Responses to human cloning. Aspects of private law

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Ever since the possibility of cloning human beings arose, international organisations and especially those organisations concerned with the protection of fundamental rights, have been actively working to reach agreements, make recommendations, explanatory declarations, etc. What all these have in common is a deep concern, sometimes thinly disguised and sometimes more openly explicit, about the consequences that developments in research into human cloning techniques could have. There are two basic ideas which must be borne in mind when reflecting upon this matter: the first is that, for reasons that are not entirely clear, cloning is seen as a perversion; hence, when work in assisted reproduction began, the majority of the same international organisms were quick to outline a field of action that would facilitate its development, although within limits; however, cloning is different in that from the outset everyone seems to agree that it should not be applied to human beings. The reasons underlying this unanimity may be ambiguous, but in the end unanimity existed.

The second idea is closely linked to the first: in contrast to what happened in assisted reproduction where there was a drive to legislate control, firstly, over the products of assisted reproduction, be they embryos, frozen or otherwise, or others, and secondly, over the system to be employed to determine paternity of any children actually born through use of the techniques, this has not been the case with human cloning. This may be because to date no children have been born as a result of cloning, and because jurists have not thought out what would occur if one day a team of scientists should present a human «Dolly» to the press.

This lack of legal provision leads me to think about the vacuum which surrounds the question of what would arise and the consequences in the area of *private law*. The question is *what problems would we jurists be faced with if a cloned human were born.*

I. What kind of cloning are we dealing with?

The first clarification needed concerns what we mean when speaking about cloning. This is an absolutely unprecedented problem for a jurist and for that reason I propose to outline the

problem using the terms presented in its report by the *Comité Consultatif national d'éthique pour les sciences de la vie et de la santé*. This report distinguished among three different types of cloning:

i) *The creation of monozygotic twins*, by means of the manipulation of an embryo created *in vitro*; an embryo of several cells is split and separated into two or more independent parts, each of which is capable of engendering genetically identical organisms. The report points out that this situation can occur naturally, though it can also be provoked in the laboratory, and it involves sexual reproduction, that is, the individuals born will carry genetic elements of both partners.

ii) *Cloning by means of the transfer of embryonic nuclei:* It is possible to obtain cloned organisms by means of the transfer of already developed cell nuclei from a single embryo to previously enucleated oocytes. Again, the report points out that procreation must take place previously to obtain the donor embryo.

So far then, these two types of cloning require a preliminary basis of sexual procreation, and therefore the beings born as a result will carry a double set of genetic information, that of the genetic father and mother.

iii) *Cloning of an embryo derived from an adult organism*, which does not require any procreation act, since it uses a non-fertilised female gamete. This is the case of «Dolly». According to the report, the oocyte which receives the donated cell can be from the same organism or another, in which case it can be male or female. Therefore, if the technique employed with sheep was applied to humans it would give rise to single-parent reproduction, since 100% of the genes inherited would come from the progenitor. At the same time however, the progenitor's genetic information is that passed on to him by his parents; therefore, the clone's genetic information is also that provided by the parents of the person who has provided the material leading to the clone's birth.

This third case is of course the most complex and we can safely say that this was the situation that the organisers of this meeting had in mind when they sought possible legislative responses to a hypothetical birth due to human cloning. However, what I have just said refers only to the procedures or techniques that can be employed to obtain a clone. And the technique is not the essential issue. Rather, what is essential is the fact that *a clone is a being which is identical to another, which has the same genetic characteristics as another.* And it is this which I feel should serve as a basis for general consideration of the common factors of all cases of cloning: *the clone is a copy of a living being, which in turn is the result of the natural union of a man and a woman; therefore, if the clone is a copy of this being, it will have the same genetic features*, in other words, *it will not be the genetic offspring of whoever commissions it, but rather of this person's parents.* This must be borne in mind, since a number of the present legislative solutions are incapable of taking this into account.

Cloning procedures may give rise to different results: by means of *in vitro* fertilisation, preimplantation embryos may be obtained for the purpose of posterior transfer in cases in which it is difficult to obtain further oocytes; cells may be obtained for the purpose of genetic analysis

or for the creation of tissues or organs for transplants, or finally, a human clone could be obtained, for whatever reasons. Of all these results, of most interest from the point of view of positive law is the case which gives rise to a living human being. Therefore, I propose to set out from the basis of a threefold hypothesis:

i) A human being has been born;
ii) This birth has been the result of cloning, and
iii) This cloning has involved asexual reproduction.

