

CASE COMMENTARIES

EVANS v UNITED KINGDOM
(APPLICATION NO. 6339/05) 7 MARCH 2006

A Woman's Right to Motherhood?

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THE FACTS

In 2000, a 29 year-old woman, Natallie Evans, and her partner, Howard Johnston who was aged 24, attended the Bath Assisted Conception Clinic, England to be treated together for infertility problems. During the course of the treatment, Natallie and Howard learned that she required an operation to remove her ovaries because of the presence of pre-cancerous tumours. The tumours were slow growing and she was informed that it would be possible to extract eggs from her ovaries prior to surgery, which could be fertilized *in vitro* (commonly known as IVF), providing she acted rapidly. The resultant embryos could be frozen for implantation at a later date.¹

Immediately following this distressing news, Natallie and Howard were told, in a brief one hour consultation, that if they wished to proceed with IVF, they would each have to consent in writing to the treatment, in accordance with the Human Fertilisation and Embryology Act 1990 (HFEA 1990).² They were also told that each one of them had a right to withdraw consent at any time prior to implantation. Natallie wanted to have control over her own eggs in case her relationship with Howard broke down. She, therefore, asked if it would be possible to freeze her eggs and have them fertilized at a later date

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¹ IVF involves the extraction of ova from the follicles of a woman's ovaries. These are fertilised in a laboratory procedure using the husband's, partner's or donor's sperm. The embryos, which result, are transferred into the potential mother's uterus in the hope that a viable pregnancy may occur. Because the IVF procedure frequently produces more embryos than required or that may be safely transferred at any one time, the excess embryos may be frozen for future use through a process called cryopreservation.

² Sch 3, para 6(3) provides that an embryo created by IVF may not be used for any purpose unless there is an effective consent by each of the gamete providers. Para 1 of the Schedule provides that "effective consent" means a consent under Sch 3 which had not been withdrawn and para 4 allows for withdrawal of consent by giving notice to the person responsible for storage of the embryo.

when she was ready for implantation. The clinic explained that it did not undertake this practice because attempts to fertilise eggs which had been frozen were less likely to result in a successful pregnancy than eggs which had been fertilised prior to freezing. Howard lovingly reassured Natallie about their relationship. He emphasised that he was not planning to abandon her and that he wished to father a child with her.

With those assurances, Natallie and Howard each signed the relevant consent forms which stated clearly:

“NB – do not sign this form unless you have received information about these matters and have been offered counselling. You may vary the terms of this consent at any time except in relation to sperm or embryos which have already been used. Please insert numbers or tick boxes as appropriate.”

Howard ticked the boxes consenting to the use of his sperm to fertilise Natallie’s eggs *in vitro*, and for any embryos created to be used for his and Natallie’s treatment together. He also agreed to the storage of those embryos for up to 10 years,³ and that his sperm and the embryos could remain in storage if he died or became mentally incapable during that time. Natallie signed a similar form which, of course, referred to eggs rather than sperm, and agreed to be treated with Howard.

Twelve of Natallie’s eggs were removed and fertilised and 6 embryos resulted. These were frozen. A few days later Natallie’s ovaries were removed, whereupon she was told that she must wait 2 years before implantation of the embryos could be attempted.

In 2002, 18 months after the surgery, Natallie’s relationship with Howard broke down. He contacted the clinic and requested, in writing, that the embryos be destroyed. Natallie proceeded to seek an injunction which would allow the clinic to continue treating her on her own, and which would, in effect, make Howard reinstate his consent to her use of the embryos to create a viable pregnancy. In addition, she sought a declaration under the Human Rights Act 1998 (HRA 1998) that section 12 of, and Schedule 3 to, the HFEA 1990 breached her rights under Art 8 (the right to respect for privacy and family life), Art 12 (the right to marry and found a family), and Art 14 (the right to non-discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR 1950). Natallie also maintained that the stored embryos were entitled to protection under Art 2

³ The normal storage period under the HFEA 1990 is 5 years but this may be increased to 10 years in the case of people with significantly impaired fertility.

