

'Denying the implantation of the embryos amounts in this case not to a mere restriction, but to a total destruction of her right to have her own child. In such a case the Convention case-law is clear and does not allow a State to impair the very essence of such an important right, either through an interference or by non-compliance with its positive obligations. We do not think that a legislative scheme which negates the very core of the applicant's right is acceptable under the Convention.'
Dissenting opinion of Judges Traja and Mijović at paragraph 2 in *Evans v United Kingdom*
(Application no. 6339/05)

Should an exception to the consent provisions in the Human Fertilisation and Embryology Act 1990 have been made in the case of *Evans*?

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I Introduction

The HFE Act 1990 established in law a regulatory body, the Human Fertilisation and Embryology Authority (HFEA)¹, and the domestic legal framework within which human embryos may be created, stored and implanted. The Act was the product of recommendations of the 1984 'Warnock Report'² and the government's 1987 White paper entitled '*Human Fertilisation and Embryology: A Framework for Legislation*'³.

On 1st October 2003, Wall J issued judgment in two cases brought before the Family division of the High Court⁴ concerning the fate of embryos created and stored under the provisions of the Human Fertilisation and Embryology Act (HFEA) 1990⁵. At issue were the competing rights to reproductive autonomy of the gamete providers and prospective parents of embryos created by *in vitro* fertilisation (IVF).

This discussion will first outline the facts of the *Evans* case before considering the statutory framework regulating artificial reproductive technology within the United Kingdom, pursuant of the HFE Act 1990. The arguments forwarded by Miss Evans ('E') and the counter arguments of Mr Johnston ('J'), based both in domestic law and European human rights law⁶, will be assessed to determine whether an exception to the *consent provisions* in the 1990 Act could or should have been made in Miss Evans's favour.

In accordance with the dissenting judgement of Judges Traja and Mijović at paragraph 2 in *Evans v United Kingdom (Application no. 6339/05)*⁷, detailed consideration will be given to the issue of Miss Evans's right under the European

¹ Human Fertilisation and Embryology Act 1990 s.5.

² Department of Health and Social Security, Report of the Committee of Inquiry into Human Fertilisation and Embryology ("The Warnock Report"), Cm 9314, July 1984.

³ Human fertilisation and embryology. A framework for legislation. London: HM Stationery Office, 1987.

⁴ *Evans v Amicus Healthcare Ltd, Hadley v Midland Fertility Services Ltd*. [2003] EWHC 2161 (Fam)

⁵ Human Fertilisation and Embryology Act 1990.

⁶ Pursuant of the Human Rights Act 1989

⁷ *Evans v United Kingdom (Application no. 6339/05)* [2006] 2 F.L.R. 172.

Convention on Human Rights (ECHR)⁸ to become pregnant with her own genetic child and the obligations placed upon the State not to interfere with that process.

Finally, the discussion will broaden, through an analysis of emerging case law, to consider whether Miss Evans could have advanced argument based in a right to the ownership embryos as her *property* in support of her claim to exempt her from the consent provisions contained within the HFE Act 1990.

II Facts of the case

In September 2001 Natallie Evans, at the age of thirty years, was diagnosed with bilateral ovarian tumours, the treatment for which would necessitate the removal of her ovaries. She already had a history of sub-fertility in her relationship with her former husband and during that marriage had been advised to consider assisted reproduction by IVF.

In order to protect her future fertility, E, in partnership with her new fiancé five years her junior, embarked upon a programme of IVF that resulted in the creation of six viable embryos intended for implantation after completing her cancer therapy. Six months later, however, the relationship between E and her fiancé, J, ended.

J wrote to the Bath Assisted Conception Clinic to withdraw his consent for the embryos to be implanted. E, for whom the embryos represented her last chance of a pregnancy with her own genetic child, contested the lawfulness of J's reversal and claimed that, but for J's reassurances, she could and would have considered preserving some of her eggs unfertilised in case of such a split.

