Letters

Hoity-toity morality and embryos for research

To the Editor: I would like to comment on the above-titled opinion piece in the December 2009 issue of *SAJBL* by Mr Donrich Jordaan. I came across it recently while re-reading this particular issue and felt that, despite the lapse of time, my response is important.

Although the submission was correctly classified as 'opinion', I am nevertheless rather disappointed at the content quality, including its unprofessional style, emotive language and lack of intelligent argument. Such emotive discussions filled with exclamation marks that are aimed at ridiculing those who are of another opinion, rather than engaging them in intelligent debate, are more suited to a popular magazine than an academic journal.

For well-thought-out intellectual reasons, as a scientist (as it seems Mr Jordaan also considers himself to be), I am of the opinion that research with human embryonic stem cells **should** be heavily regulated, and I object to being called archaic and prejudiced and being compared with a racist and a sexist by Mr Jordaan.

Mr Jordaan is critical towards those whom he sees as prejudiced. Prejudice is in fact the very thing that would allow someone to conduct such research without infringing their conscience. If you feel it is acceptable to discriminate against someone as long as they are very young or very small or, more importantly, because they do not have the power to defend or speak up for themselves, then you would have no problem treating them with contempt. So it is with embryo research.

Mr Jordaan fails to mention that there are alternatives to research with human embryonic stem cells.

Mentioning that many pre-embryos do not implant makes no difference to the discussion on the morality of the issue. It only elicits an emotional reaction. Mr Jordaan's thought might run something like this: 'It happens so often in nature anyway, so what's the difference if we make it happen some more?' This response, however, is not rational. What if I were to say that, because HIV kills millions of people every year and there is no cure, it should be legal for researchers to kill any humans in their research; that it happens commonly in nature, so we can make it happen more commonly?

Although the High Court ruled that an embryo/fetus is not a person, it is certainly not true that all first-trimester fetuses are considered to be of no value whatsoever. A doctor still has to consider the welfare of the first trimester fetus when prescribing medicines for a pregnant woman. Most parents consider their first-trimester fetuses to be of incredible value. If Mr Jordaan is a parent, I would speculate that he was probably also one of those.

A Donkin
Somerset West
donkinaj@gmail.com

I would like to assure Dr Donkin that the SAJBL *is an academic, scholarly and peer-reviewed journal, and as such the opinion piece he discusses was reviewed and found to be of a quality suitable for publication. It is acceptable for opinion pieces to contain strongly provocative language in order to stir controversy and follow-up discussion and debate. Dr Jordaan's article has done exactly that.* – Ames Dhai, Editor

Donrich Jordaan replies: I would be delighted to engage in vigorous intellectual debate about the topic of embryo research, and I therefore invite Dr Donkin to set out in an academic article in this journal, his reasons for believing that human embryonic research should be heavily regulated, to which I shall respond in kind. In the meantime, I would like to refer Dr Donkin to some of my peer-reviewed articles on this topic.[1-4] In this reply, I shall only address some of the more pertinent points made in Dr Donkin's letter.

The purpose of my opinion piece was to present an argument that the human pre-embryo does not have intrinsic value, and to highlight the real practical hypocrisy in the opposing position. Dr Donkin incorrectly summarises my argument as: 'It happens so often in nature anyway, so what's the difference if we make it happen some more?' This is a misleading straw-man fallacy. A more accurate summary of my argument would be: 'Given that human pre-embryos are so often excreted from a woman's body in nature without anybody endeavouring to save these excreted pre-embryos, it is highly hypocritical to endeavour to "save" pre-embryos that can be used constructively in scientific research.'

Dr Donkin's HIV example is therefore incorrect, and can instead be recast in terms of the correct version of my argument: We as moral human beings care for people with HIV, and our governments, our universities and our biotech companies invest great effort into finding a cure for HIV. This perspective is based on the shared humanity of both HIV-positive and HIV-negative people. In contrast, no attempt is made to save all the pre-embryos that are naturally excreted. What does this imply about the humanity of pre-embryos?

Dr Donkin speaks of the human pre-embryo as 'someone very small' that does 'not have the power to defend or speak up for themselves'. It is indeed chivalrous to protect the small and the powerless – referring to small and powerless human persons, or at least beings with some degree of sentience. However, I fail to see how such chivalry can properly have as its object a microscopic clump of undifferentiated human cells. If Dr Donkin is seriously of the opinion that the pre-embryo is a proper object of chivalric protection, does he or she make a chivalric attempt to save the millions of pre-embryos that are naturally excreted annually?

Dr Donkin correctly states that a doctor must consider the welfare of the first-trimester fetus when prescribing medicines to a pregnant woman. The legal principle is that an action that causes harm to a person can take place prior to the person coming into existence, as cause and effect can be separated in space and time. If an embryo is harmed by a doctor's negligence, the embryo (as a non-person) will not be able to sue the doctor until it is born alive, and harm to such resulting baby (person) as a result of the doctor's actions or omissions is evident. If the embryo that was 'harmed' by a doctor's negligence is never born because of unrelated reasons, the 'harm' would be irrelevant in law and no delictual liability would follow. Accordingly, this legal position provides no basis for an inference that the pre-embryo has any intrinsic value.

