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Gender Equality and Reproductive Decision-making

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Abstract: In *Evans*, both the U.K. High Court and Court of Appeal upheld Howard Johnston's right to refuse Natallie Evans access to the stored embryos which represented her only hope of having a child which was genetically her own. In this note, I focus on claims of gender (in)equality in the resolution of *Evans*. My argument is that such claims are often made all too easily, without full consideration of the problems of advancing them in the context of procreative decision-making, where men and women are inevitably differently situated. I conclude that although equality arguments are not wholly without value in this context, they need be used with extreme care. And, with due caution, I set out an equality argument of my own which was not made in *Evans*.

Keywords: embryos, equality, Human Fertilisation and Embryology Act 1990, infertility treatment services, reproduction

Evans v. Amicus Health Care [2003] E.W.H.C. 2161 (Fam.), *Evans v. Amicus*

Healthcare Ltd [2004] E.W.C.A. (Civ.) 727

INTRODUCTION

In October 2001, Natallie Evans was told that due to the presence of serious tumours both of her ovaries would have to be removed. In order to preserve some possibility of having the child she had always wanted, she agreed for some eggs to be harvested from her, and for embryos created from them and the sperm of her partner, Howard Johnston, to be stored for future use. Following the removal of her ovaries, whilst still able to carry a pregnancy normally, Ms. Evans was left unable to conceive spontaneously. Consequently, use of the frozen embryos

stored before surgery remained her only hope of having her own genetic child. But in May 2002 her relationship broke down and, in July of that year, Mr. Johnston wrote to their clinic requesting that their embryos be destroyed. Ms. Evans was devastated.

This set of facts formed the basis for a seemingly intractable dilemma, widely reported in the U.K. media. Ms. Evans brought an action requesting that she should be allowed to use her stored embryos in order to become pregnant, a request opposed by Mr. Johnston.¹ Her desperate desire to have her own genetic child was thus pitted against his clear wish not to be forced to procreate against his will. This has led a number of commentators to read this case as being fundamentally concerned with the relative rights of men and women in reproductive decision-making. As Arden L.J. notes in considering *Evans*:

the wider issue arises whether in a world in which many people have come to accept a woman's right of choice as to whether she should have a child or not the genetic father should have the equivalent right – a right greater than that conferred by nature.²

¹ Ms Evans's action was joined in the High Court with that of another woman, Lorraine Hadley. When the High Court found against them, Mrs Hadley dropped out of the action, leaving Ms Evans to proceed alone to the Court of Appeal. For reasons of convenience, I focus here just on Ms Evans' case. See: *Natalie Evans v. Amicus Healthcare Ltd, Howard Johnston, Royal United Bath Hospital NHS Trust, The Secretary of State for Health, the Human Fertilisation and Embryology Authority. Lorraine Hadley v. Midland Fertility Services, Wayne Hadley, the Secretary of State for Health, the Human Fertilisation and Embryology Authority* [2003] E.W.H.C. 2161 (Fam.), hereinafter *Evans (H.C.)*, *Natalie Evans v. Amicus Healthcare Ltd and Others* [2004] E.W.C.A. (Civ.) 727, hereinafter *Evans (C.A.)*. The Human Fertilisation and Embryology Authority (H.F.E.A.) and the Secretary of State for Health were also joined to the proceedings, taking a neutral stance on the facts but each arguing that the terms of the Act itself precluded granting the women the relief they sought. The clinics where the couples had been treated also took a neutral stance in the proceedings. Ms Evans' solicitors have recently announced that they have lodged a petition for permission to appeal to the House of Lords. See http://www.alexharris.co.uk/article/Natalie_Evans_appeals_to_the_House_of_Lords_2090.asp.

² *Ibid.*, *Evans (C.A.)*, at 89.

After briefly reviewing the legal issues raised by the case, I want to offer some more general thoughts about gender equality in reproductive decision-making and the way such arguments are deployed in *Evans*.

THE LEGAL ISSUES

The Human Fertilisation and Embryology Act 1990 (the 1990 Act) provides that embryos which have been created *in vitro* can only be used within the terms of “an effective consent” from each of the parties whose gametes were used to create it.³ It further provides that such consent can be varied or revoked at any time up until the moment that the embryos are used.⁴ Mr. Johnston’s right to withdraw his consent therefore seemed very clear.