A second claimant, Lorraine Hadley, joined E in her action. Mrs Hadley, who already had an eighteen year old daughter, had undergone unsuccessful infertility treatment by IVF with her husband. Following the couple's divorce she sought to have implanted the two remaining embryos that were in storage; Mr Hadley refused to consent to implantation.

Mr Justice Wall heard the cases in June 2003 in the Family Division of the High Court. In his judgement, Wall J considered the law under the HFE Act 1990 and held the licence holding clinic had fulfilled their legal duty not to proceed with embryo transfer based upon the withdrawal of J's and Mr Hadley's consent. In dismissing the claim, he also considered argument based upon the doctrine of promissory estoppel and the ECHR.

Mrs Hadley chose not to appeal the judgment. E, however, persisted and brought her case before the Court of Appeal in 2004⁹. This action failed. E pursued her claim via the ECtHR in 2006 and ultimately to the Grand Chamber of the ECtHR in 2007¹⁰ where she finally lost her legal challenge.

⁸ Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe 1950.

⁹ *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727.

¹⁰ *Evans v United Kingdom (6339/05)* [2007] 1 F.L.R. 1990 (ECHR (Grand Chamber)).

III The withdrawal of consent

A Consent under the HFE Act 1990

At the original trial, Wall J had little difficulty in applying the provisions contained within the HFE Act 1990 to the circumstances of J's withdrawal of consent. The Act requires that¹¹:

An embryo the creation of which was brought about in vitro must not be used for any purpose unless there is an effective consent by each person whose gametes were used to bring about the creation of the embryo to the use for that purpose of the embryo and the embryo is used in accordance with those consents.

While the terms of the Act are clear, Wall J deemed it 'unfortunate' that:

'Part II of the Clinic's consent to treatment form, which I have summarised at paragraph 72 and 73, does not fully reflect the terms of paragraphs 4(1) and 6 of Schedule 3 to the Act.'

Indeed the form merely suggested that the use of stored embryos should be 'reviewed' in the event of the relationship ending. E and J could hardly have been expected to know the law in this area or to understand the nuances of their decision; E simply relied upon J's reassurances of the longevity of their relationship. Furthermore, the clinic may be held to have been culpable both in failing to provide appropriate time and counselling to assist the couple before obtaining consent to treatment, given that consent was sought within an hour or so of E having been given the news of her ovarian cancer, and for failing to accurately reflect in their documentation the consent provisions (especially those relating to withdrawal of consent) of the HFE Act 1990.

Wall J did, however, point to the statement embedded in the consent form '*in the treatment of myself together with a named partner*' as evidence in support of J's assertion that E could not receive the embryos without his agreement; in effect they were being treated together or not at all. This statement was echoed in Thorpe JL's interpretation of section 4(1)b of the HFE Act 1990 which he re-wrote as¹²:

No person shall...in the course of providing treatment services for any woman, use the sperm of any man unless the services are being provided for the woman and the man together or use the eggs of any other woman, except in pursuance of a licence.

¹¹ Human Fertilisation and Embryology Act 1990 Schedule 3 s.6(3).

¹² Human Fertilisation and Embryology Act 1990 s.4(1)b: No person shall: in the course of providing treatment services for any woman, use - (i) any sperm, other than partner-donated sperm which has been neither processed nor stored, (ii) the woman's eggs after processing or storage, or (iii) the eggs of any other woman, or (c) mix gametes with the live gametes of any animal, except in pursuance of a licence.

Also, in accordance with the Act, the child's best interests demanded that a father should be involved in its upbringing¹³. Given the explicit objection of the genetic father to the continuance of the treatment, the clinic was under a duty not to proceed with embryo transfer. Any earlier decision by E to pursue the option of having her eggs frozen might similarly have cast doubt upon the strength of her relationship with J and thereby engaged the same provisions of the Act.

