

Not sympathy but justice: Natalie Evans v Human Fertilisation and Embryology Act 1990

Mukaddes Gorar*

The case of *Evans v The United Kingdom* (Application no. 6339/05) turns on the issue of consent, contained in Schedule 3 and 4 of the Human Fertilisation and Embryology Act (HFEA) 1990. This allows both parties to withdraw their consent until the embryo is implanted. On the 7th March 2006, the decision of the European Court of Human Rights (ECHR) upholding the UK court's decision showed us that there was nothing to amend on the HFEA 1990; however, it is contented that the Act should be amended on this issue.

The facts are well known. As a result of her cancer treatment Ms Evans' ovaries had to be removed which means there would be no chance for her to have her own genetic child after the treatment. Therefore, she started IVF treatment with her partner Howard Johnston in 2001. When their relationship ended Mr Johnston withdrew his consent for the embryos to be used. Ms Evans was unsuccessful in her claim that her right to family life under Article 8 of Human Rights Act (1998) outweighed the right of Mr Johnston to withdraw his consent under the HFEA. The recent decision of the ECHR to uphold the House of Lords' decision under the doctrine of margin of appreciation¹ has ruled that she cannot use the frozen embryos to have a baby.

Professor Mason² (teacher of medical law and ethics at Edinburgh University) argues:

“...it is clearly the right decision according to law; whether it's right according to justice is a different matter. The only way, in which the ECHR could have said the law was wrong, was if the right of one person was disproportionate based on the severity of the outcome. Whereas the ECHR upheld the UK court's judgments justifying this under the doctrine of margin of appreciation. The outcome in this case is that Natalie Evans cannot use the embryos.”

Clearly the rights of the parties involved to have their own genetic offspring are not equal. Jennifer Cunningham observes:

“The irony is that men have the luxury of banking sperm before they have cancer treatment, but women do not have the luxury of banking eggs or ovarian tissue because we do not yet have the technology to do that routinely.”³

* BA, LLB, LLM. The author would like to thank Emily Fiddian for her help in the earlier drafts. However, all errors remain the responsibility of the author.

¹ Jennifer Cunningham, *Human Rights and a sense of wrong*, *The Herald Online*: <http://www.theherald.co.uk/features/57581>, p.1

² *Ibid*, page 1.

³ *Ibid*, page 1.

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Professor Sheldon confirms this view, “...egg storage is at an early and experimental stage and, at the time of the hearings in *Evans*, has not resulted in a single successful pregnancy in the UK.”⁴

Striking a balance between the conflicting rights of men and women involved is complex: the woman’s right to conceive - and the man’s right not to conceive is extremely difficult to achieve. At present, under the HFEA, consent from either party can be withdrawn up to the time of implantation of the created embryo. However, where the only chance for the woman to conceive is with the use of the frozen embryos created with the gametes of the party who wishes to withdraw his consent, the Supreme Court of Tennessee⁵ ruled that in such circumstances withdrawal of consent should not be permitted.

The balance of the parties conflicting rights, to conceive or not to conceive, may be better achieved if the withdrawal of consent is limited up until the time of creation of the embryo. It can be argued that the right to withdraw consent under the HFEA 1990, up until the implantation of the embryo, has been extended too far. Furthermore, granting an unfettered right of withdrawal of consent at anytime before the embryo is implanted may undermine the counselling procedure provided by the Act. Once counselling has been provided and valid consent given, what is to be achieved by allowing a party at so late a stage to withdraw that consent? As Fuscaldo comments:

“In the planning of legislation, it is important that, if gamete donors are to be legally bound by their prior agreements or promises, then they and all concerned must be clear on what it is that is being promised”.⁶

It is worth considering the structure of the Act itself, which regulates the issue of consent. Schedule 3 provides the procedure for giving consent as:

- 3.—(1) Before a person gives consent under this Schedule—
- (a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and
 - (b) he must be provided with such relevant information as is proper.

Schedule 4 talks about variation and withdrawal of consent, which are:

- 4.—(1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo to which the consent is relevant.
- (2) The terms of any consent to the use of any embryo cannot be varied, and such consent cannot be withdrawn, once the embryo has been used—
- (a) in providing treatment services, or

⁴ Professor Sally Sheldon, *Nathalie Evans’ Case: Some Lessons for the Parliamentary Review of the Human Fertilisation and Embryology Act (1990) (1)*, Reproductive Technologies, (online) http://www.prochoiceforum.org.uk/irl_rep_tech_3.asp page 5.

⁵ G.Fuscaldo, *Gamete donation: when does consent become irrevocable?* Human Reproduction (online) <http://www.humrep.oupjournals.org/cgi/content/full/15/3/515> at page 2.

⁶ Ibid at p.6

(b) for the purposes of any project of research.

Schedule 3 requires an independent consultation of the parties to prevent any undue influence and to ensure the couple understands what they are undertaking. Under Schedule 4 consent can be withdrawn at any stage (by either party) up until the embryo is implanted and *before* the consultative process has taken place. Now a question stands confidently on its own: does this not undermine the counselling process?

After the counselling process parties would be bound to what they agreed. Couples should think about the possibility of splitting up and its consequences at that time. Separation is a common feature of our society, nothing unusual or unpredictable.

Once the embryo is created this should be considered, as 'a pregnancy started' which means there can be no withdrawal of consent by either party. Under normal circumstances when a pregnancy has started there is no way of withdrawing any consent. Of course in these circumstances if the disagreement comes from the female party, the male party would need to find a surrogate mother. It cannot be expected that the female party will carry the baby to term.

Cancer is now diagnosed much more readily than in the past. An inevitable consequence of treatment for this disease is infertility. The HFEA could be amended on the issue of consent by limiting the withdrawal of consent until the creation of the embryo. This would result in better clarity in the law, and also more clarity in the expectations of couples. The judges who decided against Ms Evans expressed that they were sympathetic to her situation, however what needed is an amendment of the HFEA, not sympathy.

Alternatively conflict between the right of Ms Evans to become a mother (using her own genetic material) and the right of Mr Johnson not to become a father could be resolved by relieving Mr Johnson of any parental responsibilities by giving him the same status as a donor.