A Neutral Citation Number: [2006] IEHC 359

THE HIGH COURT

[2004 No. 9792 P.]

BETWEEN

M. R.

PLAINTIFF

AND
T. R.
ANTHONY WALSH
DAVID WALSH
AND
SIMS CLINIC LIMITED

DEFENDANTS

AND
THE ATTORNEY GENERAL

NOTICE PARTY

Judgment of Mr. Justice McGovern delivered on the 15th day of November 2006.

The Facts

1. The plaintiff and the first named defendant were married on the 5th March, 1992. In 1994 they sought fertility advice from their General Practitioner and were referred to Holles Street Hospital. In July 1995 the Plaintiff underwent a laparoscopy which did not indicate any particular fertility problem. In March 1996 the plaintiff was checked for a possible cyst on her ovary due to the fact that she was experiencing some pain in her abdomen. In December 1996 she underwent a medical procedure at the National Maternity Hospital Holles Street, Dublin. This involved a HCG injection in mid cycle. She became pregnant in January 1997 and a son was born in October 1997.

2. Shortly after the birth of her son the plaintiff underwent surgery for an ovarian cyst and she lost two thirds of her right ovary. She was referred back to the National Maternity Hospital in Holles Street in 1999. On the 5th May, 2000 she underwent another laparoscopy. She had fertility treatment in 2001 at Holles Street which proved to be unsuccessful. In July 2001 the plaintiff and the first named defendant were referred for IVF treatment. They elected to have the treatment at the Sims Clinic (the fourth named defendant). Their first appointment at the fourth named defendant's clinic was in October 2001. They returned to the clinic in January 2002. On the 29th January, 2002 the plaintiff signed a document entitled "Consent to Treatment Involving Egg Retrieval". In this document the plaintiff agreed to the removal of eggs from her ovaries and a mixing of the eggs with the sperm of the first named defendant. On the same date the plaintiff and the first named defendant signed a document entitled "Consent to Embryo Freezing". In that document it was stated, *inter alia*, "we consent to the cryo preservation (freezing) of our embryos and take full responsibility on an ongoing basis for these cryo preserved embryos." The first named defendant signed a document entitled "Husband's Consent" in which he acknowledged that he was the husband of the plaintiff and consented to the fertilisation of the plaintiff's eggs and the implantation of three embryos. He also acknowledged in that document that he would become the legal father of any resulting child. On the same date the first named defendant signed a "Semen Collection Form" confirming that the sample produced was his. On the 1st of February, 2002 the plaintiff signed a form entitled "Consent to Embryo Transfer". In this she agreed to the placing in her uterus of three embryos and the administration of any drugs or anaesthetics that might be found necessary in the course of the procedure.

3. As a result of the IVF treatment six viable embryos were created. Three were inserted in the plaintiff's uterus and the remaining three were frozen. The plaintiff became pregnant as a result of the transfer of the three embryos and gave birth to a daughter on the 26th of October, 2002.

4. Towards the end of the plaintiff's pregnancy following IVF treatment, marital difficulties arose between the plaintiff and the first named defendant which resulted in the first named defendant leaving the family home. He had entered into a second relationship. An attempt at reconciliation failed and the parties eventually entered into a judicial separation although they still remain legally husband and wife. The plaintiff wishes to have the three frozen embryos implanted in her uterus and the first defendant does not wish this to happen and does not wish to become the father of any child that might be born as a result of the implantation of the frozen embryos.

5. I have already held, after the hearing of a preliminary issue, there was no agreement between the plaintiff and the first named defendant as to what would happen the frozen embryos if the implantation of the initial three embryos resulted in a successful pregnancy. I also held that the first named defendant did not give his consent either express or implied to the implantation of the frozen embryos and it is clear that the fourth named defendant is unwilling to release the embryos into the care and custody of the plaintiff without the consent of the first named defendant. There is an issue concerning the storage of the embryos. The second, third or fourth named defendant have indicated they will abide by any order of the court. They pointed out that the stored embryos could only be removed from their storage unit and transferred elsewhere if the plaintiff and the first named defendant agreed. On the 24th June, 2005 the fourth named defendant wrote to the plaintiff and the first named defendant stating "we have not received any payment for storage of your embryos since June 2003. This failure of payment despite a request for same is a breach of unit policy which renders our implied storage contract null and void." They did state that they were prepared "as an act of altruism" to maintain the integrity of the embryos for an additional year and pointed out that the clinic and its agents had no further ongoing responsibility for the embryos. It is against this background that the proceedings have been commenced.