E contested that J's consent was valid up until the point of the embryo's use and that examination of the embryos under the microscope constituted that end point; after this there would be no requirement for on-going consent to the transfer of the embryos. The Court of Appeal dismissed this submission as 'absurd', although the ECtHR acknowledged that in some member States, notably Austria, Estonia and Italy, the male 'veto' exists only up until the point of fertilisation; thereafter it is for the woman alone to determine the fate of the embryos¹⁴. The perception remains that the margin of appreciation afforded to these jurisdictions displaces the Article 5 rights as established by the Oviedo Bioethics Convention of 1997¹⁵.

The ECtHR also cited *Nachmani v Nachmani*¹⁶, a case heard in the Israeli jurisdiction, in which it was held that '*the husband could no more withdraw his agreement to have a child than a man who fertilises his wife's egg through sexual intercourse*'. Although the judgment was briefly overturned in support of the husband's reproductive autonomy it was again upheld at a second hearing of the Supreme Court.

It is clear that when it comes to deciding such matters judicial opinion is divided both at home and abroad. However, the consent provisions in UK law are unambiguous: J was entitled under the HFE Act 1990 to withdraw his consent to the transfer of the embryos to E at any time prior to implantation and this was a right that he exercised lawfully.

B Promissory estoppel

E contended, however, that J had provided consent to treatment, and that once treatment was in progress, consent could not be revoked. In essence this represented a 'Ulysses contract'¹⁷ made by J to bind himself to a future course of action, namely the completion of IVF with E in the pursuit of a child. Indeed J was *explicit* in binding himself to a future with E and their child, or children, born as a result of the treatment

¹³ Human Fertilisation and Embryology Act 1990 s.13(5): A woman shall not be provided with treatment services, other than basic partner treatment services, unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

¹⁴ *Evans v United Kingdom* (Application no. 6339/05). 2006, para.33

¹⁵ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. Oviedo 1997. *An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time.*

¹⁶ *Nachmani v Nachmani* 50(4) P.D. 661 (Isr)

¹⁷ The legal principle underpinning a advanced directives. See: Ryan Spellecy. Reviving Ulysses Contracts. (2003) Kennedy Institute of Ethics Journal 373

that they were embarking upon. This may have been a more compelling argument than that which E actually advanced, based in the doctrine of promissory estoppel. Estoppel provides that one party to a contract shall not enforce his / her rights in that contract if the other party has acted through reliance upon that 'promise'.

J argued the estoppel claim on a point of law. Promissory estoppel relies upon the existence of a contractual relationship between the person being estopped and the person benefiting from the estoppel. There was no such contract between E and J; the 'contract' existed between E and J as individuals and the licence-holding clinic, for it was the licence holder who required the consent from both E and J to perform the IVF treatment. Counsel for J also re-emphasised the wider public interest and social policy decisions underpinning statute that, in this case if not in others¹⁸, should prevail over estoppel. Wall J concurred, and in determining that any change of heart on J's part could not be criticised as 'unconscionable', added:

'Mr. Johnston cannot give an unequivocal consent to the use of the embryos irrespective of any change of circumstances. In the wider public interest of the proper operation of the scheme under the Act, Parliament does not permit him to give such a promise.'

The public policy position reflected by the HFE Act 1990 was similarly defended by Thorpe LJ and Sedley LJ in the Court of Appeal¹⁹:

'The need, as perceived by Parliament, is for bilateral consent to implantation, not simply to the taking and storage of genetic material, and that need cannot be met if one half of the consent is no longer effective.'

But for the clear language of the HFE Act 1990, the estoppel argument would, on superficial inspection, have been reasonably compelling. However, the 'promise' could not have been honestly held to be binding irrespective of future events; indeed it remained valid only as long as it was not withdrawn. In this sense, consent to treatment did not require a promise at all, for a promise speaks to some future event. The consent was, in fact, more temporally constrained for it sought step-wise agreement between the licence holder and each party for progression to successive phases of the IVF treatment.

IV Argument based in Convention Rights

A Article 2

At trial, argument by E in support of the putative Article 2 rights²⁰ of the embryo was summarily dismissed by Wall J, who determined that an embryo 'cannot be

¹⁸ See obiter of Beldam LJ in *Yaxley v Gotts* [2000] Ch 162 at 191: 'The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it.'