II. Hypothetical problems for private law

I am afraid I must warn that from now on, we must employ a little imagination in order to picture a situation which at present is purely hypothetical, and also to clarify my line of reasoning. Let us turn to a science fiction scenario. Let us imagine that Dr. Frankenstein, worried about the consequences of his actions, approaches an expert in private law for his opinion on the being that he had created; let us imagine that in this case, the being is not yet the «monster», but rather a new-born baby, which for our present purposes, we shall say is the result of cloning. We must also bear in mind that while the law expert may bring all his powers of imagination to bear on the problem he is limited to the use of an external instrument which he cannot change or alter in any way: the law of the land. This is the basis on which he must solve the problem. However the problem is not contemplated in the code, nor can it be side-stepped, since Dr. Frankenstein is not asking for permission to create a being, rather he is asking about the consequences of what he has already done. Of course, if the legal expert were also a member of a Parliament, he could introduce a law to regulate this situation, such as Law 35/1988 which regulates assisted reproduction techniques. However, the law always lags behind the reality of new situations and is only effective when these situations have become consolidated; so what can our legal expert do in order to find a useful response for a worried Dr. Frankenstein?

Following the methods employed by law, he must first of all identify the legal problems posed by this new situation; secondly, he must decide what legal technique would best be employed to find a solution to the problems, and thirdly, he must apply the recommended solutions to the specific case in hand. Let us try to follow the path taken by our hypothetical legal expert.

In the first phase, there are three problems.

The first problem is the attribution of personality, since every human being is a person in the eyes of private law, independently of origin, on condition that he or she meets the requirements set out in article 30 of the Spanish Civil Code (*v. ultra*). Therefore, the first thing we must determine is whether the being is a person in legal terms.

The second problem to be faced lies in the need to attribute a father and mother to this new-born being, that is, to determine paternity.

It is essential to find a solution to these two problems, since the entry of this being into the

world demands, for reasons that will be seen later, that we determine whether he or she is a person or not, and that we grant it some form of protection throughout the years it will be incapable of acting for itself; and all of this is done by determining paternity.

However, it may be that our legal expert is faced with further doubts, since his client has obtained a being by means which infringe the prohibition on cloning for the creation of human beings. In which case, he may well decide that he is facing a third problem: *could this action give rise to a claim for indemnification?* If the answer to this question is «yes», then he is faced with yet another question, *who has the right to claim this indemnification and against whom?*

A) *Acquisition of personality*

Article 29 of the Spanish Civil Code states that personality is acquired at birth, on condition that the new-born fulfils the requirements set out in article 30 of the same code, namely, that it must have a human form and must live independently for 24 hours outside the mother's womb.

Any human being that is born then, is considered to be a person and to have acquired personality, and will consequently be entitled to the set of rights and obligations which this entails. Personality, from the legal point of view, is construed as a preliminary criterion which determines the entitlement to fundamental rights. Existence as a person implies the acquisition of personality and allows for full legal consideration as such, in all the existing legal codes. However, as mentioned above, for the acquisition of personality to be deemed to have taken place, two requirements must be met: the new-born must have a human form and must live for a total of at least 24 hours outside the womb. These two requisites are not uniformly applied in other legislative codes; the requirement as to human form has historic precedents, which were intended to prevent the attribution of personality to immature foetuses, which although biologically alive were quite clearly incapable of living (MONTÉS in A. López - V. Montés (eds). Derecho civil. Parte general. 2nd ed. Valencia 1995, p. 308). However, it must be said that it is highly problematic to determine this matter in purely legal terms since recourse must be had to medical science; BERCOVITZ (Manual de Derecho civil. Derecho privado y derecho de la persona. Madrid, 1996, p. 73) states that

«Through this, a demand of improper viability may sometimes be lodged, in that the lack of human form (due to physical defects of the foetus) does not allow the new-born to survive in minimally normal conditions».

However, the author adds a clause which is important for its relevance to the potential problems posed by cloning:

«Evidently, the presence of a deformity in the foetus does not in principle preclude recognition of personality».

Hence, we must accept the conclusion drawn by DIEZ PICASO-GULLON BALLESTEROS that the requirement regarding human form is equivalent to a requirement that the foetus must be capable of surviving (Sistema de Derecho civil. I. 8th ed. Madrid, 1993. p. 226).