The Issues

6. While the issues are set out in the pleadings, I was informed by Counsel for the Plaintiff that the issues had been resolved into more specific topics set out in a draft list of issues agreed between the parties and furnished with the book of pleadings. The issues are stated to be as follows:

> "1. Whether the frozen embryos are 'unborn' for the purposes of Article 40.3.3 of the Constitution of Ireland.
>
> *2. Whether the plaintiff and the first named defendant had agreed that the said embryos would be returned to the plaintiff's uterus and, if so, whether the said agreement still binds the parties irrespective of the subsequent marital separation.*
>
> *3. Irrespective of the answer to 2, is the plaintiff entitled to the return of the said embryos to her uterus whether by virtue of Article 40.3.3 and/or Article 41 of the Constitution or otherwise?*

4. Is the first named defendant entitled to withdraw his consent to the said return of the embryos by virtue of the subsequent breakdown of the marriage and/or by virtue of any constitutional right to determine how the said embryos might be used, stored, maintained or kept."

7. After hearing legal argument it was agreed that issue No. 2 should be dealt with first by the Court, this being a private law issue. Evidence was heard on the issue and judgment was delivered by this Court on the 18th July, 2006. In that judgment I held that the first named defendant did not give his express or implied consent to the implantation of the three frozen embryos in the plaintiff's uterus. That preliminary hearing disposed of item 2 on the list of issues. Of the remaining issues the principle one is issue number 1 namely, whether the frozen embryos are "unborn" for the purposes of Article 40.3.3 of the Constitution of Ireland. The other issues are subsidiary to that question and depend on the answer to that question although there is also the question of Article 41 which arises in the third issue which I will come to later in this judgment. A number of witnesses were called on behalf of the plaintiff who gave evidence as to when, in their view, life begins. Some of these witnesses argued that from the moment of fertilisation of the ovum by the sperm a new human life begins. Other witnesses called to give evidence in this case postulated that it was only when the embryo became implanted in the uterus that the potential to be born existed and that human life began at that point. Yet other witnesses indicated that human life began at the formation of the primitive streak and some witnesses offered the view that it was impossible to say when human life begins. What is clear is that a debate which has existed over centuries continues to this day even with the major advances which have been made in medicine and science. In opening the case Mr. Hogan for the plaintiff stated that the court "… in the context of this case, is confronted with the most difficult decision of all, a decision which probably or at least to date, eluded the most gifted and brilliant of medical scientists, scientists… and those in the medical community and indeed in other communities who have reflected on this; at what point does human life begin?" It is possible for Scientists and Embryologists to describe in detail the process of development from the ovum to the embryo and on to the stage when it becomes a foetus after implantation of the embryo in the wall of the uterus, but in my opinion, it is not possible for this Court to state when human life begins. The point at which people use the term "human being" or ascribe human characteristics to such genetic material depends on issues other than science and medicine. For example, it is a matter which may be determined by one's religious or moral beliefs and, even within different religions, there can be disagreements as to when genetic material becomes a "human being". But it is not the function of the courts to choose between competing religious and moral beliefs. This issue was considered by Munby J. in *The Queen on the application of Smeaton v. Secretary of State for Health* [2002] 2 FLR 146. This was a judicial review proceeding brought by the society for the protection of unborn children (SPUC) challenging the making of a statutory instrument which permitted the sale of the "morning-after pill" to women of 16 years and over. It was alleged by the applicant that such a pill was an abortifacient substance used with intent to procure miscarriage and, therefore, a substance whose supply, administration and use was a criminal offence under the Offence Against the Person Act 1861 ss. 58 and/or 59. Munby J. said at p. 157:

> "I have said that this case raises moral and ethical questions of great importance. It would be idle to suggest otherwise. For those who view such matters in religious terms it raises religious and theological questions of great – and to some, transcending importance. But I must emphasis that so far as the Court is concerned, this case has nothing to do with either morality or religious belief. The issue which I have to decide is not whether the sale and use of the morning after pill is morally or religiously right or wrong, nor whether it is socially desirable or undesirable. What I have to determine is whether it may constitute an offence under the 1861 Act.
>
> Cases such as this, and others in the field of medicine…raise moral, religious and ethical issues on which, as Lord Browne – Wilkinson pointed out in Airedale NHS Trust v. Bland [1993] A.C. 789, [1993] 1 FLR 1026, at 879 E, 880 A and 1050 F, 1051 B respectively, 'society is not all of one mind' and on which indeed 'society as a whole is substantially divided'. Our society including the most thoughtful and concerned sections of our society, are deeply troubled by and indeed deeply divided over, such issues. These are topics on which men and women of different faiths, or indeed of no faith at all, may and do hold passionately and with the utmost sincerity, starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them."