¹⁹ *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727 Para. 69

²⁰ Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe 1950. Article 2(1): Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

considered a person, or to have a “qualified” right to life.’ Wall J followed judgement in *Re F*²¹ and *obiter* from *Paton v United Kingdom*,²² to conclude:

‘If a fetus has no right to life under Article 2, it is difficult to see how an embryo can have such a right.’

Furthermore, the Court of Appeal referred to the Abortion Act 1967²³, as amended²⁴, which permits the termination of pregnancy, and the destruction of foetal life, up until the 24th week of gestation²⁵; this puts the legal rights of the embryo, of only several days ‘gestation’, into even clearer perspective.

In summary, the Article 2 construction was unconvincing. As observed unanimously by the European Court:

‘...in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.’

B Article 8

While the balance of the argument concerning the *lawfulness* of J’s withdrawal of consent appears to be weighted fairly heavily in J’s favour, the *morality* of that argument is informed by the ethical issues arising from the competing Article 8²⁶ rights of E and J. Herein lies the basis of the dissenting judgments of Judges Traja and Mijović in the European Court and the alleged incompatibility between the consent provisions of the HFE Act 1990 and the ECHR.

The HFE Act 1990 upholds the reproductive autonomy of ‘gamete donors’ providing that those rights are exercised jointly. There is no provision within the Act for discordance between partners, save to observe the negative obligations of the licence holder to withhold treatment when consent is withdrawn by one partner.

But why should one partner’s rights override those of the other? Had E refused to accept transfer of the embryos she could not have been compelled to do so at J’s

²¹ *Re F (In Utero)* [1988] Fam. 122

²² *Paton v United Kingdom* 8416/78) (1981) 3 E.H.R.R. 408: ‘If article 2 were held to cover the foetus and its protection under this article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the ‘unborn life’ of the foetus would be regarded as being of a higher value than the life of the pregnant woman.’

²³ Abortion Act 1967

²⁴ Abortion Act 1990 s.37(1)a

²⁵ Arden LJ: ‘...while an embryo has the potential to become a person it is not itself that person: further changes must take place.’

²⁶ Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe 1950. Article 8(1): Everyone has the right to respect for his private and family life, his home and his correspondence; 8(2): There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

insistence, nor should she. The law therefore appears to side with non-procreation; while the state must not interfere with a woman's desire to become pregnant it has no positive obligation to *promote* that pregnancy.

Similarly, following conception, the liberal interpretation of the Abortion Act 1967 creates conditions under which there is easy lawful access to abortion services within the first 24 weeks of pregnancy²⁷. Here the reproductive autonomy of the father is sidelined without further thought and there is no recourse in law for challenging a decision to terminate²⁸.

This transfer of rights occurs because there is a break in the chain of reproduction that is artificially introduced by the technique of IVF. Under natural conditions there is no intervention available to the man following intercourse that can influence conception and implantation. Once pregnancy is established the right of the woman to self-determination prevails over the reproductive autonomy of the man. However, when an embryo is created *ex vivo*, the opportunity arises for the man to exert his own autonomous rights prior to embryo transfer; in this he is equally determinative of the fate of that embryo – each partner is able to exercise a 'negative veto'.

Under such circumstances the Article 8 rights of E to family life must be weighed against J's Article 8 rights to determine *when* to enter into family life. E wished to assert her own reproductive autonomy by proceeding with implantation, while J simply no longer wanted to become a parent with her. However, to force J into parenthood would constitute a *positive act* and State interference in his Article 8 rights under s.8(2). In contrast, given that the State has no duty to promote E's pregnancy, the default position in her regard becomes that of non-interference, and hence non-implantation. Without intervention, that natural course of events would be that the embryos would perish.

Against this backdrop, Wall J first balanced the rights of E and J under Article 8 and, in attributing primacy to J's rights under s.8(2), reasoned that:

'...the interference from the State identified in Article 8 is necessary for the protection of the freedom of others, and entirely proportionate to the policy objectives identified.'

