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Evans v Amicus Healthcare Ltd [2004] EWCA Civ727

Summary

Evans v Amicus Healthcare Ltd is an English case that addresses the issue of who has the right of guardianship over human gametes. This case is relevant to the application of New Zealand's Human Assisted Reproductive Technology Act 2004 (the "HART Act"). The English Court of Appeal ruled that in order for a frozen embryo to be implanted, the consent of both parties (i.e. the sperm donor and the egg donor) must be given.

The Facts

In 2001 Natallie Evans created six frozen embryos with her then partner Howard Johnston. Following this procedure her ovaries were removed because of tumours which could have resulted in cancer had they been left untreated. At the time she was informed that there would be a two year wait before a transfer of the embryos into her womb could be attempted. In the intervening time her relationship with Mr Johnston ended. In July 2002 Mr Johnston wrote to the clinic where the embryos were being stored and asked that they be destroyed. By doing so he effectively withdrew his consent for them to be used. The English Act that controls IVF procedures (the Human Fertilisation and Embryology Act 1990) states that UK clinics may only store embryos if both biological parents (or 'gamete providers') consent to this storage. Therefore the clinic was legally obliged to destroy the embryos as soon as Mr Johnston withdrew his consent. However, it was agreed that the embryos would be kept in storage while Ms Evans pursued a court case in the hope of being allowed to preserve the embryos for implantation. She first took her case to the High Court where it was heard by Wall J, and then to the Court of Appeal where it was heard Thorpe, Sedley and Arden LJJ. She was unsuccessful in both these cases, but there was some disagreement between the Judges in the Court of Appeal. (Ms Evans subsequently took her case to several international courts, but this case note will focus on the UK decisions.)

The Issues

It was argued for Ms Evans that two phrases used in the Human Fertilisation and Embryology Act 1990 (the “1990 Act”) could be interpreted in such a way as to not require joint consent in order for the embryos to be used. These two phrases were ‘treatment together’; and the ‘use’ of an embryo.

The Court of Appeal’s Decision

(1) The interpretation of ‘treatment together’

According to the 1990 Act, when someone consents to the use of an embryo it must be specified what type of use they are consenting to: the treatment of the consenting person; the treatment of the consenting person together with another person; the treatment of other persons; or research. If it could be shown that Mr Johnston had consented to the embryo being used to treat “other persons”, then it is possible that Ms Evans would have been able to go ahead with the “treatment” (i.e. the implantation of the embryo in her uterus). However, the Court ruled that Mr Johnston had not consented to such a scenario. He had consented to the embryos that had been created with his sperm and Ms Evan’s eggs being used to treat him and Ms Evans together.

In light of this, the Court held that in cases involving ‘treatment together’ both parties must have the intention of pursuing treatment. The fact that Ms Evans and Mr Johnston were no longer in a relationship was not a problem in itself. The relevant fact was that they were no longer involved in a joint enterprise to pursue the implantation of the embryos. Because Mr Johnston had only consented to ‘treatment together’, Ms Evans was not entitled to pursue the treatment once his consent had been withdrawn.

(2) The interpretation of ‘use’

The second line of argument put forward for Ms Evans was to do with the way in which the word ‘use’ was to be interpreted in the statute. The 1990 Act provides that a person who gives consent for an embryo created using their gametes to be stored

or used can withdraw their consent up until such time as the embryo is used for treatment. The lawyer for Ms Evans argued that the embryos were 'used' when they went through a selective process to determine which ones were to be stored and which were to be excluded. If this interpretation of 'use' was accepted, the point at which Mr Johnston could have withdrawn his consent had already passed.

An earlier Court of Appeal case had found that the 'use' of an embryo was not limited to the implantation of the embryo into a woman's uterus. However, the judges in Ms Evans's case concluded that, when considered in the context of the withdrawal of consent for the use of the embryo, the word 'use' was to be interpreted as the implantation of the embryo. This decision was based on the 1990 Act's clear distinctions between 'storage', 'use' and 'creation'. The Court's interpretation seems natural, given that the scheme of the 1990 Act placed considerable weight on both parties consenting. To give the word 'use' any other meaning in this context would be to disregard Parliament's intent in producing the legislation.

Ms Evans's appeal was denied.

Application to New Zealand Law

The HART Act does not deal with policy matters such as the problems arising when one party withdraws consent to the use of stored embryos. The matters are instead left to the Advisory Committee on Assisted Reproductive Technology (ACART), which has not yet ruled on this particular subject. Cases such as Ms Evans's may be of significant persuasive value to both ACART and to the New Zealand courts.

Bibliography

Cases

Evans v Amicus Healthcare Ltd [2004] EWCA Civ 727
R (Quintavalle) v HFEA [2003] FLR 335

Legislation

The Human Assisted Reproductive Technology Act 2004
The Human Fertilisation and Embryology Act 1990 (UK)

Articles

Katharine Wright 'Competing interests in reproduction: the case of Natallie Evans'
(Winter 2008) 19.1 *Kings Law Journal* 135-149



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