Ms. Evans based her case on four arguments both in the High Court and, having failed there, in an unsuccessful appeal against that Court’s ruling. First, she claimed that Mr. Johnston could not now withdraw his consent to treatment. Given that effective consent existed at the date of harvest and storage, she argued, it must be assumed to continue, as to hold otherwise would place the treating clinic under an intolerable burden to investigate the current state of a couple’s

³ Schedule 3, para. 6(3): “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 and the embryo is used in accordance with those consents.”

⁴ See Schedule 3, para 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 an embryo cannot be varied, and such consent cannot be withdrawn, once the embryo has been used – (a) in providing treatment services, or (b) for the purposes of research.”

relationship. Both courts rejected this argument, finding that if those who formerly sought treatment “as a joint enterprise” no longer do so, the original consent must be deemed inoperative as the treatment services would no longer be within the terms described in the consent.⁵ As a question of fact, Mr. Johnston and Ms. Evans would plainly not be united in their quest for treatment services and, accordingly, Mr. Johnston’s consent would not cover implantation of the embryos into Ms. Evans. The Court of Appeal further noted that while “clinics can hardly be expected to investigate and pass judgment upon the physical, sexual, psychological and emotional togetherness of a couple, [it does not seem] unrealistic to leave to the clinic the necessity to judge whether the couple remain united in their pursuit of I.V.F. treatment.”⁶

Ms. Evans’ second contention was that the process of selecting and storing of embryos meant that they had already been “used” in the provision of treatment services with the result that, under the terms of the 1990 Act, consent could no longer be varied or withdrawn. Both courts also rejected this claim. The Court of Appeal noted that it would be “almost absurd” to adopt a construction the effects of which would be to remove a person’s right to withdraw consent on the very day that the embryos were created.⁷

Thirdly, Ms. Evans claimed that Mr. Johnston was estopped from withdrawing his consent, as she had relied on his assurances that there was no need for her to

⁵ *Per* Arden L.J., *Evans (C.A.)*, *supra* n. 1, at para. 94.

⁶ *Ibid.*

⁷ *Evans (C.A.)*, *supra* n. 1, at para. 33, *per* Thorpe L.J.

store unfertilised eggs in addition to the embryos created from their gametes.⁸ Again, this argument receives short shrift in both courts, with Arden L.J. noting that:

A person may give up a right created by statute for his benefit only, but here the right of withdrawal is granted in recognition of the dignity to which each individual is entitled. Such must include an individual's right to control the use of their own genetic material. In my judgment, it would be contrary to public policy for courts to enforce agreements to allow use of genetic material.⁹

Finally, Ms. Evans played the strongest card in a weak hand, arguing that courts must either read the 1990 Act in such a way as to render it compatible with her rights under the Human Rights Act 1998 or, if that were not possible, they must issue a declaration of incompatibility under it.¹⁰ Again her arguments failed.¹¹ While both the High Court and Court of Appeal found that Article 8, which protects privacy interests, was engaged for both Ms. Evans and Mr. Johnston, such interference in the private lives of the parties as permitted by Schedule 3 of the 1990 Act was necessary for the protection of the rights of both gamete providers and proportionate to that aim:

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...¹²

Ms Evans' claim that she was discriminated against in the enjoyment of her Convention rights on the basis of her infertility likewise failed to convince any of the

⁸ Although recollections of exactly what had been said on this matter were hazy, Wall J. found it probable that Ms Evans had raised the possibility of storing unfertilised eggs, and Mr Johnston had said something like: "[t]hey were not going to split up. She did not need to go in for egg freezing. She should not be negative. He wanted to be the father of her children". *Evans (H.C.)*, *supra* n. 1, at para. 62.

⁹ *Evans (C.A.)*, *supra* n. 1, at para. 120, *per* Arden L.J.

¹⁰ Citing Articles 2, 8, 12 and 14 of the European Convention on Human Rights.

¹¹ The Court of Appeal refused even to hear arguments under Article 2, noting that "Ms Evans' case is not about the right to life; it is about the right to bring life into being", *Evans (C.A.)*, *supra* n. 1, at para. 19. Arguments on the basis of Article 12 were also swiftly despatched, with the courts finding that either this Article was not engaged or, alternatively, that it was not breached because of the objective justification discussed with regard to Article 8 (see below), *Evans (H.C.)*, *supra* n. 1, at para. 265.