Arden LJ in the Court of Appeal concurred, determining that:

'...if Ms Evans' argument succeeded, it would amount to interference with the genetic father's right to decide not to become a parent. Motherhood could surely not be forced on Ms Evans and likewise fatherhood cannot be forced on Mr Johnston'

²⁷ Abortion Act 1967 c.87 s.1(1)a. Medical termination of pregnancy: (1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith— (a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family

²⁸ *Paton v British Pregnancy Advisory Service Trustees* [1979] Q.B. 276

The ‘obligations’ argument, however, was less persuasive upon the European Court²⁹. It preferred instead, in recognition of the competing interests that may be generated, to defer to the wide margin for appreciation in the context of Article 8 afforded to member states in legislating within the field of reproductive medicine.³⁰

Judges Traja and Mijović, in their dissenting judgement, took a different view and balanced the competing public policy and private life considerations:

‘The absolute power of the party who withdraws his or her consent entails that the other party loses all autonomy in respect of his or her genetic material, which, according to the principles said to underlie the domestic law, is also contrary to a paramount public interest.’

They returned to the stored embryos as E’s last opportunity for motherhood with her own genetic child; certainly, although IVF using donated eggs remained an option, it is difficult to be persuaded how this could be contemplated with any equivalence. In contrast, J’s future fertility, and freedom to exercise autonomous procreative choices, was assured.

The two judges were also mindful of the fact that E’s infertility was the result of an unforeseen cancer diagnosis. It is difficult, however, to imagine circumstances in which infertility is the product of one’s conscious actions (apart from voluntary sterilisation) and in this E demonstrates no exceptionality. Judges Traja and Mijović proposed caveats to domestic legislation³¹, based upon principles of ‘fairness’ and in reference to domestic law in Austria and Italy, that, no doubt, were considered (along with the views of the Grand Chamber³²) but not adopted in the drafting of the HFE Act 2008.

²⁹ *Evans v United Kingdom (Application no. 6339/05)* [2006] 2 F.L.R. 172 para 59: ‘The Court does not in any event find it to be of central importance whether the case is examined in the context of the State’s positive or negative obligations. The boundaries between the two types of obligation under Article 8 do not always lend themselves to precise definition and the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a certain margin of appreciation.’

³⁰ *Evans v United Kingdom (Application no. 6339/05)* [2006] 2 F.L.R. 172 para 65: ‘The Court recalls that on several previous occasions it has found that it was not contrary to the requirements of Article 8 of the Convention for a State to adopt legislation governing important aspects of private life which did not allow for the weighing of competing interests in the circumstances of each individual case.’

³¹ Para 9 of dissenting judgment: ‘the interests of the party who withdraws consent and wants to have the embryos destroyed should prevail (if domestic law so provides), unless the other party (a) has no other means to have a genetically-related child; and (b) has no children at all; and (c) does not intend to have recourse to a surrogate mother in the process of implantation.’

³² *Evans v United Kingdom (6339/05)* [2007] 1 F.L.R. 1990 (ECHR (Grand Chamber)) para 92: ‘The Grand Chamber considers that, given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention.’

C Article 14

Argument based in Article 14³³ - the prohibition of discrimination - was also advanced to support E's status as 'disabled' by virtue of her inability to conceive naturally. She was, in effect, one of a group of infertile women discriminated against by the consent provisions of the HFE Act 1990 which deprives them of their autonomous right to self-determination through pregnancy. Wall J countered that at least the Act treats both men and women equally:

'If a man has testicular cancer and his sperm, preserved prior to radical surgery which renders him permanently infertile, is used to create embryos with his partner; and if the couple have separated before the embryos are transferred into the woman, nobody would suggest that she could not withdraw her consent to treatment and refuse to have the embryos transferred into her. The statutory provisions, like Convention Rights, apply to men and to women equally.'