The second requirement involves what is known as legal viability, namely, confirmation of the

existence of independent life of the new-born outside the mother's womb for a period of at least 24 hours. The Code does not then include any of the other possible criteria: confirmation of foetus maturity, or confirmation of the absence of defects which could render its survival unviable; these stipulations are discarded in favour of an objective system aimed at confirmation of so-called viability once birth has taken place. If the new-born does not meet these requirements and dies within 24 hours, it is deemed not to have acquired personality; if it meets both of these requirements it is deemed to have acquired personality and from the legal point of view will be entitled to consideration as a person from the moment of birth, and not just from 24 hours after the moment of birth. In fact if these two legal requisites are met, personality is deemed to have been acquired from the moment the umbilical cord is severed.

As I said earlier, acquisition of personality is automatic and is attributed at birth. This is the essence of being a person in the eyes of the law and it entails entitlement to certain fundamental rights as set out in the Constitution.

This then is the legal theory; however we must ask whether we can apply it to the case which we are now dealing with. The answer must be a resounding *clearly, yes.* As we have just seen, personality and all its attendant legal consequences is attributed through having been born. The principle of non-discrimination set out in article 14 of the Spanish Constitution means that every human who is born and who meets the requirements of article 30 of the Spanish Civil Code is deemed to have acquired personality, regardless of biological origin. That is, the process followed prior to the birth and giving rise to it is not a concern of the law, since if it were, it would be a case of discrimination and would therefore be unconstitutional.

As has also been pointed out earlier, personality is independent of the person's individual capacity. From the point of view of the law, there are no hominids, no human beings pertaining to a lower category as a result of their intellectual or physical capacity. An entirely different matter is the fact that, given the real capacity of the new-born, a system of protection must be established for when he or she reaches the age of majority, or in the assumption that he or she will reach the age of majority, so as to avoid prejudice to him or her as the person he or she is deemed to be. This, as I say, is a different argument and is concerned with matters I will take up in the next section.

Therefore, regardless of the origin of the new-born and the question of whether birth has been the result of cloning or not, and similarly regardless of the new-born's innate capacities, if it is entitled to consideration as a person in the terms set out in article 30 of the Spanish Civil Code, then it is deemed to have acquired personality in legal terms and it is entitled to enjoy fundamental rights, which in turn means that protected status must be assigned in accordance with its lack of capacity as a new-born.

This first conclusion therefore, may be seen as reassuring to those who fear that through genome manipulation, evil scientists would produce a race of «inferior» beings, thus constituting a modern category of slaves. I do not think that we can improve on the present provisions of the Spanish Civil Code: the legal category of *person* is intrinsically bound up with the physical

condition of being a *man/woman*, in such a way that we can say that the human being is invariably a person in terms of the law. And this constitutes a guarantee against abuses and other temptations: this is a major achievement of modern mankind, from which I think there can be no turning back now, given the constitutional ruling on human dignity as the foundation of political order and social peace.

B) *The cloned human in society: determining paternity*

Up to now, our legal expert has come up against relatively few problems, since the rulings on acquisition of personality do not leave room for deviation. However, if we have a cloned human, we must now designate legal protection and this is where the real problems begin.

As a general rule, humans are born into families based around a father and mother who are obliged to «take complete care of all children born to them either within or outside marriage», as set out in article 39.3 of the Spanish Constitution. This obligation is enshrined in law, by means of two mechanisms: firstly, by presumptions that the new-born is the offspring of the husband of the mother, or the mother's partner in cases where no marriage has taken place, through the systems mentioned in article 89 of the Spanish Family Code and article 120 of the Spanish Civil Code. And secondly, in cases where presumptions of paternity will not serve, or when paternity has never been established, recourse can be had to the paternity investigation mechanisms which are provided for in article 39.2 of the Spanish Constitution. This, in effect, constitutes an instrument in the service of the citizens enabling them to seek a certificate of paternity or to contest it, and thus allowing them to determine who their progenitor is and obtain enforcement of the parental duties attributed by law. This is deduced from the sentence handed down by the Spanish Constitutional Court on the seventh of January 1994 (7/1994). This case involved a father who refused to undergo biological paternity tests on the grounds that it would constitute an infringement of his right to privacy. The Constitutional Court ruled that the offspring's interest overrode the father's right to privacy.

