

**Ethical Dilemmas: Who should decide – scientists, God or
lawyers?**

By Katrina Bochner

It is time for judges to cease their claim, most recently made by Lord Justice Ward in Re A (Children) (2000) that they preside over a court of law, not a court of morals. Every year, advances in science, and in medical knowledge and technology stretch the bounds of human achievement, of scientific possibility and medical probability. The moral dilemmas created by these developments and discoveries were barely dreamt of at the start of the twentieth century. At the beginning of the twenty-first century, they are a reality that must be faced, and dealt with. Who better to deal with them, than those who are already the custodians, and to a very large extent the defenders of what is right in our society – our judges?

Let us look a little more closely at Lord Justice Ward's claim. Is it, in fact, true to say that we currently have a court of law, and not morals? Surely the law that is applied in many cases is a codification of the morals and ethical views of former generations. Our law against killing exemplifies the moral principle of the sanctity of life. Laws proscribing homosexuality were based on a particular moral view; laws against divorce had their basis in a moral principle, as do laws against bigamy. The only difference between these ethical questions and the new ethical dilemmas facing courts is that the courts have been dealing with these questions for centuries.

Before proceeding any further, it is necessary to ask whether there is a need for a particular body, such as a court, overseeing the activities of doctors, scientists and others, to ensure their ethical conduct. Clearly the answer is yes, and the very fact that cases such as Airedale NHS Trust v Bland [1993] AC 789 and Re A (Children) (2000) have been brought before the court shows that this is so. Previously, such questions would not have arisen. There was no question of keeping alive by artificial feeding a patient in persistent vegetative state; conjoined twins lived or died according to the dictates of God or nature; infertile couples did not bear children, let alone have the ability to choose the sex of their children. And now that all of these things are possible, very few people, if any, would argue that humans should not intervene and simply let God or nature take his, or its, course. The natural desire to prolong, create and enhance life will not allow us to take a step back to allow God to do his work unaided. Man's ability to intervene, and at times to interfere, has left questions which our laws and our ethical code are unable to answer. The doctors and scientists, however, who allowed these ethical dilemmas to arise feel unable, or at least reluctant to mark out the moral pathway that users and recipients of these technologies should tread.

Nor should those doctors and scientists mark out the moral pathway. One must always question the objectivity and motives of the people who are actually using and developing these sciences and techniques. For some, the fact that something can be done may

overshadow the crucial question of whether it should be done. The fact that we have the scientific ability to tamper with the genetic makeup of plants is not sufficient reason for doing so. The long term implications and effects of such acts must be ascertained and weighed in the balance. An objective body, external to the researchers, can best do this. The fact that the parents of the babies in Re A (Children) (2000) had different views to the doctors caring for them indicates clearly that the ability to operate did not necessarily determine that the operation should go ahead.

The following points have, therefore, been established. Courts have always upheld and enforced the moral views of their communities. Given that intervention is possible, it is not sufficient to wish to turn back the clock to let God have his way, or nature take its course. And finally, those who develop and use these techniques may lack the objectivity to set the moral course. This burden must fall back on the court system, as it has already done, and the court must adapt so that it can continue to fulfil its function.

The court must openly acknowledge, most importantly to itself, that it is setting the moral framework for a society, which has moved beyond the traditional boundaries imposed by science and religion. In a less secular time, the church, in conjunction with the court fulfilled this function. But in our society, people are not satisfied to allow the church to set the moral standard, and therefore the court must step in and acknowledge that this is

part of its role. Once this acknowledgment has been made, it can move on to develop the principles on which these new ethical dilemmas can be resolved. It has already begun this process in cases such as Bland and Re A, where it has identified as important ethical principles such as the sanctity of life, the need to respect an individual's autonomy and dignity, and the need to identify the individual's best interests. In those cases, the court has been able to weigh up these principles and, where they conflict, determine where the ethical path should lie. Once the court acknowledges its role in this regard, it can seek the assistance of experts in ethics, to assist in reaching a decision that gives appropriate weight to the competing principles and views expressed by those involved.

The ethical pathway that lies ahead of us is, as it should be, in the hands of our lawyers and judges. The court has a responsibility to accept that this is so, and to continue to fulfil the function that in the past, it fulfilled with the assistance of the church. But our judges are not alone. Once they acknowledge that this is part of their role, they can seek the assistance of ethicists and philosophers, doctors and scientist, parents and family members of the individual concerned, to ensure that the right balance is struck and the right decisions are made.