¹² *Evans (C.A.)*, *supra* n. 1, at para. 111, *per* Arden L.J.

judges,¹³ although there was an interesting division of opinion in the Court of Appeal on this point. Thorpe and Sedley L.J.J. followed the reasoning of the High Court: all women enjoy the right to self-determination once the embryo is implanted regardless of the chosen conception technique. The fact that a woman has a disability thus does not mean that she has been discriminated against on the basis of her disability. Arden L.J. adopted a slightly different approach, albeit one which was ultimately as unhelpful to Ms. Evans. She suggests that our focus should be on the position of a fertile woman and an infertile woman in relation to the putative father:

Seen from that perspective, there is discrimination between the position of Ms. Evans and that of a woman who conceives through normal sexual intercourse. The genetic father is allowed to withdraw his consent in I.V.F. later than he could do so in ordinary sexual intercourse.¹⁴

Notwithstanding this *prima facie* finding of discrimination, Arden L.J. agreed with the majority that Ms. Evans could not succeed under Article 14, as the factors which render the material provisions proportionate under Article 8(2) will also have the effect of affording objective justification for the discrimination.¹⁵ Ms. Evans' lack of success in this final claim meant that her action had failed on all points in both the High Court and Court of Appeal.

¹³ Identifying Articles 3, 5, 8 and 12, *Evans (H.C.)*, *supra* n. 1, at para. 267. Article 14 provides that: "[t]he 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."

¹⁴ *Evans (C.A.)*, *supra* n. 1, at para. 11.

¹⁵ *Ibid.*, at paras. 73 (Thorpe and Sedley L.J.J.) and 118 (Arden L.J.).

In this brief commentary, I do not intend further to explore the courts' response to the legal issues raised by *Evans*. For Thorpe and Sedley L.J.J., this verdict was wholly “dependent on the resolution of the law” rather than requiring the “experienced discretion that seeks to achieve fairness” which is usually required of the family law judge.¹⁶ The wording of the 1990 Act certainly pointed strongly towards the conclusion they reached, although reading between the lines of the judgement in the Court of Appeal clearly does suggest a creative attempt to explore other possibilities more favourable to Ms. Evans.¹⁷ In my view, the greater interest of *Evans* for critical commentators lies not in the way in which the 1990 Act was applied, but rather in whether the Act itself allows for an appropriate resolution in such scenarios.¹⁸ Elsewhere, I have suggested that *Evans* may highlight some problems with each of the ‘twin pillars’ of ethical support for the 1990 Act: consent and child welfare (see Sheldon forthcoming). My interest in this note is with the broad ethical underpinnings of the resolution in *Evans* and, specifically, whether an appeal to the idea of gender equality plays any useful role in guiding us here. In what follows, I criticise what I believe to be equally problematic and simplistic assertions of both gender *equality* and gender *inequality* in *Evans*, before going on to suggest that there is one specific aspect of the case which may usefully be read in terms of gender inequality.

¹⁶ *Ibid.*, at para. 1.

¹⁷ I differ here from the view expressed by a previous commentator for *Feminist Legal Studies* (Miola 2004, p. 76) who considers that the court “clearly came to the wrong conclusion” in *Evans*. In my view, the two courts come to the conclusion very strongly indicated by the 1990 Act. However, see below and Sheldon (forthcoming) for two tentative suggestions for further arguments which might have been advanced on behalf of Ms Evans. Note further the judges’ exploration of a third (which had not been raised by counsel): whether Mr Johnston would feel able to agree to the continued storage of the embryos, in the hope that Ms Evans would eventually remarry or seek treatment with another man who might become the father of any resulting children by virtue of the operation of s. 28 of the 1990 Act.