(the right to life) and Art 8 of the ECHR 1950. The clinic was ordered not to destroy the embryos until the legal proceedings had been determined.

THE HIGH COURT JUDGMENT

In the High Court, Wall J refused to grant Natallie the injunction and declaration which she sought.⁴ He held that the parties had consented to joint treatment in the context of an ongoing and functioning relationship. Once that relationship came to an end, they were no longer being treated together. Wall J rejected Natallie's claim, based on estoppel, that it would be inequitable for Howard to withdraw his consent. He held that the provisions of the HFEA 1990 with respect to consent overruled the possibility of an estoppel, and that, in any event, Howard's assurance was given merely to console Natallie who had just heard the news that she had to have her ovaries removed. It did not amount to an unequivocal promise that he would never revoke his consent. It would not, therefore, be inequitable to allow him to withdraw his consent.

Wall J also held that the embryos were not persons with rights capable of protection under Art 2 and Art 8 of the ECHR 1950, and that Natallie's right to family life was not engaged under Art 8. He accepted that the relevant provisions of the HFEA 1990 did interfere with Natallie's right to private, in that they did not protect her right to respect for her decision to become a parent. However, the State's interference with her Art 8 right to protect the rights of both parties to treatment and was proportionate in its effect. The whole basis of the legislation was that the parties should be in agreement to become parents throughout the course of IVF. Wall J found no breach of Art 14 because the relevant provisions of the HFEA 1990 applied equally to men and women. He explained that:

“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.”

⁴ *Evans v Amicus Healthcare Ltd and others; Hadley v Midland Fertility Services Ltd and others* [2003] 4 All ER 903.

THE APPEAL COURT JUDGMENT

Natallie appealed to the Court of Appeal which upheld Wall J's decision.⁵ Thorpe and Sedley LJ expressed their sympathy for Natallie's situation which meant that she would be unable to give birth to her own child. Lady Justice Arden also acknowledged that,

“... the ability to give birth to a child gives many women a supreme sense of fulfillment and purpose in life. It goes to their sense of identity and to their dignity.”

However, the Court maintained that Parliament was within its rights under the ECHR 1950 to legislate and impose a “brightline” rule, which rigidly enforced the requirement of an ongoing consent by both parties to the use of embryos, even if it interfered with the right to private life of one of them. Any other view would enhance the respect for Natallie's private life by allowing her the unilateral right to implantation of the embryos, but it would diminish the respect which was equally owed to Howard for his private life. It would force fatherhood, with all its attendant financial responsibilities, on him. Without a “brightline” rule, decisions would have to be made, where there was conflict about the use of the embryos, using a mix of ethics, social policy or human sympathy. This could well lead to arbitrariness and inconsistency.

The Court also noted the impossibility of equal treatment if unilateral consent were to be permitted. Women would be able to force fatherhood on reluctant men but it would be impossible at a practical level to impose motherhood on a woman, who withdrew her consent.

THE ECHR MAJORITY JUDGMENT

The House of Lords refused Natallie leave to appeal and she turned to the European Court of Human Rights (ECHR) in an attempt to fulfill her desire to become a biological mother. The UK Government maintained that her application should be dismissed outright as totally ill-founded on the grounds that it did not engage any of the rights claimed under the ECHR 1950, or if it did, any interference with those rights was within the margin of appreciation afforded to it under the ECHR 1950 and proportionate in its effect.

The ECHR accepted that Natallie's application raised important questions of law and declared her application to be admissible,⁶ but proceeded to find in favour of the UK Government by a majority of 5 to 2.⁷

⁵ *Evans v Amicus Healthcare Ltd and others* [2004] 2 FLR 766.

⁶ See Art 29(3) of the ECHR 1950.