The perspective of the prospective parent also does not assist Dr Donkin's position. Prospective parents (I assume in most cases) do value their prospective offspring greatly. This extrinsic value-allocation should, however, not be confused with intrinsic value at the very early pre-embryonic (1 - 14 days) stage. To il-

Letters

lustrate: When parents who have used IVF donate the remaining embryos after a successful pregnancy to scientific research, I seriously doubt that these parents allocate the same value to these freely donated embryos as they would have if they still had plans to use these embryos to have a child. And then of course some prospective mothers opt to take the morning-after pill to terminate their prospective offspring, which indicates a negative extrinsic value allocation to the pre-embryo.

Dr Donkin mentions that there are alternatives to research with human embryonic stem cells. This is a dangerous half-truth. It should also have been mentioned that, for some important research areas, none of these alternatives is as useful and effective as using human embryonic stem cells. For example, research areas such as human fertility require human embryos with which to experiment. And even in research areas where there are alternatives to human embryos, the obvious question is: Why not use human embryos? In the absence of sound and rational reasons, scientists should not be prohibited, or bogged down in excessive red tape, to use such embryos. To hinder the progress of science in the absence of sound, rational reasons is profoundly unethical.

To conclude, I believe that hypocrisy and prejudice are proper objects of ridicule. And to erect steep regulatory barriers around the use of pre-embryos for research, but simultaneously allowing such embryos to be aborted at will and simultaneously not blinking an eye at the millions of pre-embryos that are naturally excreted, constitutes hypocrisy and prejudice against science. Moreover, irrational beliefs that cause suffering of real persons by hindering the progress of medicine are not only proper objects of ridicule, but also of contempt and condemnation.

1. Jordaan DW. Pre-implantation genetic screening and selection: An ethical analysis. Biotechnology Law Report 2003;22(6):586-601.
2. Jordaan DW. The legal status of the human pre-embryo in the context of the genetic revolution. South African Law Journal 2005;122:137-149.
3. Jordaan DW. Science versus antiscience: the law on pre-embryo experimentation. South African Law Journal 2007;124:618-634.
4. Jordaan DW. Criteria for pre-embryo research in South Africa: an analysis within the paradigm of respect for the pre-embryo. Medicine and Law 2008;27(2):417-437.

State doctors, freedom of conscience and termination of pregnancy revisited

To the Editor: May I comment on the article by David McQuoid-Mason relating to freedom of conscience in abortion cases, which appeared in your December 2010 issue?[1]

By failing to refer to the Regulations made under the Principal Act, the writer makes this issue extraordinarily complicated. It is, of course, trite law that regulations are subordinate legislation that have the same force of law as the Act of Parliament from which they emanate. The statutory duties imposed on a practitioner consulted about an abortion are explicitly set out in the Regulations.

Regulation 9 of the *Regulations under Choice of Termination of Pregnancy Act 92 of 1996* (gazetted 31 January 1997) reads as follows:

> Information concerning the termination of a pregnancy:
>
> A woman requesting the termination of her pregnancy shall be informed –
>
> (a) that she is entitled to the termination of her pregnancy upon request during the first 12 weeks of the gestation period;
>
> (b) that, under the circumstances determined by section 2(1)(b) of the Act, her pregnancy may be terminated from the 13th up to the 20th week of the gestation period;
>
> (c) that only her consent is required for the termination of her pregnancy;
>
> (d) that counselling contemplated in section 4 of the Act shall be available; and
>
> (e) of the locality of facilities for the termination of pregnancies.

Quite clearly, sub-paragraph (e) is designed to amplify, clarify and specify the statutory duty that arises under section 6 of the Principal Act when a woman requests an abortion from a doctor who is not prepared to carry out the procedure personally. Such a duty does NOT include any responsibility to refer to another doctor. It goes no further than a duty to name an alternative hospital or clinic.

I find it extraordinary that so many lawyers as well as practitioners have failed to read this regulation. After extensive and heated debate on this very topic (see Hansard), Parliament decided to specify in its subordinate legislation exactly what the duty amounted to. It follows that David McQuoid-Mason's fascinating and indeed erudite discussion about the relevance of the Limitation Clause in the Constitution and about comparisons with English law, and indeed section 10(c) of the Principal Act, all become otiose.

In the light of Regulation 9(e), there can be no doubt that a court would reject out of hand the suggestion that section 10(c) ('preventing the lawful termination of a pregnancy or obstructing access to a facility') criminalises a doctor who refuses to refer to another doctor; it would choose in favour of the clear and obvious intention of Parliament, namely that the section was designed to criminalise violent behaviour outside clinics intended to prevent patients lawfully entering the facility.

I would respectfully submit that it is most important that those doctors who wish to exercise their constitutional right of conscientious objection should not be intimidated by threats and fears quite unfounded in law.

John J Smyth

Consultant in SA Constitutional Law

Director, Justice Alliance of South Africa

1. McQuoid-Mason D. State doctors, freedom of conscience and termination of pregnancy revisited. South African Journal of Bioethics and Law 2010;3(2):75-78.