

**Keynote Speech = Sir Alan Moses, Lord Justice of Appeal = A Little Brief Authority**

Speaker	Transcript
Professor Lisa Jardine	I will move straight on to our second speaker. Our next keynote speaker is Lord Justice Moses. Sir Alan Moses, Lord Justice of Appeal. I have here, Sir Alan was called to the Bar in 1968. Surely not! (laughs a bit) Became a QC in 1990. He was appointed a High Court Judge in 1996 and from 2005, he has been Lord Justice of Appeal. He is known I am sure to many of you for the robust decisions he has handed down in some very controversial cases. The title of Sir Allan's thoughts this morning is, absolutely dear to my heart as a renaissance's Shakespearean is 'A Little Brief Authority.' Thank you all. <b>(applause)</b>
Sir Alan Moses	I'm sorry to intrude. Indeed I am not at all sure a Judge should be here at all at the introduction of what should prove to be so stimulating a day ahead. Now, my reluctance to be here at all does not just derive from a desire this morning to be attending to the appeal I ought to be attending to, in Court 7, the appeal of Prisoner X. Should it in this brave new world of rebalancing the Criminal Justice System be five years or indeterminate sentence with a minimum of 10 for the third offence of shoplifting? Or should I be in Court 52 to decide on her eighth appeal whether the illegal Entrant or Immigrant from Darfur who arrived here aged five 10 years ago and has by now 12 GCSEs, 4 A Levels, grade A's starve, and an offer of a scholarship at Balliol should even now be sent back to displaced persons camps in Khartoum? No! The reason for my doubts, my grave doubts as to whether a mere Judge should be here at all is for these reasons. The deliberations on making better regulations happen or information for improvement seemed to be far more suited to your consideration than to mine. Nor is my reluctance solely due to the open-ended invitation from your Senior Legal Adviser. He said he was happy to leave the framework of the talk to be determined by me! Framework? A word of doom! What about the substance? <b>(crowd laughed)</b> Then he went on. Relevant issues, he wrote, might include changes to the regulator and legislative landscape, human rights, and issue , the influence of Judicial Review and the Freedom of Information Act on the behaviour of regulator legal challenges for regulators generally and the proper relationship between the Regulator and the regulated. Well, how long have you got? <b>(audience laughed)</b> Even Lord Justices of Appeal have to get a life! If the eyes of the recipient started to water at that list of what should merely be included. They can perhaps be forgiven for glazing over when told that the HFEA would welcome a lively and challenging talk. Well, for

goodness sake! **(audience laughed)** I declined the invitation and wished instead to dwell on why the Judge should stay away and the paradox that the reason for that unusual reticence stems from what you, the Authority and the Judge have in common.

In 1978 when the first IVF Baby was born, Judges spent most of their time punishing the guilty and ensuring that a man's word if not a banker's was his bond! **(audience laughed)** And even then he, because with very few exceptions it was a he, could be sure that he was driven by a strong sense of what was right or wrong founded on his ideas of Christian morals and fortified by his membership of the Athenaeum. Whilst Judicial review, the intervention of the Courts into the process by which decisions of the Executive or Public Authorities were reached and occasionally intervention into the substance of those decisions was developing, it did so, but slowly and with a proper sense of caution.

Subsequent turf wars between Government and the Executive and the Courts in which each accuse the other of parking their tanks on each other's lawn had not yet arisen. Still less were rights now taken for granted and enshrined in the Human Rights Act anything other than given a more insouciant nod or not, confident as the Judges were that the fundamentals of the Common Law would do very nicely. Nor could those austere and distant Judicial figures who but believed that their colleagues, then but callow deferential junior counsel had had to grapple less than one year, less than a year... less than a generation later with disputed regular conduct ... contact between an estranged donor father with a child of two lesbian partners or the fact that Mr A was not the father of the mixed-race twins of Mrs A for the purposes of Section 28 of the Human Embryology and Fertilisation Act 1990, notwithstanding that Mrs A's eggs had been injected without the knowledge or consent of either Mr or Mrs A with Mr B's sperm. But now, they are face to face with the very problems that scientific advances coupled with the expectations of those who wish to take understandable advantage of them with such advances impose.

