

The tragic high profile case of two women, who were denied use of their frozen embryos by the High Court on 30 September 2003, raises a host of legal and ethical issues.¹ Peter Saunders digs deeper

Frozen embryos

– The tip of a huge iceberg

Human embryos are amongst the weakest and most vulnerable of all human lives, and yet are being sacrificed in huge numbers in this country under the provisions of an Act that is desperately overdue for major review

Natalie Evans, 31, of Trowbridge, Wiltshire, who had her ovaries removed after being diagnosed with cancer, previously had six embryos created and frozen, before breaking up with her boyfriend Howard Johnston. Lorraine Hadley, 38, from Baswich, Staffordshire, who had a 17-year-old daughter from a previous relationship, had two embryos previously frozen using her eggs and the sperm of her ex-husband Wayne. Under the 1990 Human Fertilisation and Embryology Act (HFE Act), both parties must consent to the storage and use of embryos at every step of the IVF process, but both former male partners had refused to give this consent.

The legal judgment

Lawyers acting for the women had argued that destruction of the embryos violated their rights under the 1998 Human Rights Act.

Under articles 8 and 12 they said they had a right to 'respect to private and family life' and to 'marry and found a family', but High Court Judge Justice Wall said these rights applied equally to their male partners who did not want the embryos implanted. They further argued under article 2 that their embryos, had a 'right to life' but Wall ruled that embryos are not persons with rights in UK law. He also ruled that article 14 ('prohibition of discrimination') did not apply in this case as the HFE Act itself does not discriminate against women who are unable to conceive without undergoing IVF treatment.²

Justice Wall in conclusion, whilst saying he had sympathy for the women's position, could not overrule the law as it stood, and said it was up to Parliament to decide whether the law should be changed. He ruled

that the embryos should be destroyed. Natalie Evans has since applied to the Court of Appeal, but Lorraine Hadley has abandoned further legal action.³ It remains to be seen whether the present legislation, which seemingly allows for no exceptions even in hard cases, will be found too rigid to survive a human rights challenge in higher courts.

Most official opinion appeared to back the High Court decision. BMA Ethics Committee chairman Michael Wilks commented: 'Whilst empathising with the situation of both women we feel it would be a dangerous step to change the rules on consent retrospectively.' Suzi Leather of the Human Fertilisation and Embryology Authority said: 'The judgement is clear, the law has been clear since 1990 when it was passed by Parliament – but I don't think that takes away the pain for the women involved.' Justice Wall commented further, that had the embryos been re-implanted, the former male partners would have become the biological fathers of children for whom they would be financially responsible, but with whom they could not enjoy any form of natural parental relationship. He added that no one would have expected a mother to have frozen embryos implanted without her consent just because her partner wanted it, and that the law applied to both partners equally.

The case did however highlight an anomaly in the present legislation. Professor Ian Craft of the London Fertility Centre, said: 'The irony here is that in a natural conception a woman has absolute rights, but she apparently does not have absolute rights in IVF.'

Expendable embryos

Understandably most of the legal and ethical

discussion in the case has centred around the respective rights of the parents, but Lorraine Hadley crystallised another key issue beautifully in her comments after the trial, in speaking of her despair at the decision: 'An embryo is not a possession to be divided up in the divorce proceedings. It is a baby in the making. I fully accept that men have rights too. But I find it abhorrent that we should be able to create these little human beings – and then flush them down the toilet on a whim. Why should one of us have the right to say the embryos should be destroyed simply because it doesn't suit them any more?'⁴

The short answer is that both law and public consensus in this country regard the human embryo only as a potential human being (and hence without rights) rather than a human being with potential.

Since 1990 about 250,000 embryos have been frozen following IVF treatment in Britain. In March 1999 there were 51,346 embryos stored. This had jumped to 97,719 in March 2001 and 116,252 by March 2003, more than doubling in four years.⁵ Around eight embryos are created in each IVF treatment cycle but only a maximum of two can be implanted, meaning that there are always spare embryos to be frozen, donated, experimented upon or destroyed. Couples are allowed to keep them for up to ten years for an annual storage fee of approximately £250. Some are re-implanted by those who want to 'try again' without re-harvesting fresh embryos after failed IVF, but most are allowed to perish at the parents' request. Some are donated for medical research, and some, but not many, are given to other childless couples. In 2001 there were just 189 cycles of treatment with donated embryos out of a total 25,000 IVF treatment cycles and only about 1,500 babies have so far been born as a result of donated embryos.