> «There is no doubt that, in paternity cases, the interest of society and public order is closely bound up with these claims, which involve the maintenance and inheritance rights of the offspring, which are granted special protection by article 39.2 of the Spanish Constitution, and this interest and public order transcends the rights of the individuals involved... such that constitutional rights to privacy and physical safety cannot be construed as constituting a basis for impunity from the responsibilities and obligations arising from possible family connections.»

However, let us proceed slowly, because this issue is a delicate one.

With regard to the matter of attribution of paternity and how it is determined, in Spanish law we must distinguish between paternity and maternity.

i) *Maternity* is attributed from the moment of birth. In the rulings on paternity in the Spanish Civil Code there are no rules on the attribution of maternity; Article 87.2 of the Catalonian Family

Law Bill introduces a modification, establishing that maternity is determined at birth. Indeed, this approach is the one adopted by article 10.2 of Law 35/1988 on assisted reproduction, which establishes that in cases of surrogate motherhood, «paternity of children born after surrogate motherhood will be determined at birth».

Clearly, this constitutes just one legal option from amongst a range of possibilities, since, in addition to the woman who has borne the child, the law could opt to attribute maternity to the woman who donated the genetic material, or to the woman who commissioned the entire process. Spanish law and all the international recommendations however, have opted to assign maternity to the woman who bears the child, that is, when deciding on whose interest is most worthy of protection, they have opted to attribute maternity on the basis of a certain and definitely confirmable fact: birth. Here legal certainty prevails and this benefits the new-born, who is assigned a mother who is clearly obliged to carry out the duties set out in the Constitution.

ii) Determining the best way to attribute *paternity*, i.e. *fatherhood* poses more difficulties. One certain way would be to determine paternity by biological tests carried out at childbirth, that is to carry out comprehensive testing of the genetic characteristics of the new-born and the alleged father; this however, cannot be applied as a general rule. Therefore, the law must establish systems which enable to determine paternity immediately but without recourse to biological methods, although these may of course be employed in cases of contested claims, that is, when efforts are made to have formal paternity reflect real paternity. In fact, the law acts on the presumption that the woman's husband is the biological father of her children. However, this general rule is a mere presumption which can, of course, be contested in a court of law.

The basic principle in the Spanish Civil Code, based on article 39.2 of the Spanish Constitution is that paternity should be attributed to the biological father. However, this principle can be overridden by the existence of other interests: thus, article 8 of Law 35/1988 establishes a different principle in cases where birth has taken place as a result of assisted reproduction techniques, in which the determination of paternity is not biologically-based, but rather hinges on the consent of the mother's husband. The established formulation is as follows:

> «Neither the husband nor the wife, in cases where they have previously and expressly granted their consent to fertilisation with sperm from a donor or donors, may contest the paternity attributed to the married couple over any child born as a consequence of the fertilisation.»

This same solution, which I will later return to in greater detail, is applied in article 111.2 of the Catalonian Civil Code, which, having established that the husband's consent, confirmed in public deed, is determinant for a presumption of paternity, states that a claim against paternity cannot be admitted on the sole basis of assisted fertilisation of the wife, if this fertilisation has been carried out with the express consent of the husband, confirmed in public deed, both when this consent has been for insemination with the husband's sperm or for insemination with sperm from a donor.

And this rule is also applied in cases where insemination takes place in a non-married couple.

From this, a very important conclusion can be drawn, which ties in with what was said earlier: the general rule used to attribute paternity to the biological father is not an absolute principle, since in certain cases the interests which must be protected, essentially those of the new-born, oblige the legislator to employ other criteria. In the latter case, it will not necessarily be the genetic father who is assigned paternity; rather it will be done on the basis of consent, to the point that «revelation of the identity of the donor...does not *in any case* imply a legal attribution of paternity» (article 8 of Law 35/1998). We have then, arrived at a situation in which the principle contained in article 39.3 of the Spanish Constitution is respected and applied, and we are now in a position to express it differently: protection of the interest of the new-born demands that we attribute a father and a mother to him; they may be his biological parents; but if they are not, we must seek another system to meet his developmental needs and this we do by means of attributing paternity by alternative and basically formal means as follows: a declaration of intent to undertake a process which will lead to the birth of a new being is sufficient for the determination of paternity. In this way even if the new-born's biological characteristics do not correspond with those of the father, the latter cannot deny paternity. The circle has now been closed.