Art 2

In its decision on the alleged breach of Art 2, the ECHR maintained that, in the absence of any general European agreement on the scientific and legal definition of the beginning of life, the question of when the right to life comes into being is within the margin of appreciation enjoyed by individual States.⁸ The UK Government was, therefore, entitled to adopt a law which determined that an embryo has no independent rights or interests for the purposes of Art 2.

Art 8

In its consideration of Natallie's claim under Art 8, the ECHR accepted that the term "private life" in Art 8 was very broad;⁹ it included the right to respect for the decision to become or not to become a parent.¹⁰ The Court concluded that Natallie's right to private life had been breached. Therefore, the central question became whether the law relating to consent in the HFEA 1990 was within the permitted margin of appreciation afforded to constituent States; it was not for the Court to consider whether the UK could or should have enacted a different law.

The ECHR rejected the distinction which Natallie had sought to draw between the protection of public interest and the safeguarding of private rights. She maintained that the margin of appreciation in the case of the former was wide and justified the State in taking an inflexible approach in its legislation. In the case of the latter, the margin of appreciation was much narrower; absolutism had no part to play in legislation which would infringe the rights to private life. The Court took the approach that public interest and private rights overlapped to such an extent that there could be no distinction in the margin of appreciation applicable to both. The Court also rejected Natallie's argument that the situation of the male and female parties to IVF treatment could not be equated and that, normally, a fair balance could only be preserved by holding the male donor to his consent. It accepted that there was clearly a difference of degree between the involvement of males and females in the process of IVF, but did not accept that the rights of the male would usually be less worthy of protection than those of the female.

The ECHR found that the HFEA 1990 provided a fairly comprehensive legal framework regulating all aspects of artificial reproduction, although it

⁷ *Evans v United Kingdom* (Application no. 6339/05) 7 March 2006.

⁸ See *Vo v France* - 53924/00 [2004] ECHR 326 (8 July 2004).

⁹ *Pretty v United Kingdom* (App no 2346/02) [2002] 2 FLR 45.

¹⁰ *X, Y and Z v UK* (Case No 75/1995/581/667) [1997] 2 FLR 892.

was silent on the issue of what should happen to the embryos in the event of the parties' relationship coming to an end.¹¹ It was enacted following the Warnock Committee's detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology.¹² The 1990 Act stressed the importance of the continuing consent to IVF by both parties to the treatment, right up to the moment of implantation. This was seen to protect both the parties and any children who might be born as a result of IVF.

The Court considered whether the UK Government had a responsibility to ensure that a woman, who commenced treatment together with a man specifically to procreate a genetically related child, should be permitted to use the embryos unilaterally if the man withdrew his consent.¹³ The Court maintained that, there must be a fair balance between the interest of the Government to regulate IVF effectively, and the right to private life of the individuals who sought such treatment. The Court observed that there was no international consensus relating to the regulation of IVF treatment or to the use of embryos created by such treatment. Some States had adopted specific legislation in this area; others had only partially legislated or not legislated at all but merely relied on general legal principles and professional ethical guidelines. States varied in their approach to consent, some permitted consent to be withdrawn prior to fertilisation; other States allowed withdrawal at any time prior to the implantation of the embryo. In yet other States, the point at which consent may be withdrawn is left to the courts to determine on the basis of contract or according to the balance of the interests of the gamete providers.

On several previous occasions, the ECHR had found that it was not contrary to Art 8 for a State to enact rigid legislation which did not allow for the balancing of rights to private life on a case specific basis.¹⁴ "Bright-line" rules were acceptable if based on strong policy considerations such as the

¹¹ The silence may be because it was assumed that one of the parties would withdraw consent in such an event, and in any case, on relationship breakdown, they could not claim to be being treated together and consent given by both parties is only enforceable for joint treatment.

¹² The United Kingdom was particularly quick to respond to the scientific advances in this field by the appointment of the Warnock Committee four years after the first IVF birth. This resulted in the Warnock report which was published in 1984.

