is, whether intended temporary removal is incompleteness. If it is, the fetus remains an unborn child while extra uterum and on replacement. If the fetus becomes a human being, however, homicide laws apply thereafter, including when it is returned to the uterus. Acts causing stillbirth would then be chargeable as homicide.

The Law Reform Commission of Canada's recent paper Crimes Against the Foetus proposes a new crime of negligently inducing abortion. Although it recommends that a pregnant woman herself not be chargeable, its proposals would expose any woman who suffers miscarriage to police and forensic

examination to discover whether any other person is chargeable with the offence of deliberately or negligently causing the fetal loss. New techniques of enquiry based on improved knowledge of human reproduction and reproductive failure may thereby be applied not just to protect unborn life, but to pursue those who caused its loss.

## CURRICULUM VITAE

**NAME** Bernard M. Dickens  
**BORN** London England - 4 November 1937  
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### **POSITIONS**

Professor, Faculty of Law, University of Toronto  
Professor, Faculty of Medicine, University of Toronto  
Professor, Centre of Criminology, University of Toronto

### **FORMERLY**

Tutorial Student in Laws, King's College, University of London, 1952-63  
Lecturer 1964-68, Senior Lecturer 1968-72 and Principal Lecturer  
1972-74, The College of Law (Law Society), London, England  
Research Professor 1974-80, Associate Professor 1980-81, Faculty of  
Law, University of Toronto

### **QUALIFICATIONS**

LL.B. King's College, University of London, 1961  
Barrister, English Bar (Inner Temple), 1963  
LL.M. King's College, University of London, 1965  
Ph.D. (Criminology Division of Law)  
King's College, University of London, 1971  
Barrister & Solicitor, Ontario Bar, 1977  
LL.D. (Medical Jurisprudence) University of London, 1978

### **TEACHING**

Medical Jurisprudence, Faculty of Law  
Medical Jurisprudence, Faculty of Medicine  
Criminal Law & Procedure, Faculty of Law and Centre of Criminology  
Juvenile Justice, Centre of Criminology  
Health Law, Graduate Department of Community Health,  
Faculty of Medicine  
Ethical and Legal Issues in Health Administration, Graduate  
Department of Community Health, Faculty of Medicine

155. "The Anencephalic Organ Donor and the Law" 5 Transplantation/Implantation Today (Sept. 1988) pp. 42-46.
156. (with Rebecca J. Cook) "International Developments in Abortion Laws: 1977-88" 78 American Journal of Public Health (1988) pp. 1305-1311.
157. "Legal and Ethical Considerations in 'Enforced Therapy'" in R.J. Freeman and S.N. Verdun-Jones (eds.) The Treatment of Sexual Aggression: Legal and Ethical Issues Criminology Research Centre, Simon Fraser University, Burnaby, B.C. (1988) pp. 23-52.
158. "The Medical Malpractice Problem in the United States and Canada" 5 Transplantation/Implantation Today (Nov. 1988) pp. 31-36.
159. (with M. Silberfeld et al.) "A Competency Clinic for the Elderly at Baycrest Centre" 10 Advocates' Quarterly (1988) pp 23-28.  
- Reprinted in 9 Estates & Trusts J. (1989) pp. 111-116.
160. "Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law," in S.A.M. McLean (ed.) Legal Issues in Human Reproduction, London, U.K.: Gower Medico-Legal Series (1989) pp 80-112.
161. "Legal Developments in Terminal Care" 6 Transplantation/Implantation Today (May 1989) pp. 13-18.
162. "Legal Approaches to Regulating Human Embryonic Research" in J.M. Nicholas (ed.) Moral Priorities in Medical Research: The Second Hannah Conference, Toronto: Hannah Institute for the History of Medicine (1989) pp. 251-267.
163. "Medico-Legal Issues Concerning the Elderly - An Overview" in J. Eekelaar and D. Pearl (eds.) An Aging World: Dilemmas and Challenges for Law and Social Policy, Oxford: Clarendon Press (1989) pp. 487-514.
164. (with Rebecca J. Cook) "Ethics and Human Values in Family Planning: Legal and Legislative Aspects" in Z. Bankowski, J. Barzelatto and A.M. Capron (eds.) Ethics and Human Values in Family Planning, Geneva: Council for International Organizations of Medical Sciences (W.H.O.) (1989) pp. 117-140.

#### APPOINTMENTS

Member, Human Experimentation Committee, University Research Board, University of Toronto, 1977-

Member, Human Experimentation Committee, Research Institute, Hospital for Sick Children, Toronto, 1976-

Member, University Committee on Ethics in Research and Scholarship, University of Toronto, 1979-81

Member, Human Research Committee, Institute of Child Study, Faculty of Education, University of Toronto, 1979-82

Member, [Ontario] Attorney-General's Committee on the Legal Representation of Children, 1978-

Member, Expert Panel on Child Abuse, Children's Services Division, Ontario Ministry of Community and Social Services, 1976-84

Chairman, Study Group on Child Welfare in Ontario, Ontario Ministry of Community and Social Services, 1978-1979

Member, Legal Task Force, Committee on Mental Health Services, Ontario Council of Health, 1978-1979

Member, Editorial Advisory Board, Bibliography of Bioethics, Kennedy Institute of Ethics, Georgetown University, Washington, D.C., 1978-

Chairman, Law and Medicine Section, Canadian Association of Law Teachers, 1979-

Contributing Editor, Health Law in Canada, 1980-

Member, Consultant Panel, Project for the Development of Guidelines for the Establishment of Ethical Review Procedure for Research Involving Human Subjects, World Health Organization/Council for International Organizations of Medical Sciences, 1978-83

Chairman, Review of Dental Services under the Denture Therapists Act, 1974, Ontario Council of Health 1980-81.

Member, Board of Directors, Justice for Children (Canadian Foundation for Children and the Law), 1976-83

Member, Editorial Board, The Canadian Journal of Community Mental Health, 1982-

Member, Board of Directors, Advocacy Resource Centre for the Handicapped (ARCH), 1980-84

Member, Advisory Board, (Ontario) Psychiatric Patient Advocate Office, 1983-

Project Consultant, Project on Human Artificial Insemination and Related Matters, Ontario Law Reform Commission, 1982-85

Consultant Member, Committee on Ethics, Canadian Medical Association, 1982-

Member, Committee on Ethics in Experimentation, Medical Research Council of Canada, 1984-

Legal Consultant, Development Law and Policy Program, Center for Population and Family Health, Faculty of Medicine, Columbia University, New York, 1984-

Chairman, Working Group to Redraft M.R.C. Guidelines "Ethics in Human Experimentation", Medical Research Council of Canada, 1984-

Member, Editorial Advisory Board, Transplantation/Implantation Today, 1985-

Member, International Board of Editors, American Journal of Law & Medicine, 1985-

Member (elected), Board of Directors, American Society of Law & Medicine, 1986-

Legal Editor, Law, Medicine & Health Care, 1987-

Julius Silver Fellow, School of Law and Visiting Professor, School of Public Health, Columbia University, New York, Spring Term 1987.

Visiting Scholar, Hastings Center, New York, June 1987.

Secretary, American Society of Law & Medicine, 1987-

Chair, Human Experimentation Committee, University Research Board, University of Toronto, 1988-.

Member, Board of Directors, Medico-Legal Society of Toronto, 1988-

Advisor, W.H.O. Western Pacific Region Workshop on Health Legislation, Shanghai, China, April 1988.

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