Now our hypothetical legal expert is truly worried, since he does not know what rules he can possibly apply to the case of our clone. He does not know because he is working on the basis of three hypotheses, and he must chose one solution.

i) *First hypothesis*: the new-born is the result of a system to create twins, produced *in vitro* by the manipulation of an embryo. In this case, the cloned twin has exactly the same characteristics as its sibling and both have the genetic blueprint passed on by both their parents, since it was their genetic material which served for the *in vitro* creation of the original embryo. This case would involve relatively few problems, even if the birth of the clone were to take place a long time after its first twin, on condition that the procedure followed for the creation of the original embryo was that stipulated by Law 35/1988, which has been described earlier. The reason for this is clear: if the original progenitor gave consent, then paternity must be attributed to him.

ii) *Second hypothesis*: given the same situation, let us suppose that the clone is frozen and implanted many years later in the womb of a different woman to the woman who provided the egg which gave rise to the original embryo. If we are to apply the law as it now exists, the woman who gestates and gives birth to the new-born will be the legal mother of the second child. However, and this is where the problems begin, who will be the father? We are clearly faced with a situation in which a process of artificial fertilisation has taken place, which will have required the consent of the husband or partner of the mother. In addition, we must also apply the rule described earlier, according to which, consent is equivalent to an acceptance of paternity. The only basis for a claim on the part of the husband or partner of the mother against paternity is a lack of consent. The same would occur in a surrogate motherhood contract.

So far, application of Law 35/1988 means that the genetic origin of the new-born is secondary: it does not matter whether it is a clone or not.

iii) *Third hypothesis*: the new-born is a clone of an adult, created by means of an asexual reproduction technique. We should clarify here that, as I pointed out earlier, this fact in itself does not matter; what is important now is the fact that we are dealing with a copy of an already existing person. The matter now becomes more complex, because as a copy, the clone will have the same genetic characteristics as the original person, which will of course be those of the parents of this person, that is, the clone will bear a genetic stamp corresponding to the father and mother of the original person. In other words, the clone, biologically, will be a sibling rather than a son or daughter of the person of whom he is a copy, since he will be the genetic offspring of the parents of the original person. I do not need to point out how confusing this situation has become. Let us try to reason our way out of this situation, which our hypothetical legal expert, now totally lost, faces with his Dr. Frankenstein client who has created a clone of himself.

Let us now momentarily set aside the line of reasoning drawn from Law 35/1988, to which I will return at a later stage. For we must now proceed following an *ad absurdum* reasoning, by which I mean we must imagine absurd situations which could arise from the rigid application of the law, since this may provide the most coherent means of solving the problem.

To this end we must study two specific aspects of paternity: surnames and inheritance. Let us imagine that a person creates a clone of him or herself and that the person's parents are dead. If we attribute paternity by biological criteria, the clone will be the offspring of the parents of the person of which he is a copy and, will therefore be a sibling of the original. Conclusion: they would have the same surnames and share the inheritance of the «parents», and this could take place many years after their death. This is an absurd conclusion. It is true that the law of the land could perhaps put forward other solutions, but in their absence, at present the situation would be as I have just described.

Now let us further complicate things: if the person of whom the clone is a copy also has natural offspring, this does not mean that his inheritance must be shared among his children and the clone. By applying the rule we have just seen, the children do not have a new sibling, but their father does and must share his inheritance with the clone, which means that the children will only be entitled to half the amount that would have accrued to them if cloning had not taken place. Following this path a little further, perhaps the only conclusion to be drawn would be that we are all sons and daughters of Adam and Eve, since all our genes are essentially a combination of the original ones.

We can now see that any conclusion involving the attribution of paternity by biological means would pose unsolvable problems. Therefore, we have no choice but to fall back on the formal/voluntary system of assigning paternity, so that in legal terms, the man who granted consent for the cloning procedure to go ahead would be considered to be the father: the principle by which everyone is responsible for their own actions means that decisions must always be taken with a view to the interest of the new-born, and thus paternity is attributed by means of the most coherent system, which in this case is the voluntary one. We have now reached the same conclusion accepted in 1988 by the Spanish legislators.