¹³ In the proceedings in the UK courts, the arguments and the decisions had, rather, concentrated on the negation of obligations inherent in the Government's interference with the applicant's right to respect for her private life. However, the ECHR acknowledged that it mattered little whether the obligations were phrased in positive or negative terms.

¹⁴ See *Pretty v United Kingdom* (App no 2346/02) [2002] 2 FLR 45, *Odievre v France* - 42326/98 [2003] ECHR 86 (13 February 2003).

need for legal certainty and public confidence, in a highly sensitive field. To have made the withdrawal of the male donor's consent relevant but not conclusive would have resulted in problems of evaluation of the respective rights of the parties concerned and would have created irresolvable difficulties of arbitrariness and inconsistency.

Because IVF treatment involves such sensitive moral and ethical issues in a world where scientific developments are moving rapidly, the ECHR found that the margin of appreciation must be a wide one. The UK Government's adoption of a "bright-line" rule which permitted consent to the use of the embryos to be withdrawn up to the moment of implantation, and was explained to both parties both verbally and in the consent forms, which they both signed, did not exceed the margin of appreciation or upset the fair balance required under Art 8. The Court acknowledged that Natallie's circumstances were extreme, and that she and Howard had had to reach a decision to sign the consent forms with minimal time for reflection. However, these factors did not alter its view that the UK law on consent in the HFEA 1990 was in proportion to the government's well thought out policy of IVF treatment.¹⁵

Art 14 in conjunction with Art 8

With respect to the alleged breach of Art 14, the ECHR accepted that discrimination exists if there is a difference in treatment in relation to any of the Convention rights between persons in analogous or relevantly similar positions, which has no legitimate aim, or if there is a lack of proportionality between the means employed and the aim sought to be realized.¹⁶ Discrimination may also exist where States fail, without reasonable justification, to treat persons differently whose situations are significantly different.¹⁷

Once the Court had found that the UK Government was justified in denying Natallie's right to privacy under Art 8, it was bound to rule in a similar way on the alleged breach of Art 14.

¹⁵ See above note 14.

¹⁶ The scope of Art 14 is limited to discrimination with respect to rights under the Convention, and protocol 12 extends this to cover discrimination in relationship to any legal right if that right is protected under the applicant's State law.

¹⁷ See above note 14.

THE DISSENTING JUDGMENT

Judges Traja and Mijovic, in a dissenting judgment, found against the UK Government with respect to Art 8, but accepted the view of the majority with respect to Art 2 and Art 14 in conjunction with Art 8. The major thrust of their judgment was that the majority had not balanced the need to produce legal certainty and maintain public confidence in the field of reproductive technology against an individual's right to private life.

In summing up, the dissent held that that, because Convention States enjoy a certain margin of appreciation, domestic laws should, in principle, be upheld, even where the legislation includes a "bright-line" rule. However, there should be permitted exceptions where a rigid application of the law could lead to irreparable harm to, or the destruction of the essence of the rights of, one of the parties in conflict. The dissent explained:

“‘Bright-line’ legislation is exceptional in the European context and, therefore, must be strictly scrutinized by the Court. We consider that in certain, specific, circumstances, the relative importance of one of the parties’ interests entails that it should be allowed to override the interest of the other party.”

Thus, the correct approach, according to the dissent, should be that the right to private life of the party who withdraws consent and wants to have the embryos destroyed should prevail in accordance with the domestic law, unless the other party has no other means to have a genetically-related child; has no other children, and does not intend to have recourse to a surrogate mother in the process of implantation. This case-specific approach was viewed as gender neutral and deemed to provide a fair balance both between public and private interests, as well as between the conflicting individual rights.