There is no shortage of commentators on the ethical and regulatory problems imposed by the advance of science in the field of that which used to be described as the province of nature or at least original sin. That which the faithful would have ascribed to a deity becomes the work not of a god but of mankind and of the scientist. No longer, say possibly in Alaska, do the Parki preside over the birth and life of mankind. Clotho over the moment of our birth, the Lachesis spinning out the events of our lives and Atropos cutting our mortal thread.

Your esteemed acting Chief Executive Alan Doran spoke back in October 2007 of the fact that 30 years ago no child had ever been born using IVF, but that now there are 40,000 IVF cycles a year and more than 8,000 live births. He saw over the horizon microchip technology for better embryo selection, invitro growth of eggs from ovarian tissue and the progression of stem cell research. As the author of a book on the intellectual revolution of the 17<sup>th</sup> and 18<sup>th</sup> centuries wrote, "it is because science grows out of the preoccupation and pressures of everyday life that its discoveries have in the end be accessible to all of us. Scientific progress ought to be meaningful to the ordinary person in the street because each of us has participated in the way of life that has produced the problems pressing for solutions".

I wonder what on earth happened to her. (looking at his speech file)

And as we know, as the science of creation advances, so do the expectation and perhaps the demands of those who wish to procreate. And as the expectations and demands of those who seek the advantages that they perceived as progress in the field, so the ethical dilemmas increase. Your former Chairman Ruth Deech and Smajdor in the guide to the dilemmas from IVF to immortality, explored those dilemmas created by individual and social interests and the rapid development of reproductive technologies. Such moral and ethical dilemmas are inevitable. The advance and development of reproductive science is not merely the concern of those desperate for a solution to the tragedy of their infertility, but also to those anxious to deploy their intelligence and skill to provide a cure. And not just them; this is not a mere private concern in which the parties privately seek resolution. Nor can those within the scope of the dilemmas be confined to the sperm donor who no longer wishes to be a father or to the child who wishes to identify his genetic father. This is not a dual or tripartite problem, but a problem for us all. The Minister responsible for the field of Reproductive Science is the Minister for Public Health and the development of reproductive technologies is a matter of public concern. The justification for regulation lies not just in concern over harm to the patient and to the unborn child, but in recognition that society as a whole is deeply and directly affected. Not just in the expense and concern in for example, the problems of multiple birth, but in their recognition of the right to respect for the dignity of the genetic parent and the parent in practice, the right to give informed consent and the right to withdraw it. All of their dilemmas are real enough. The genetic father had to come to terms that he was not the legal father, in 2005 the first Judge said he was, the Court of Appeals and House of Lord said he was not.

What a roll call there is of the names of those whose cases might be said to be replete with merit. Mrs Blood whose husband in a coma was unable to consent to the removal and storage of his sperm. Miss Evans no longer able to conceive and yet wants consent from her husband was withdrawn; deprived of the only hope of having her own a genetic child. And now, Elle who sought the storage of her husband's commits pending resolution of the issue as to whether they may be used after export elsewhere in the EU after her husband had died all too suddenly.

But the ethical merit of each and every case is matched by opposite arguments of equal force to the contrary. And yet, just as the source of these ethical dilemmas is the human instinct of inquiry and discovery as that which had previously been thought of as the province of divinity becomes an experiment in the laboratory. So those caught in the mesh of moral dilemma seek a human solution. They jeered at the proposition that the dilemmas which progress create a susceptible of no certain correct and indisputable resolution, but we know they are not! There is and perhaps there should be no universally accepted system of morals. There is no standard by which a moral or ethical problem can be assessed, and thus, there is and can be no correct decision.

And yet, and yet, there must be a decision maker. The Parties, the putative parents, the unborn child and the community in which they live, all require and they are entitled to demand a decision maker. And that is you, the Authority, placed as Alan Doran described you at the heart of change in scientific advance. It is the 1990 Act and its proposed amendments which placed the whole field of reproductive innovation under control; the control and regulation of the Authority. And the important and well settled proposition of Public Law as established by the Courts is to recognise that the authority and not the Courts is the decision maker. It is the Authority which is qualified to make the decisions, which resolve the dilemmas not the Courts. True it is that many of the decisions which the Courts are called upon to make require the statute to be construed. One might have thought of the twin pillars upon which the statute is founded and will be maintained after amendment, the welfare of any child born by treatment under its provisions and the requirements and consent require no body revolutionary judicial approach. After all, the central significance of consent is identified in the very provisions of the Act and the Judges, at least the Judges in the Family Division, are no strangers to considering the welfare of children. But you would, cause you all know it would be wrong. As that which have been thought inconceivable becomes all too right for conception so the inadequacies of not

merely the legislation, but also those who are concerned to interpret it and apply it become all too apparent. This is not to criticise those Judges who are compelled to make the decision, but to recognise that litigation is no substitute for the judgment of the Authority empowered by statute to make the primary decisions.