At this point, we must ask ourselves one last question, which undoubtedly underlies all the

observations I have thus far made: does it not seem that the concept of paternity has lost all meaning in this case? The report of the French *Comité Consultatif* which I have already quoted (p. 28) states that an individual born from a cloning process would at one and the same time be a descendant of an adult and his twin, and therefore, *«à la limite serait ainsi vidée de sens l'idée même de filiation»*. This reasoning is surely correct if we set out from the basis of non-purely legal conceptions of paternity; however, if we take paternity to embrace the relationship between a person and his or her descendants, with a view to assigning a series of rights and obligations to the former for the benefit of the latter, then it means that we jurists are under the obligation to search for solutions to avoid a situation in which a person is condemned to not have parents, not just because he or she will never know them, but because they do not exist. Among the main criticisms levelled at paternity issues arising from the use of assisted reproduction is that if sperm donor anonymity is maintained, then the person born as a result of this process is denied the right to know his or her own origin and the identity of his or her progenitor, as well as being denied the hypothetical right to actually have a father and mother. I prefer not to speak of these rights as forming part of the, as it is, highly nebulous concept of the free development of personality, as it appears in various constitutions, but rather by accepting the interpretation of paternity set out earlier, as a legal mechanism by which a series of obligations are assigned to certain persons in benefit of another. Every person is born with the right to have a relation of this nature so as to enjoy protective mechanisms in keeping with the individual circumstances. Therefore, I have reached an irrefutable conclusion, by which every being born with a human form is a person, regardless of the method employed to bring about his or her conception. Paternity, in the legal sense, is not only not absurd in this case, but is also applicable in the fullest sense of its meaning with the aim of affording protection to the new-born.

It would be a different case if the law were to stipulate a system for the assignation of paternity/maternity in keeping with the specific circumstances of each situation. This no doubt would be the best solution; however we cannot expect this to happen until such time as a real case of human cloning occurs. In the meantime, the only possible elements on which to base a decision are those which I have pointed out here. Because any decision which left the clone without a family would be tantamount to admitting that the already living are entitled to plan the existence of persons without families, and this is quite clearly unacceptable.

C) *Could a claim of civil responsibility be made?*

In all certainty, our hypothetical legal expert, concerned by the personal problems likely to be encountered by his client in relation to the new-born clone, will be keen to explore all possibilities in his search for a solution and is now very worried about the consequences that the very act of cloning could give rise to. And having considered and noted down all the arguments we have seen, it occurs to him that there is yet another possibility: could a claim of civil liability be made? Against whom? For what damages?

Let us suppose that the entire cloning process has been carried out in Spain and let us also

imagine that this process has infringed the prohibitions set out in article 161.2 of the Penal Code, so that the person responsible for the cloning is liable to prosecution. In this case, article 1091 of the Spanish Civil Code and article 109 of the Penal Code oblige the culprit to repair the damage caused by the offence. But even if we say that no offence has been committed, due to, let us say, the difficulties of interpreting the above-mentioned article 161 of the Penal Code and because of the application of the presumption of innocence, even in this case there still is the possibility of applying article 1902 of the Spanish Civil Code, by which the culprit is obliged to repair the damage. In both of these cases, two questions are posed: what is the damage which must be made good, and who has to make it good? Without an answer to these two questions there can be no judicial action.

i) *What is the damage?* An obvious answer would be to say that the damage caused is life itself, since if the cloning process had not been carried out the clone would not have been born. However, in a constitutional system which is based on the protection of fundamental rights, among which the right to life figures prominently, to conclude that life is in itself a damage is entirely incoherent. Let us look at what can be deduced from the Spanish Supreme Court rulings in cases where vasectomy operations have failed: a doctor has never been sentenced or fined on the basis of a birth considered in isolation as a damage *per se*; rather they have been ordered to pay damages arising as a consequence of the birth, including maintenance of the child, moral damages, and so on. The Spanish Supreme Court rulings are in the sentences handed down on 25 April 1994 and 11 February 1997, among others. In the first of these the Court affirmed that an indemnification consisting of a sum equivalent to that which would be paid for the death of a child would be correct, «not of course as compensation for moral damages, but rather as assistance for maintenance and education of the children». The sentence here distinguishes two types of damages; patrimonial damages, caused by the inevitable increase in expenses and secondly, moral damage, caused by the actual birth and it is understood that this second category must be discarded, since human life cannot ever be construed to constitute a damage, and this, in effect, is what a reading of the sentence in question would seem to imply.