COMMENTARY

The ECHR's decision in Evans has been heavily criticised for denying Natallie Evans her desire to become a mother. It may be that these criticisms are based not on legal analysis of the decision but, rather, on a sympathetic approach to the dilemma of a woman who was forced to have surgery to remove her ovaries during her child bearing years. It should, however, be remembered that the ECHR was not considering Natallie's right to motherhood under Art 8. It was determining her right to respect for her

decision to become or not to become a parent which comes within the meaning of Art 8 - the right to respect for private and family life. There is no right to parenthood *per se*. Many of those who desire parenthood cannot achieve it because of biological, medical, emotional, social or other obstacles. Wall J noted in the High Court that:

“The Family Division, unfortunately, is only too used to the fact that nature often makes most fecund those least able properly to exercise parental responsibility, whilst at the same time denying parenthood to those who would undertake it conscientiously”

So the question which has to be asked is not whether the ECHR was unfair towards Natalie in its decision, which undoubtedly frustrated her desire to have a child, but could it have reached a different conclusion under Art 8 which would have enabled her to achieve her biological goal? I would like to suggest that, in spite of the views expressed by the dissent, that the ECHR could not have done so.

All Convention States have a measure of discretion in enacting domestic legislation which might, conceivably, interfere with Convention rights, provided that they are able to demonstrate that the legislation satisfies a legitimate aim which may be viewed as necessary in a democratic society, and is not discriminatory. The State must always balance the need to protect the public interest with the need to safeguard the private rights of the individual as laid out in the Convention. The breadth of the margin of appreciation permitted and the satisfaction of the principle of proportionality will depend on the nature of the right alleged to be infringed, and the level of consensus amongst Convention States concerning legislation related to the right. The ready acceptance by the ECHR of the doctrine of the margin of appreciation and the principle of proportionality must inevitably limit the success rate of many applications which seek redress for infringements of human rights. It is a fault inherent in human rights which lets States “off the hook”.

The UK Government had an undeniable legitimate aim in enacting the HFEA 1990 and, regulating reproductive technology. In so doing it attempted to strike a fair balance between public and private interests with respect to IVF, against a background of rapidly changing scientific and medical knowledge. It is an area which inevitably involves moral and ethical dilemmas and there is no agreement between Convention States how IVF should be controlled. In this context, it was readily understandable that the UK Government argument that it should enjoy a wide margin of appreciation was accepted by the ECHR.

The policy behind the “brightline” continuing consent requirement in the HFEA 1990, as was noted by the Court, was to ensure that both the parties who have provided the gametes for fertilization want to continue with the treatment and have the embryos implanted in the female in order to achieve genetic parenthood. This policy was to protect, not merely the gamete providers from having parenthood unilaterally thrust upon them but also, in so far as is possible, to safeguard the future welfare of any child resulting from implantation. The process of implantation was viewed by the legislators (somewhat questionably) as the near-equivalent of conception, which occurs at the time of sexual intercourse, for those couples who are not in need of IVF. Until the moment of sexual intercourse either party is free to refrain from that activity if he or she does not wish to become a parent. In the absence of a judicial Solomon to adjudicate between the parties, the imposition of a “brightline” consent rule in the context of IVF, is not unreasonable to avoid the ethical, rather than legal, dilemma, inherent in determining the conflict between the rights to private life where one party wishes to withdraw consent to implantation.

There can be little justification for the enforcement of a right to private life which respects one person’s desire to become a parent, at the expense of another person’s right to private life because parenthood is imposed upon him. To have enforced Natallie’s right would be to have denied Howard’s right. The dissent’s approach to impose a case specific best interest or quasi-least harm test does not resolve this difficulty. To allow one gamete provider to force the other to continue to consent (somewhat of a contradiction in terms) because she does not and cannot have, a genetic child is not a gender neutral basis on which to determine rights to private life, in spite of the dissent’s statement to the contrary. It is impracticable as well as unethical to force a woman to have embryos implanted in her. It bears a remarkable similarity to the circumstances of abortion where a woman wishes to have an abortion and the man does not want his child to be aborted; the woman’s right trumps that of the man.¹⁸ There is no practical means of enforcing the woman to continue the pregnancy. If gender neutrality is to prevail, the male would have to be permitted to take the embryos under his control and attempt to find a surrogate mother, which would allow him respect for his decision to become a parent and thus protect his right to private life.