Infertility and adoption

The whole debate needs to be seen against the broader sociological background of rises in the incidence of infertility and falls in the number of babies available for adoption.

Infertility is increasing primarily because of delayed childbirth or tubal infertility. Couples are marrying later, or choosing to delay having children for career or personal reasons. Tubal infertility is increasing mainly as result of chlamydia infection, which currently affects 10% of women and is itself increasing 20% per year, largely as a consequence of unwise sexual choices.

In the mid 1960s there were about 15,000 baby adoptions per year but this has now fallen to around 200. This is in part because women who might previously have given their babies up for adoption are instead choosing abortion. In fact if adoption was more widely encouraged there may be many more babies available for adoption. In 1968 there were about 23,000 abortions in England and Wales but the total is now about 180,000 per year. In addition there is far less stigma now attached to one parent families, and about two million UK children live with only one parent.

About 8,000 IVF babies were born in 2001, the latest year for which figures are available. This is about

half the number of adoptions that took place each year in the 1960s. Whereas clearly not all infertile couples would choose adoption above IVF, if more babies were available for adoption in the UK one would expect demand for IVF to decrease substantially.

IVF births now account for about 1% of all births. Since 1978 more than 68,000 children have been born through IVF, out of over 900,000 embryos created. Costs range from £2,000 to £4,000 per cycle and the success (live birth) rate for IVF patients of all ages is about 22%. In the UK about 40% of all IVF treatments are provided by the NHS,⁶ but under new NICE guidelines all women up to 39 either with a clear cause of infertility, or three years unexplained infertility, will be entitled to three complete treatment cycles free. The estimated cost to the NHS is £400million or about 0.6% of the annual health budget.⁷

In the US a Christian adoption agency, *Nightlight Christian Adoptions*, has launched an embryo adoption scheme called 'Snowflakes',⁸ whereby couples with spare embryos can donate them to another couple. They are seeking to introduce the service into the UK in the near future. 'Snowflakes' was created to rescue IVF embryos that would have otherwise been discarded, and has been responsible for the birth of 32 children in the US to date. Its procedures are similar to the traditional adoption process, including screening both sets of parents and allowing donor parents to veto adoptive parents they consider unsuitable.⁹

Better solutions

The frozen embryo saga highlighted by the cases of Natallie Evans and Loraine Hadley is just the tip of a huge iceberg. Human embryos are amongst the weakest and most vulnerable of all human lives, and yet are being sacrificed in huge numbers in this country under the provisions of an Act that is desperately overdue for major review. Christ gave his life for us 'when we were still powerless'¹⁰ and it is a fundamental Christian ethical principle that the strong should make sacrifices for the weak.

Christian doctors have a huge obligation to be at the forefront of a push for more humane legislation that treats human embryos with the wonder, respect, empathy and protection that they deserve as creatures made in the image of God.

But there are also far deeper sociological issues raised here: the promotion of embryo and baby adoption as alternatives to embryo disposal and abortion, and the prevention and proper treatment of the sexually transmitted diseases that account for so much infertility. A society that followed God's wisdom of 'one man, one woman for life' and which put service and family obligations above material gain would avoid much of the legacy of the sexual revolution that we are currently reaping.

We may never eliminate infertility, but even in an imperfect world there are more humane, wise, sensible and just solutions that those we have currently embraced.

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KEY POINTS

The failed High Court appeal by Lorraine Hadley and Natallie Evans to save their frozen embryos against their partners wishes has highlighted the fact that current law offers protection for the rights of neither the mother nor her embryos in these circumstances. But the case also raises the deeper issues of the rising epidemic of chlamydia, the shortage of babies for adoption and the unavailability of non-high-tech solutions for childless couples. The Human Fertilisation and Embryology Act needs urgent review, but we cannot do so without also addressing our society's unbridled 'sexual freedom' with its legacy of infertility and abortion.

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