As stated by PANTALEON,

> «It would be absurd in these cases to consider life as one of the benefits which should be taken into consideration in the calculation of the indemnification by *compensatio lucro cum damni*» («Procreación artificial y responsabilidad civil». In *La filiación a finales del siglo XX*. Vitoria, 1988, p. 266).

ROMEO CASABONA, in a recent work, quotes Hans Jonas as claiming the following:

> «The simple and unprecedented fact is that the hypothetical clone knows (or believes he knows) *too much* about himself, and others know (or believe they know) too much about him. These two facts, real and assumed self-knowledge and real and

assumed knowledge by others, have a paralysing effect as far as the spontaneity of the clone's *getting to know himself* is concerned, the second fact has a similar effect on the way others will see and deal with the clone.»

He then continues to say that this

> «has a harmful effect on the process of achieving an individual identity... In short: the product of cloning has been robbed of his freedom in advance, his freedom can only remain intact if it is protected by ignorance» («¿Límites jurídicos a la investigación y sus consecuencias? El paradigma de la clonación». *Revista de Derecho y Genoma Humano*, n.° 6, 1997, p. 32).

This quotation should help to see the nature of the damage to be made good: the *a priori* impossibility of freely developing his own personality, in accordance with article 10 of the Spanish Constitution, which in turn may involve the breech of other fundamental rights of the individual.

However, we must clarify the concepts which have been presented here: what I have said earlier does not necessarily allow to conclude that cloning is in itself contrary to the concept of human dignity and, therefore in conflict with fundamental rights; this is an issue with which I am afraid I cannot deal in the present paper. But what I do wish to say is that if the clone should suffer damages affecting the fundamental rights to which he is entitled as a person, then these damages must be redressed, and this could be the object of a claim.

ii) Who would the action be taken against? I am now assuming that the party who takes the action is the clone, as the victim of irreversible infringement of his fundamental rights. But against whom must he take his claim for damages? Here, we must distinguish between two situations: firstly, that in which the clone's creator has been found guilty of an offence, and secondly, that in which this has not proved possible.

Let us look first at the situation in which an offence has been committed. Article 161.2 of the Spanish Penal Code is not clear on exactly who can be found guilty; evidently, the scientist who is responsible for carrying out the cloning process will be guilty; however, it is not entirely clear whether those who have collaborated in this process will also be guilty as accomplices, such people as for example, a woman who agreed to gestate an implanted oocyte which had undergone cloning. If such parties are found guilty of an offence in accordance with article 161.2 of the Spanish Penal Code, and if damage is deemed to have been caused, I do not think there is anything to prevent them from being sentenced to make good these damages.

If no penal offence is deemed to have existed, I think the same people should be found guilty, including the person who voluntarily initiated the cloning process.

In any case however, we must set out from the basis of an unprecedented event in Spanish legal history, which is that the claim would be presented by the affected party himself, and would be directed against his «creators» for having brought him into the world in such unusual

circumstances that he is now an almost unique being, and exposed to unknown consequences for his health and privacy, in that he will undoubtedly be the subject of medical studies and media reports which could well infringe his right to privacy. In addition, there is the likelihood that he himself will also have to resort to cloning techniques if he wishes to reproduce. Could we not include this case within what Anglo-Saxon doctrine refers to as *wrongful life*? At the outset we must clarify the meaning of the terms to be employed: the term «*wrongful life*» is normally employed to designate the action taken by a person to contest a negligent action committed prior to his birth, when if this action had not been taken, the person taking the action would not have been born. As pointed out by KENEDY and GRUBB (Medical Law. 1994, p. 954), the essential argument of this action is that it would have been better that the child had not been born, but that the defect he suffers is not the result of negligence on the part of the doctor, rather the action is taken because of a lack of information on the defect in question, whether it be hereditary in nature, or due to the implantation of a damaged embryo or because the doctor did not advise the mother that her baby was going to be handicapped. Clearly, the problem is not identical to the case we are discussing here and which involves possible actions taken by a hypothetical human clone against whoever is responsible for creating him. Nevertheless, I believe an analogy can be drawn between the solutions reached in Anglo-Saxon law and the case which concerns us here, since actions taken for *wrongful life* are not taken by the parents but by the affected party himself. Understandably, there exists a wide range of opinions on this issue, which we cannot investigate with any level of depth now. Suffice it to say that there are arguments which hold that responsibilities do not exist in this case on the basis of such concepts as the sanctity of life and that the grandness of parenthood is ample reward for bringing up a handicapped child. (DE ANGEL «Diagnósticos genéticos prenatales y responsabilidad». *Revista de Derecho y Genoma Humano*, no. 6, 1997, p. 152). On the other hand, there are views supporting the existence of responsibility. although with limited damages and, finally, there are those who hold that unrestricted indemnification must be made. PANTALEON puts forward a view according to which:

> «Children born as the result of techniques of artificial human reproduction will be entitled to take compensation actions against the doctor for *wrongful life* in cases involving the transmission of infectious, genetic or hereditary illness which could have been detected had the level of diligence required in such cases been applied»,

and he adds a further statement which is highly relevant to our case in hand:

> «The child in question can act against the doctor for having set in course, through negligence, in addition to his birth, the circumstances which caused the defects with which he was born» (PANTALEON. op. cit. pp. 273-274).

This view is also taken by R. DE ANGEL who accepts the existence of the right to compensation for both material and moral damages, as follows:

«I do not believe that the claim brought by the child himself (wrongful life) can be dismissed, if it seeks indemnification for material damages suffered by the child» (op. cit. p. 155).

Therefore, it seems that a claim could be entered against a doctor who had carried out a process of this type, since by applying the analogy of the conclusions reached in the case of children born with defects when these defects could have been avoided through the provision of accurate information, it seems impossible to deny the right of indemnification to a person who is born as a unique being as a result of the infringement of the most basic ethical prohibitions and rules.

More difficult is the matter of making a claim against the progenitors, that is, those who caused the process to begin or gave their consent to it. Here, we must once again turn to actions taken against their parents by offspring born with genetic defects. These claims have not been admitted. However, they have been admitted in cases where the defects were induced. I do not think that there would be great difficulty having a claim made by a cloned human against his creators admitted; however, in this case it would not be on the basis of a *wrongful life*, but rather of a life which will involve unknown difficulties and which would never have existed in those conditions but for the use of the system which was employed.

Conclusions

Having reached this point, our hypothetical legal expert is now equipped with the arguments to respond to his client. He now knows the rules to be applied in the case of this cloned being which he has been presented with.

The first point he has established is that the being is a person and, therefore, he cannot be treated as excluded by the law which states that all humans who are born are persons in the eyes of the law, regardless of the nature of the procedure undertaken to cause birth. As long as the cloned being meets the requirements set out in article 30 of the Spanish Civil Code, he or she will be deemed to be a person and will therefore be entitled to enjoy the fundamental rights bestowed by the Constitution.

As a result of this, our legal expert must now determine who the being's progenitors are so as to charge them with maintenance and protection in accordance with article 39 of the Spanish Constitution. And since we cannot use genetic criteria, as this would lead us to an absurd situation, formal criteria as stipulated by Law 35/1988 for the regulation of paternity in cases of assisted reproduction must be employed. What is really important here is attributing parenthood, because the purpose of fulfilment of parental obligations is not the biological criterion but rather a voluntary criterion: the parents are those who grant consent for the «artificial» operation which will culminate in the birth of a clone. Those who agree to the

procedure taking place cannot later point to biological criteria to escape their obligations as parents. In cases of cloning, the same approach must be applied. Therefore, since as yet there is no law to regulate this case, we must conclude that the mechanisms set out for the ruling on paternity in assisted reproduction are applicable by analogy to as yet hypothetical cases of human cloning, since if this is not the case, the clone would be deemed to be parentless.

Finally, he would also see that claims for indemnification could also be entered on the part of the clone against his «creators», whether scientists, medical professionals or the actual «parents» who have commissioned the cloning process. It must also be borne in mind that these actions would seek redress not only for any possible physical defects occasioned by the cloning process, but also for damages due to infringements of the fundamental rights of the cloned individual, who would be a unique case within the human race. This latter would surely be the most severe damage caused to the clone's human dignity.

And on this note, our hypothetical legal expert will close his report. Luckily, he then wakes up and realises that it has all been a dream, that he simply dropped off to sleep while watching a Frankenstein film on the same day that the world press carried the story of «Dolly», the cloned sheep.

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