Lord Bingham back in 2003 and successive Courts since, have acknowledged that what is loosely called discretion left to the Authority to make decision in circumstances where activities are highly unlikely to be acceptable to the majority of public opinion and that within the constraints of the legislation and consistently with the perks of that legislation, the Courts recognise that it must be left to the Authority to decide what is acceptable. That the Courts leave primary decisions to the Authority is not the result or merely the result of the inadequacies of litigation and they are not to be ignored. The expense of litigation which each Party, the Authority and the Government Department is represented is not to be scoffed at. Deech and Smajdor hint that the ultimate decision of the Authority to permit export in their bloody case was due not merely to public pressure, a theme which I shall warm to shortly, but to expense. No one wins in litigation! The loser resents his or her loss, the winner wonders why the strength of her position was not reconised long before, long before all that time had passed, and that agony that had been suffered. Nor the settled intent to leave the decisions to the Authority derive, I assure you, from uncharacteristic judicial recognition of the Judge's own inadequacies or the judicial equivalent of a Gallic shrug of the shoulders. Nor is it to be derived merely from the fact that the creation of that Authority is by statute and from the powers which that statute conferred. Much more importantly, the acceptance that is for you the Authority to make decisions which are necessary to resolve so many anxious problems comes from the essential characteristics of the Authority.

You, the Authority, listen to the demands of patients, of parents and of children, of scientists, of clinics, of lawyers and legislators. You, the Authority, licensed and prescribed. You make both general directions of policy and specific directions in individual cases day by day, hour by hour, and it is that which places you in the best possible position to exercise what I prefer not to call a discretion but is better described as a judgment, a valued judgment. It is that day to day experience exercised by variety of fellow citizens, chosen in a transparent manner which provides the true authority to the exercise of your powers. All of these features distinguish you from a Court exercising its discipline of statutory constructions and the powers of judicial review. It is those features which qualify you to make the decisions and it is the absence of those features which disqualify the Courts.

And one further essential characteristic, the paradox, that which you do share with the judicial decision maker. One that I regard as a paramount importance and that is independence. The ability to make a decision in a field fraught with opposing merit without pressure and free from interference. That characteristic, that necessary feature is one which the rule of laws tries to protect. It is that I suggest which gives you the right to make these decisions. Decisions with which many will disagree but which all are bound to respect. After all in the field in which you make decisions, everyone has an opinion. Everyone believes they know the facts and can identify the correct solution. Everyone knows better than you! How could it be otherwise? When it's so easy to arouse sympathy! Indeed, when understanding and sympathy are the only proper in human reaction, time and again, the Courts rush to repeat their compassion. Remember Justice Headley in B? One of the difficulties that I have observed time and again, were artificial or unconventional means of creating a family are employed, is the depth of motion engaged.

But there is a danger for the decision maker in seeking to give way too readily to the sympathy aroused from the tears of others. Ruth Deech and Smajdor drew attention to the pressure faced by the Authority from the Media and public in the Blood case. Why should there not be such an outcry when the public learned of the plight of the grieving wife? Neither they nor the authors of the banner headlines or the infectious editorials infected by tears may have been familiar with the advice of Don Quixote to Sancho Panza. "Never be guided by arbitrariness in law which tends to have a good deal of influence on ignorant men who take pride in being clever. Let the tears of the poor find in you more compassion, but not more justice than the briefs of the wealthy. If a beautiful woman comes to you in need for justice, turn your eyes from her tears and your ears from her sobs and consider without haste the substance of what she is asking if you do not want your reason to be drowned in her weeping and your goodness in her sighs."