The Court of Appeal was similarly unimpressed:

'...it is not the Act which discriminates against Ms Evans on this ground. It is the Act which, conditionally, seeks to reverse nature's discrimination. What are under attack in these proceedings are the conditions on which it does so.'

Arden LJ maintained that even if Article 14 were engaged it would be justifiable in order to preserve the right of one partner to withdraw consent in accordance with national law³⁴. The Article 14 claim failed to progress any further in the European Court.

V The legal status of the embryo: person or property?

Had it been argued that the embryos constituted E's property, the dissenting judgement of Judges Traja and Mijović could have extended to embrace Article 1 of the Protocol to the ECHR - the protection of property³⁵.

It is a fundamental point of law that property cannot be said to exist in the human body^{36,37}. The origins of the 'no property' rule can be found as early as in 17th century

³³ Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe 1950. Article 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

³⁴ *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727 para 118: "...there is no violation of Article 14 if the discrimination is objectively justifiable. In this case, in my judgment, the provision permitting withdrawal of the genetic father's consent prior to transfer of the embryo to a woman would be so justified for the reasons given in the discussion of Article 8 above.'

³⁵ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1952. Article 1: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

writing³⁸. We cannot own our own bodies for the purpose of sale, nor can our bodies be owned by someone else. It also follows that if we cannot own our bodies while alive, they cannot be owned by us, or indeed any other person, when dead (the corpse is *nullius in bonis* - owned by nobody). Legal possession of the corpse of a deceased person may, however, be granted for the purpose of burial or cremation³⁹.

Property rights can arise in relation to body parts or products once separated from the body^{40,41,42} under the Theft Act 1968⁴³. The Diane Blood case was an example of gametes being treated as property⁴⁴. Mrs Blood requested the removal and use of her husband's sperm after he entered a terminal coma due to meningococcal meningitis. The request was refused under the HFE Act 1990 as Mr Blood had not provided consent in writing for the use of his sperm. Mrs Blood sought judicial review to enable her to travel overseas for fertility treatment in order to bypass the HFEA Act. Although initially unsuccessful, her appeal was later upheld under the provisions of the Treaty of Rome promoting *free movement of goods* and the freedom to seek medical treatment abroad⁴⁵.

In the case of *R v Kelly*, it was the application of human skill for the purpose of scientific or medical examination that conferred the status of property upon anatomical dissection specimens removed from the Royal College of Surgeons⁴⁶. Rose LJ commented:

'Whether the trial judge was correct in ruling as a matter of law that there is an exception to the traditional common law rule that 'there is no property in a corpse,' namely, that once a human body or body part has undergone a process of skill by a person authorised to perform it, with the object of preserving for the purpose of medical or scientific examination or for the benefit of medical science, it becomes something quite different from an interred corpse. It thereby acquires a usefulness or value. It is capable of becoming property in the usual way, and can be stolen.'

The 'work or skill' test was recently challenged in *Yearworth*⁴⁷ in which interesting issues were raised in relation to the ownership of sperm. Here the banked sperm of six men undergoing cancer therapy was lost due to a failure in the clinic's storage process. The claimants initially claimed in tort for personal injury, but on this Lord Judge CJ, in agreement with the trial judge, remarked that:

³⁶ *Doodeward v Spence* 1908 6 C.L.R. 406

³⁷ *AB v Leeds Teaching Hospitals NHS Trust* [2004] EWHC 644

³⁸ Mark Pawlowski. Property in Body Parts and Products of the Human Body (2009) Liverpool Law Review 35

³⁹ *Dobson v North Tyneside HA* [1996] 4 All E.R. 474

⁴⁰ *DPP v Smith* [2006] EWHC 94 (Admin)

⁴¹ *R. v Rothery (Henry Michael)* [1976] R.T.R. 550

⁴² *R. v Welsh* [1974] R.T.R. 478

⁴³ Theft Act 1968

⁴⁴ *R. v Human Fertilisation and Embryology Authority Ex p. Blood* [1997] 2 All E.R. 687

⁴⁵ Treaty Establishing the European Community 1957 s.60: 'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

⁴⁶ *R. v Kelly* [1998] 3 All E.R. 741

⁴⁷ *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37

‘...it would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or “personal injury” to him.’