8. I adopt those words as being relevant and applicable to the facts and issues in this case.

9. Having heard the evidence in this matter and submissions of counsel I take the view that what I have to decide is whether the three frozen embryos at issue in this case constitute the "unborn" for the purposes of Article 40.3.3 of the Constitution. In carrying out that task I must, of course, have regard to principles of constitutional interpretation.

Principles of Constitutional Interpretation

10. Article 40.3.3 of the Constitution provides:

> *"3° The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.*
>
> *This subsection shall not limit freedom to travel between the State and another state.*
>
> *This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state."*

11. The Irish text reads:

> *"3° Admhaíonn an Stát ceart na mbeo gan breith chun a mbeatha agus, ag féachaint go cuí do chomhcheart na máthar chun a beatha, ráthaíonn sé gan cur isteach lena dhlíthe ar an gceart sin agus ráthaíonn fós an ceart sin a chosaint is a shuíomh lena dhlíthe sa mhéid gur féidir é.*
>
> *Ní theorannóidh an fo-alt seo saoirse chun taisteal idir an Stát agus stát eile.*
>
> *Ní theorannóidh an fo-alt seo seoirse chun faisnéis a fháil nó a chur ar fáil sa Stát maidir le seibhísí atá ar fáil go dleathach i stát eile ach sin faoi chuimsiú cibé coinníollacha a fhéadfar a leagan síos le dlí."*

12. The Article does not define what is meant by "unborn" in the English version and "beo gan breith" in the Irish version.

13. I have been referred to the Constitution Review Group's report published in July, 1996. The review group pointed out that:

> "Definition is needed as to when the 'unborn' acquires the protection of the law. Philosophers and scientists may continue to debate when human life begins but the law must define what it intends to protect".

14. In considering the meaning of the words in Article 40.3.3 the Court can have regard to the legislative history of the amendment to Article 40.3 but not to debates in the Oireachtas. See *Maher v. Minister for Agriculture* [2001] 2 I.R. 139 at 145. See also *Campaign to Separate Church and State v. Minister for Education* [1998] 3 I.R. 321 at 360. In *Curtain v. Dail Eireann* [2006] 2 ILRM 99 at 128 Murray C.J. stated that Article 34.4.1 contained no guidance on the power of the houses of the Oireachtas to appoint investigating committees or the powers that they may delegate to such committees. "In these circumstances, it is reasonable to consider whether there is any history or background to the enactment of the Constitution capable of elucidating what was in the contemplation of the framers". So in the circumstances of this case one can look at the history or background to the amendment of the Constitution which resulted in Article 40.3.3 being adopted by the people. In *The State (Healy) v. Donoghue* [1976] I.R. 325 O'Higgins C.J. stated at p. 347 that the preamble to the Constitution:

> "…makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a constitution which can absorb or be adapted to such change in other words the Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment".

15. He went on to quote Walsh J. in *McGee v. The Attorney General* [1994] I.R. 284 at 319 when he said:

> "According to the preamble, the people gave themselves the Constitution to promote the common good with due observance of prudence, justice and charity so that the dignity and freedom of the individual might be assured. The judges must, therefore, as best as they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

16. These views expressed by O'Higgins C.J. and Walsh J. acknowledge that changing values in society may mean that rights which were not acknowledged in the past may now be accepted as firmly established under the Constitution. They are not, in my view, authority for the proposition that the word "unborn" in Article 40.3.3 should be given a different meaning to that which was understood by the people at the time when they approved the amendment, if it can be ascertained, from the historical context, what the word was understood to mean.

Are the Frozen Embryos "Unborn" Within the Meaning of Article 40.3.3 of the Constitution of Ireland?

17. The word "unborn" appears in Article 40.3.3 and also appears in s. 58 of the Civil Liability Act 1961. It is not defined in either case. Section 58 of the Civil Liability Act, 1961 provides as follows:

> *"For the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive."*

18. The rights given in s. 58 can only be invoked if:

> *"…the child is subsequently born alive"*

19. Thus, to take a simple example, if a pregnant woman is involved in a car accident and the child in her womb sustains injuries due to someone's negligence, that child, on birth, would be entitled to have proceedings brought on his behalf to recover damages for such injuries. It would seem, on the face of it, that "unborn" in s. 58 of the Civil Liability Act 1961 refers to a child in the womb. But it could be argued that if a child, created as a result of IVF treatment, was born with injuries resulting from a negligent act done to the embryo *in vitro* that the child subsequently born might come within the section. One could think of a number of arguments which might be made if this issue ever came before the Courts but it is not necessary for me to decide such issues here. Suffice it to say that the word "unborn" as set out in the Civil Liability Act does not offer much assistance to my determination of the issues in this case.