And it is in the maintenance of your independence that I see a cloud perhaps since the bill is not yet law. Still on the horizon, no bigger than a man's hand but there and looming. May I introduce a word of caution? Your former interim Chief Executive foresaw the requirements of the bill as the need for published and consistent standards, for transparency and a code of practice, and then this. He identified key principles against which the Authority should measure itself. Five principles of good regulation. Proportionality, Consistency, Transparency, and Targeting, and one other. Now, none of the good fairies who will come to the confirmation of the Authority should do other than confer on the Authority the gifts

of those four virtues of good regulation. They all read them on the Regulation Department's website or the Government's better regulation agenda. But what about the fifth? The Government's agenda's fifth? The fifth, whispered and hissed into the ear of the Authority, was whispered and hissed, I suggest, by the bad or at least, the sadly confused fairy. The fifth is accountability. Now if you thought those principles were merely a rare example of departmental windy rhetoric or as they call it vision, **(laughter)** you'd be wrong! Embedded, if I may borrow the word within the bill, is what is proposed by the new Section VIII ZA (2). In carrying out its functions, the Authority must, so far as relevant have regarded the principles of best regulatory practice, including the principles under which regulatory activities should be transparent, proportionate, consistent and targeted, and yet cases in which action is needed, and accountable. There in the statute. What on earth, what on earth is meant by accountable? Search the website, search me! Accountable to who? To the mother deprived of the chance to have a baby? To the donor who no longer wishes the responsibility of genetic parenthood? To the as yet unborn child? To you? To me? To Society? To the editor of the daily carrier? To the Politician? To the Ministry? Of course the regulation of human life, the control of human fertilisation is a subject for Immanuel Kant. As Deech repeats, "human should never be treated as mere means, but should always be treated as ends in themselves". But the regulation and control of human fertilisation is a topic subject, if I may also repeat the four-letter word, full of can't, and dangerous can't.

The vital quality of independence of freedom from pressure and interference, from which you derive authority, is to my mind dangerously undermined by unspecified and meaningless references to accountability. Politicians, the Government need to be told they're accountable and that the true accountability to exist one needs at least, from time to time, to be told truth! But Judges and Regulators derive their authority from the very feature that they are accountable to no one! Of course, they must be fair and transparent. Everyone affected by their decisions must know why they have won or lost. Their decisions must be reasonable and reasoned. But once it is thought that they are accountable, answerable to anyone, their independence and their authority is lost. How true that is and so human appeal their decision making, well surely the philosophers and not the lawyers should have the last word.

Well, one last word from a lawyer. Lord Hoffman in the case of Airdale and Bland. Bland you remember was the unfortunate boy on a life support system, and the decision of the Court was whether he should be allowed to live. Said this, said

	<p>Lord Hoffman, “There is no formula for reconciling this conflict of principles and no easy answer. It does no good to cease hold one of them; such is the sanctity of life and say that because it is valid and right, as it is undoubtedly is, it must always prevail over other principles, which are also valid and right. For many people, the sanctity of life is not at all the same thing as the dignity of the individual. We cannot smooth away the differences by interpretation.” And then he cited Sir Isaiah Berlin. “The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate and claims equally absolute. The realisation of some of which must inevitably involve the sacrifice of others”. It is a conclusion that cannot be escaped by those who with Kant have learned the truth that out of the crooked timber of humanity, no straight thing was ever made. People should and will accept your solutions carved out of their crooked timber when they appreciate that you cannot bend to public opinion and that you are not accountable to it nor to anyone else. No correct solution can be found. The moral justification, the moral authority of your decision derives from your appointment as independent decision maker, exercising judgment with your experience of the day to day regulation are the very essence of human life. Yes, you may! You may shrink from Isabella’s reminder of the mortality and humanity of those called to pay make such immortal decisions.</p> <p>Back to the title ‘A Little Brief Authority.’ Well, it would be insulting to remind you of where that comes from. Isabella in Act II of Measure for Measure, “Man, proud man, dress in a little brief authority. Most ignorant of what he’s most assured. His glossy essence like an angry ape plays such fantastic tricks before high heaven must make the angels weep.” But the Courts will respect your decision and the public will learn the value of resolution by an independent and unaccountable decision maker. The Judges will lay off. It is over to you. Hoorah to each of you. <b>(round of applause)</b></p>