¹⁸ Mary Warnock, the philosopher responsible for developing its conceptual underpinning, has described the 1990 Act as “ambiguous” in the light of *Evans*, and confessed that the Committee she chaired “did not pursue a case ... where there is disagreement between the parties”, <http://news.bbc.co.uk/1/hi/england/2213640.stm>

ASSERTING GENDER EQUALITY: *EVANS* IN THE HIGH COURT

As was noted above, Ms. Evans did not base her discrimination argument on the differential treatment of men and women, claiming rather that she was discriminated against relative to an able-bodied (fertile) woman. Nonetheless, assertions made in the High Court regarding a "man's right of veto" over use of embryos, prompted that Court to express a view on the matter. Wall J. is vehement in his denial that the 1990 Act is anything other than even-handed in its treatment of the sexes, in that both are accorded the same 'right of veto'. He concludes his judgement with these words:

it is not difficult to reverse the dilemma. 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 women equally.¹⁹

This easy 'reversal' suggests that forcing Mr. Johnston to father a child against his will is comparable to forcing Ms. Evans to carry one against hers. In other words, the fact that Mr. Johnston cannot subject Ms. Evans to an unwanted and invasive medical procedure followed by nine months of unwanted pregnancy and the pain and risks of childbirth in order to create a child which he can raise is represented as equivalent to the fact that Ms. Evans cannot insist on making use of the

¹⁹ *Evans (H.C.)*, *supra* n. 1, at para. 320.

embryos herself with the result that Mr. Johnston has an unwanted genetic child in the world.

Wall J. here clearly makes the error of ignoring the significance of gestation. Possibly a more convincing analogy (invoking only the genetic link) would be one that posited the separated man with testicular cancer applying to use the embryos with a new partner or a surrogate mother in order to have a child which is genetically his own. He might tell his ex-partner that she need have nothing to do with the child, that he would raise it either alone or with another woman. Again, legally, in this situation the ex-partner is clearly within her rights to withdraw her consent, even though this would deny the man his one remaining chance of having his own genetic child. But neither is this scenario a perfect equivalent. Here, the ex-partner would have no legal relationship with (or financial liability for) the future child, as its birth mother would be recognised as its legal mother.²⁰ Further, and more speculatively, public opinion may treat more harshly a woman who is prepared to allow her genetic child to be raised entirely by others. Finally, of course, my scenario introduces a third party into the equation - the ex-partner might feel uneasy about 'her' embryo being implanted into another woman's body.²¹ But in any event, what is clear is that an exact gender reversal is impossible.

What this suggests, of course, is that Wall J. cannot be faulted for his failure to find a perfect reverse gender analogy for the factual scenario in *Evans* (though he can,

²⁰ Section 27 of the 1990 Act.

²¹ And this scenario also assumes that the significance of genetic links is equivalent for men and women, which is not necessarily true.

I think, be criticised for ever suggesting that such a reversal might be ‘easy’). The more general question which is raised here is whether gender equality arguments are *ever* likely to be any use in the context of decisions regarding the use of reproductive technologies: are men and women always going to be so differently situated as to make any recourse to thoughts about gender equality pointless?

ASSERTING GENDER INEQUALITY: *EVANS* IN THE MEDIA

Unlike the High Court, the media’s treatment of *Evans* erred not on the side of asserting the even-handedness of the 1990 Act, rather finding it thoroughly tainted with gender inequality. The aspect of *Evans* which seemed most to capture the interest of popular commentators was the balance of power between men and women in reproductive decision-making, with *Evans* represented as a case where a woman’s right to reproduce was pitted against a man’s right not to do so. I have noted elsewhere the ease with which the popular media take unusual sets of facts and locate them within a broader narrative of “long simmering gender wars”.²² And perhaps this reading of *Evans* is to be expected, given how closely it dovetails with more familiar narratives of a woman desiring pregnancy and a man seeking to resist it. But whatever the reasons, this broad understanding of *Evans* paved the way for a number of commentators to argue that *Evans* unfairly advantaged Mr. Johnson in failing to recognise Ms. Evans’ greater moral rights over the fate of their frozen embryos.

²² The phrase comes from Vobejda’s (1998) report on the US ‘sperm bandit’ case of *Wallis v. Smith*. See my discussion of the media reporting of this case, Sheldon (2001).