The case turned upon the *future intended use* of the sperm as grounds for ownership; precedent from the American jurisdiction was considered⁴⁸. The negligent destruction of the sperm created the conditions for a claim in bailment⁴⁹ and damages were awarded in recognition of the psychological trauma that was induced by the loss of a chance for parenthood. In *Yearworth*, the Court of Appeal was less than satisfied with the criteria for ownership established in *Kelly*. According to Muireann Quigley:⁵⁰

The effect of this move away from this principle as the sole basis of property in human tissue is to shift the property focus, and the consequent protections of this towards the individuals who are the sources of body parts and tissue samples. The application of skill does give a way to recognise property in human tissue. However, without additional bases for recognising property, its effect is to exclude the very source of these tissues from legal ownership. The ruling in Yearworth tries to redress the balance and explicitly vests individuals with property rights in their own body parts and tissues (or at least in their gametes).

Evans is distinguished from *Yearworth* on two counts: firstly, if the embryos were to be regarded as property, then they were the *joint* property of E and J rather than that of one individual; secondly, the biological significance of an embryo is entirely different from that of a gamete, although arguably no more likely to develop into a ‘person’ at the pre-implantation stage. Nevertheless, in *Evans* the intention, as in *Yearworth*, was for a future use of the embryos and it cannot be argued that human skill and work was not involved in their creation, despite the reservations that surfaced in *Yearworth*⁵¹.

Had the six embryos been regarded as the joint property of E and J, upon their separation E could have claimed sole possession of half; J would have been free to destroy his embryos and E to have hers implanted. The chance of a live birth resulting from each embryo transferred to E, even with current techniques, is only around 20%⁵². On the balance of probabilities, therefore, awarding E possession of three embryos would not have violated J’s rights under Article 8 because the chance of a successful pregnancy would have been less than 50% per embryo. Ultimately, nature would have determined whether or not E became pregnant.

⁴⁸ *Hecht v Superior Court* Calif Report 1993 June 17: 275-91

⁴⁹ **Bailment** *n.* the transfer of the possession of goods by the owner (the bailor) to another (the bailee) for a particular purpose. Examples of bailments are the hiring of goods, the loan of goods, the pledge of goods, and the delivery of goods for carriage, safe custody or repair. Ownership of the goods remains in the bailor, who has the right to demand their return or direct their disposal at the end of the period (if any) fixed for the bailment or (if no period is fixed) at will.

⁵⁰ Muireann Quigley Property: the future of human tissue? (2009) *Medical Law Review* 457

⁵¹ Lord Judge CJ: ‘...a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical.’

⁵² HFEA data for the year ending the first quarter of 2009 (see <http://www.hfea.gov.uk/>)

In the UK the legal status of the embryo resides entirely within the provision of the HFEA Act 1990⁵³. However, under the Irish Constitution, the State obligation to protect the 'unborn'⁵⁴ was tested in the case of *Roche v Roche*⁵⁵. The circumstances were not dissimilar to *Evans*. Mrs Roche wished to undergo the implantation of embryos created by IVF with her then husband after their divorce; Mr Roche wished the embryos destroyed. McGovern J held that the Constitutional protection of the unborn was intended to safeguard the '*foetus or child within the womb*', and not an embryo that was created *in vitro* using technology that could not have been contemplated at the time of drafting. Denham J's judgement in *Roche* offered further definition of 'unborn' as a precursor to 'being born', which is itself conditional upon implantation:

'The concept of unborn envisages a state of being born, the potential to be born, the capacity to be born, which occurs only after the embryo has been implanted in the uterus of a mother'

The *Roche* case left the legal status of the IVF embryo in a 'precarious position'⁵⁶ and one in which the European Court appears disinclined to intervene. According to North American authority, the pre-implantation embryo can be regarded neither as a person nor as property⁵⁷, although in *York v Jones*⁵⁸ a successful suit was prosecuted on the basis of a bailment relationship existing between a claimant couple and an IVF clinic in possession of their embryos.