Should the silence in the HFEA 1990 on the issue of estrangement have made a difference to Natallie’s claim? Natallie had specifically expressed her concern about the risks of estrangement; she had asked if she could have her eggs frozen in an unfertilised state for that reason. Although the clinic, which the parties attended, did not freeze unfertilised eggs because of the low

¹⁸ *C v S* [1988] QB 135.

pregnancy success rate, Natallie could have either gone to an alternative clinic or sought to have her eggs fertilised with anonymous sperm. This might, of course, have led to the questioning of the stability of her relationship with Howard. In the light of the requirement of the HFEA 1990 that a woman shall not be provided with IVF unless the clinic has taken into account the welfare of any child who may be born as a result of the treatment, including the need of that child for a father,¹⁹ she might have risked the refusal of treatment by the clinic.

The fact that Natallie received advice in a one hour interview immediately after she learned that her potentially cancerous condition required immediate treatment, although, hardly appropriate in the circumstances, and given that the Act itself provides for counseling and advice, is of little help to her.²⁰ If this led to a lack of informed consent on her part, she could hardly claim that she had consented to being treated jointly with Howard.

The decision in *Evans* has drawn attention to the need for reform of the current legislation on reproductive technology.²¹ Protracted legal proceedings under human rights legislation, in circumstances where time is a crucial element both for women undergoing treatment and for the embryos, are not a satisfactory means of resolving conflict in the context of IVF. It may be that consent to fertilisation by the gamete providers should become the defining moment for consent to potential parenthood, and that withdrawal of consent should not be allowed once fertilisation has taken place. The very fact that a couple consent to undergo IVF together in order to produce embryos is because they wish to have a child; there is no other legal purpose for the creation of the embryos. Once fertilisation has taken place, the potential for a child to be born comes into play. If consent could not be withdrawn after fertilisation, women would have to accept that if they do not wish to have the embryos implanted, men would be allowed to have them implanted into surrogate mothers. Death of one of the parties, or their estrangement,

¹⁹ 13(1) The following shall be conditions of every licence under paragraph 1 of Schedule 2 to this Act (5) A woman shall not be provided with 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.S.13 (1) The following shall be conditions of every licence under paragraph 1 of Schedule 2 to this Act.

²⁰ HFEA 1990 (schedule 3, para 3(1)). The HFEA Code of Practice requires that clinics should ensure that gamete providers are not put under pressure to give consent (para 7.5).

²¹ Suzi Leather, chair of the HFEA announced in 2004 the need for an overhaul of the HFEA 1990, which she claimed had served the UK well. However, in the light of new developments in this field, reform was necessary. The Government issued a public consultation document in August 2005 to review the HFEA 1990.

following fertilisation would not have any consequence; a valid consent to implantation would already have been given. The death of both parties would require the development of a different rule.

If “brightline” law is enacted in the field of rapidly developing medical developments, it would be preferable if it were to be developed in conjunction with other Convention States and kept under review to ensure conformity with the demands of human rights.

Natallie Evans now has a new man in her life who wishes to become the non-genetic father of her children. The couple has one last chance of achieving parenthood via the implantation of the disputed frozen embryos. The ECHR judges were greatly moved by, and sympathetic to, Natallie’s overwhelming biological desire to procreate. They reminded her legal team that they might, somewhat unusually, request that her case be referred to the Grand Chamber of the ECHR. This has been now done and the application will be considered by 5 new judges who will decide whether or not to refer the case to the Grand Chamber. If these judges agree, the case will be considered by the Grand Chamber of 17 judges. If they do not agree, the current decision will become final in June 2006.²² Until the application is considered the Court’s requirement that the embryos must not be destroyed but must remain in storage, prevails. However, time is of the essence, in accordance with the HFER 1990, the embryos may only be stored for 5 years. This statutory storage period expires in October 2006.

²² In accordance with Article 44(2) of the ECHR 1950, the judgment of the Court will not become final until the elapse of three months from the date of the decision.