For example, the philosopher A.C. Grayling (2003), writing for the *Evening Standard*, saw Ms. Evans as a victim of an unjust law which “places control of [her] prospects of motherhood into the least sympathetic hands: those of [her ex-partner]” Whilst much has been said about the rights of fathers, argues Grayling, “the clincher is the fact that parenthood is a more crucial matter to women ... [their] experience of pregnancy, childbirth, the early nurture of an infant and the bonds that persist for a lifetime thereafter” outweigh a “father’s role [which] is nowhere so central, however important otherwise” (*ibid.*)

Still more trenchant was the attack launched by broadcaster, Jenni Murray, who lambasted Mr. Johnston as “cruel, mean spirited and selfish” and the law as “an ass for stopping [Ms. Evans] from using [the] embryos” (Murray 2003). Having jointly embarked on the first step towards having children, argued Murray, Mr. Johnston had no business to change his mind at this stage:

Has no one considered the relative pain these people have endured? For a man, I.V.F. involves nothing more humiliating than having five minutes of fun with a dirty magazine. For women there’s a long course of invasive hormone treatment, an agonising surgical procedure to remove the eggs and in some cases, the risk of long-term illness or even death if the treatment goes wrong. We’ve accepted in the case of abortion that a foetus, once conceived, is the woman’s responsibility. It is her body that will carry it to term. It is her body that will be invaded if she chooses to terminate. In terms of the physical investment involved, I can see no difference, whether the creative process takes place in the womb or in the test tube ... Conception is a joint enterprise, whether both agree a child should result or not, and carries enduring responsibility. The Child Support Agency sees to that. Why should a technical method of conception be any different (*ibid.*)

What seems to unite these commentators is a belief that the location of the embryos (inside or outside a woman's body) is not relevant to the woman's greater interests in, and rights over, them.²³ Grayling is explicit on this point:

the male contributor to the creation of frozen embryos is anyway in exactly the same moral situation as any man who makes a woman pregnant but later separates from her. An embryo represents the beginning of a pregnancy; no moral difference is made by the merely geographical matter of whether it is in a womb or a refrigerator. If a woman has the right to choose to bring that embryo to term when it is in her womb, she surely has the same right if it is currently in a fridge (2003).

Is the “merely geographical” fact that the disputed embryos currently exist outside of the body of Ms. Evans a difference which legitimates treating her differently from a pregnant woman, according greater legal rights to Mr. Johnston than those enjoyed by the partners of pregnant women (who surely cannot insist on the destruction of the embryo *in utero*)? This issue might perhaps be clarified by asking a slightly different question: why is it that the partners of pregnant women have no right to a say in the outcome of their pregnancies?²⁴ The most compelling argument must surely be not that women have some special interest in bearing a (genetic) child that men do not share, but rather that the pregnant woman must have control over the pregnancy because the embryo is developing within her body and anything done to affect it must, of necessity, be mediated through her.

²³ Though clearly this sits uneasily with Murray's insistence on the centrality of women's bodily involvement in justifying why women have special rights over embryos, *ibid*.

²⁴ That putative fathers have no legal right to prevent their sexual partners from terminating pregnancies has been established in the U.K. in the cases of *Paton v. B.P.A.S.* [1979] Q.B. 276, *C v. S* [1988] Q.B. 135, and *Kelly v. Kelly* [1997] 2 F.L.R. 828 and in the European Court of Human Rights (at least for early pregnancy) in *Paton v. U.K.* (1980) 3 E.H.R.R. 408.

If this is right then it is hard to be convinced by the comments of former litigant against the Human Fertilisation and Embryology Authority, Diane Blood, that “destroying their embryos must feel a little like the women are being forced to have an abortion against their wishes” (Blood 2003).²⁵ Whilst the pain caused to Ms Evans by the proposed destruction of the embryos is apparent, the reality of this situation is surely very far from forced termination.²⁶ What Grayling, Murray and Blood ignore is the fact that the process of creating a child has two distinct biological components for women (only one of which is shared by men): a genetic and a gestational link. It is this unique gestational connection which justifies women’s typically greater control over reproduction and in *Evans* this is lacking.

What is interesting here is that, notwithstanding their denial of the importance of gestation, the commentators cited seem to assume a gender *inequality* in reproduction: arguing that women should have greater rights over the fate of embryos, even when the embryos exist outside of the body. But, in the absence of gestation, why should women enjoy such greater claims? It might be suggested, following Murray, that it is the greater physical burdens for women which are involved in the creation of an embryo, which ground such a right. After all, infertility treatment services are invasive of women’s bodies, imposing painful and sometimes risky procedures and have been charged with “putting all the risk and responsibility for reproductive failure on the shoulders of the woman” (Alto Charo 1994, pp. 65-6). It is undoubtedly true that the procedure to obtain gametes undergone by Ms Evans would have been more burdensome than that undergone by Mr Johnston. But neither should the pain and risks involved in egg harvesting

²⁵ For the legal resolution of Ms Blood’s struggle to make use of sperm taken from her deceased husband, see *R v. H.F.E.A. ex p. Blood* [1997] 2 All E.R. 687 (C.A.), (1997) 35 B.M.L.R. 1.