VI Conclusion

It seems reasonable to conclude that there remains insufficient elasticity in domestic law, or indeed other jurisdictions, for the tenuous property rights attaching to human embryos to hold sway over disputes based in the consent provisions of the HFE Act 1990. Furthermore, rights to ownership of the embryos would have even less weight compared with the primacy of Convention rights which constituted the legal battleground in the *Evans* case.

Although there appears to be no asymmetry in the influence of Schedule 3 of the Act over the reproductive autonomy of the male and female gamete providers, the burden of the IVF treatment is not shared symmetrically between them. While the woman is subjected to the bodily invasion of embryo implantation and pregnancy, the man's contribution is limited to sperm donation. This has led some commentators to

⁵³ David Gomez. The special status of the human embryo in the regulation of assisted conception and research in the United Kingdom (2011) *Medico-Legal Journal of Ireland* 6

⁵⁴ Constitution of Ireland 1937 Art.40.3.3 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'

⁵⁵ *Roche v Roche* [2009] IESC 82 (Sup Ct (Irl))

⁵⁶ Aisling McMahon. The legal status of embryos in vitro in Ireland - a "precarious" position (2011) *Medico-Legal Journal of Ireland* 33

⁵⁷ *Davis v Davis*, (1992) 842 S.W.2d 588, 597. '*We conclude that pre-embryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life.*'

⁵⁸ *York v Jones* (1989) 717 F. Supp. 421

question whether greater rights should be attributed to the woman to reflect her greater role.⁵⁹

However, irrespective of the roles played during conception, both gamete providers ultimately become something much more tangible: *parents*. While the innate biological fulfilment that flows from pregnancy is unique to the woman, the life-long social and moral implications of parenthood are surely no different for the woman or the man. The HFE Act protects the rights of both parties if they *want* to become parents; it does not at any stage require that they *must* become parents. Consequently, the Act only constrains reproductive autonomy in the pursuit of parenthood where the expression of that autonomy overrides choices freely made by another person.

For Judges Traja and Mijović it was not ‘acceptable’ that the application of this principle resulted in the negation of E’s right to have her own child. Certainly, the ‘bright lines’ nature of domestic law leaves little scope for anything other than binary decisions to be applied, perhaps uncomfortably, to highly complex issues⁶⁰.

Nevertheless, the consent provisions contained within the Act were, and are, rightly and without exception commensurate with the values and fundamental freedoms informing European human rights legislation, under which the protection of one person’s rights is afforded no greater importance than another’s.

The great tragedy of the *Evans* case goes to the heart of the reproductive psyche. As Nicolette Priaux points out:⁶¹

‘When we disregard an individual’s reproductive preferences, we undermine their ability to control one of the most intimate spheres of their life. Our reproductive capacity or incapacity indubitably has a profound impact upon the course of our lives, and decisions about whether or not to reproduce are among the most momentous choices that we will ever make...For some, decisions to reproduce may constitute a critical part of their life plan and allow them to foster a sense of belonging, stability and love; it may also herald the beginning of a tremendously creative and enriching journey. A journey that begins with the pleasure of bringing new life into the world, to one where the individual might experience mutual love, a sense of ‘greater’ purpose, and learn to view the world afresh through the eyes of a child.’

⁵⁹ Rosy Thornton. European Court of Human Rights: consent to IVF treatment (2008) *International Journal of Constitutional Law* 317

⁶⁰ Lorenzo Zucca. *Evans v United Kingdom: frozen embryos and conflicting rights* (2007) *Edinburgh Law Review* 446: ‘If it is probably appropriate that the supranational body leaves a margin of appreciation to national governments, it is probably not appropriate for the government to insist on bright line rules that are likely to produce too rigid results.’

⁶¹ Nicolette Priaux. *Rethinking progenerative conflict: why reproductive autonomy matters* (2008) *Medical Law Review* 169

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