²⁶ See *Evans (H.C.)*, *supra* n. 1, at para. 237.

be overstated. This difference alone seems to me to be an unsatisfactory basis for granting control over such an important event in the lives of two individuals to just one of them.

Is it rather then the factors cited by Grayling which should ground women's greater control over procreation? Does women's more central role in reproduction, the "experience of pregnancy, childbirth, the early nurture of an infant and the bonds that persist for a lifetime thereafter" (Grayling 2003) ground special rights to control procreative decisions? Grayling is surely correct in noting the existence of a range of sexed/gendered differences, not just in gestation but also in the typical arrangements of care for young children, and such differences should surely be relevant in allowing women control of decisions made during pregnancy. But should they extend to assuming greater rights to women over embryos which exist *ex utero*? Such a view cannot rest on the fact that women have a greater involvement with *specific* pregnancies and children (which, presumably, would ground greater rights only with regard to the particular pregnancies and children in question). Such a view must rather rest on the belief that women generally and inherently have a greater interest in procreation than do men. And that will strike many as deeply problematic.

CORRECTING BIOLOGICAL INEQUALITY: AN ARGUMENT UNEXPLORED IN *EVANS*

The above analysis suggests that it is easy to fall foul of the mistake of making easy assumptions regarding both gender equality and gender inequality in the regulation of reproductive decision-making. As such, the lesson to be drawn from this discussion of *Evans* may simply be one of greater caution. But, with due trepidation, it does seem to me that there was one possible claim of gender inequality which was left unexplored in *Evans*.²⁷

Natallie Evans was a cancer sufferer, who wished to preserve the possibility of having her own genetic child in the future. A man with testicular cancer would most likely be offered the option of storing sperm for future use. This would be done as a means of preserving his procreative options for later life, with no need for prior enquiry into the stability (or existence) of a current relationship. Of course, biology here dictates that it makes no clinical sense for men and women to be treated in a formally equal way. Egg storage is at an early and experimental stage and, at the time of the hearings in *Evans*, had not resulted in a single successful pregnancy in the U.K.²⁸ It would therefore have little meaning as a routine treatment. Yet might not a woman in this situation be offered the possibility of saving some embryos created with donor sperm? We are told that if Ms Evans had pushed either for such a possibility or for egg storage that she would have been refused.

[B]oth egg freezing and A.I.D. would have opened up the question of the durability of her relationship with Mr. Johnston. [The] clinic would have been bound to enquire into why Ms

²⁷ See Sheldon (forthcoming) for a more detailed exploration of this argument.

²⁸ *Evans (H.C.)*, *supra* n. 1, at para. 60.

Evans wanted egg freezing or to use donor sperm; and, despite her personal circumstances, might have felt unable to provide either when Ms. Evans had a partner who was capable of providing the gametes to fertilise her embryos.²⁹

The request for an alternative means of storing her eggs would have been taken as a sign of Ms. Evans' lack of confidence in the stability of her relationship, and thus would ring alarm bells for clinics who are charged by the 1990 Act to have due regard for "the welfare of any child who may be born as a result of treatment services (including the need of that child for a father)."³⁰ As such, Wall J. finds, to persist in such a request might well have led to Ms. Evans being refused treatment.

The root of the inequality here is clearly one imposed by biology and the state of medical science: sperm stores well, unfertilised eggs do not. But it is not only biology but also the operation of the law which imposes such stringent restrictions on the options which were open to Ms. Evans in terms of storage of her gametes. Moreover, in other areas, we have not been content to preserve those aspects of female disadvantage which are due to biology. Biology dictates that pregnancy and breast-feeding are uniquely female activities. But law and social policy have attempted to ensure that certain adverse social consequences do not result from these biological differences by developing a regime of protection which, however unsuccessfully, aims to allow women to combine these activities with a life outside

²⁹ *Ibid.*, at para. 308.

³⁰ Section 13(5) of the 1990 Act. For a critique of this application of the welfare principle, see Sheldon (forthcoming).

the home. This analysis may not dictate a different outcome in *Evans*, but it could suggest the need to rethink the operation of s. 13(5) in such cases for the future.³¹

CONCLUSION: GENDER EQUALITY IN REPRODUCTIVE DECISION-MAKING

In this brief note, I have not suggested that the principle of gender equality is without use in the context of reproductive decision-making. I have, however, suggested that it needs to be invoked with a great deal of caution. What this means is that, if we are serious about enshrining gender justice in the regulation of reproductive medicine, we need a rather more far-reaching enquiry of what is meant by this term than a simple appeal to equality.

One final point bears making by way of conclusion. Whatever else divided Ms. Evans and Mr. Johnston, they were united in a belief in the importance of genetic links in grounding parenthood. Ms. Evans' medical condition does not deny her the possibility of carrying a pregnancy and giving birth to a child; what is now excluded is the possibility of that child being genetically her own. Likewise, Mr Johnston made it clear that he did not want to have a genetic child in the world unless he could be involved in actively parenting it. He claimed here to be guided not just by the legal and financial burdens of fatherhood, but also by the psychological and moral ones.³² Thus, those who would criticise Mr. Johnston for his unwillingness to allow Ms. Evans to go ahead, given the only cost to him was to have an unwanted child, need to explain why his reasons for not wanting a genetic child are less compelling than Ms Evans's desire for wanting a genetically related child rather than one conceived via donor embryo. This raises two further

³¹ It also suggests a clear tension in the role of clinics in similar factual situations who may find themselves, at the same time, advising on the most medically advantageous storage of gametes for a cancer sufferer like Natallie Evans, whilst simultaneously operating at gate-keepers for access to I.V.F. On this point, see further Sheldon (forthcoming).

³² Mr Johnston told the Court of Appeal that his "clear position was one of fundamental rather than purely financial objection", *Evans (C.A.)*, *supra* n. 1, at para. 32.

interesting issues which relate to the earlier discussion of gender equality and which I here leave open. Firstly, can we assume that genetic links have the same psychological, social and moral significance for men and for women? In other words, are the genetic interests cited here truly equivalent?³³ And, secondly, if the interests of the parties are equivalent, is it right that the law should allow the decision against procreation to be the one which prevails with regard to embryos *ex utero*?³⁴

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REFERENCES

Alto Charo, R., “The Interaction between Family Planning and the Introduction of New Reproductive Technologies” in *Law and Medicine*, ed. K. Peterson (Melbourne: La Trobe University Press, 1994), 58.

³³ That they do not have the same legal significance is clear: see ss. 27 and 28 of the 1990 Act.

³⁴ The effect of allowing either party to withdraw consent to the use of an embryo is clearly that the wishes of the party who wishes to avoid procreation will prevail. This solution was also arrived at in the U.S. case of *Davis v. Davis* (1992) 842 S.W. 2d 588. “If no prior agreement [regarding disposition of the embryos] exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail.” The U.S. Court did, however, leave open a caveat, by noting that this verdict assumes “that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.”

Blood, D., “Why They Should be Given the Right to Appeal”, *The Guardian*, 2 October 2003.

Dyer, C., “Women Take Fight to Save Frozen Embryos to High Court”, *The Guardian*, 12 September 2003.

Grayling, A.C., “Embryo Case” *Evening Standard*, 2 October 2003.

Miola, J., “Mix-ups, Mistake and Moral Judgement: Recent Developments in UK Law on Assisted Conception” *Feminist Legal Studies* **12**/1 (2004), 67-77.

Murray, J., “Cruel, Mean Spirited and Selfish” *The Guardian*, 3 October 2003.

Sheldon, S., “Sperm Bandits, Birth Control Fraud and the Battle of the Sexes” *Legal Studies* **21**/3 (2001), 460-80.

Sheldon, S., “*Evans v Amicus Healthcare, Hadley v Midland Fertility Services*: Revealing Cracks in the ‘Twin Pillars’?” *Child & Family Law Quarterly* (forthcoming).

Vobejda, B., “Sexual Commodities” *Minneapolis Star Tribune*, 24 November 1998.

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