20. What is the meaning of "unborn" in Article 40.3.3? Is it the fertilised ovum or, life from the moment of conception, or does it mean something else? The plaintiff argues that where there is uncertainty the Courts must favour life in interpreting the word "unborn". The plaintiff urges that there is at least significant and weighty evidence that the frozen embryos at issue in this case *could be* human life and that if this is an issue which cannot be determined one way or the other the Court should err in favour of life and hold that such embryos are constitutionally protected.

21. In making this argument the plaintiffs refer to the evidence of Dr. Clinch

22. where he stated:-

> "The commission on assisted reproduction actually made a statement about life starting, but it produced no biological or scientific evidence to prove that implantation was the start of life. So, while there is any doubt whatsoever, you come down on the side of life and since the embryo has all the genetic material it needs to turn into a human being, you would instinctively come down on the side of life." (Transcript day 6, answer 31).

23. It seems to me that it is precisely because of this uncertainty and lack of agreement among the scientific and medical community as to when life begins that most people agree that embryos *in vitro* are deserving of special respect and that their very creation raises serious moral and ethical issues which in themselves impose restraints on what may or may not be done with them. There are also formal ethical restraints imposed on the medical profession by their governing body. I have been referred to the Medical Council's Guide to Ethical Conduct and Behaviour (Sixth Edition 2004). In that guide section F deals with "Genetic Testing and Reproductive Medicine." Clause 24.1 states inter alia; "the creation of new form of life for experimental purposes or the deliberate and intentional destruction of *in-vitro* human life already formed is professional misconduct." Clause 24.5 deals with *in vitro* fertilisation (I.V.F.) and states, *inter alia*, "any fertilised ovum must be used for normal implantation and must not be deliberately destroyed".

24. In *The Attorney General (S.P.U.C.) v. Open Door Counselling Limited* [1988] 593 at 598 Hamilton P. stated:

> "…the right to life of a foetus, the unborn, is afforded statutory protection from the date of its conception."

25. He stated that prior to the enactment of the Eight Amendment to the Constitution the right to life of the unborn had been referred to and acknowledged by Walsh J. in the course of his judgment in *G. v. An Bord Uchtála* [1980] I.R 32 where he stated at p.

69:-

> "Not only has the child born out of lawful wedlock the natural right to have its welfare and health guarded no less well than of a child born in lawful wedlock, but a fortiori it has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth… the right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended that life… the child's natural right to life and all that flows from that right are independent of any right of the parent as such."

26. The statement of Hamilton P. that:

> "…the right to life of the foetus, the unborn, is afforded statutory protection from the date of its conception"

27. was criticised by Munby J. in the *Smeaton* case at p. 202 when he said:

> "It may be observed that the point with which I am concerned did not arise for decision in that case. Moreover unless he was using the word 'conception' in the sense of the medical definitions given by Reiss's Reproductive Medicine: from A – Z (1998) and Stedman's Medical Dictionary (27th Edn. 1999) … the judge's comments would seem to display some internal inconsistency since he refers to the statutory protection as being both to 'the foetus in the womb' and as existing from 'the date of … conception'".

28. Munby J. goes on to say that there is nothing in the subsequent proceedings in the Irish Supreme Court which throws any light on the point. The complete paragraph in which the observation of Hamilton P. is contained reads as follows:-

> "Sections 58 and 59 of the Offences Against the Person Act, 1861, protected and protect the foetus in the womb and having regard to the omission of the words 'Quick with child' which were contained in the statute of 1803 hereinbefore referred to, the protection dates from conception. Consequently, the right to life of the foetus, the unborn, is afforded statutory protection of the date of its conception."

29. Sections 58 and 59 of the 1861 Act made it a criminal offence to administer any poison or other noxious thing or use any instrument or other means with intent to procure the miscarriage of any woman. In plain language it made it a criminal offence to procure or carry out an abortion. Since Hamilton P. was talking about the unborn in the context of the statutory protection afforded by the 1861 Act it seems to me that he was talking about the 'unborn' in the womb. I am reinforced in that view because at p. 614 he stated:

> "As late as 1983, the people enacted the Eight Amendment to the Constitution. Consequently, there can be no doubt but that abortion, which is an interference with and destruction of the right to life of the unborn, is contrary to national policy, public morality, contrary to law, both common law and statute law, to the fundamental right of the unborn and contrary to that right to life as acknowledged by the Eight Amendment to the Constitution."

30. Here he was clearly talking in the context of "abortion" or the termination of a pregnancy.

In *The Attorney General v. X* [1992] 1 I.R. 1 at p. 72 Hederman J. stated:-

> "The Eight Amendment establishes beyond any dispute that the constitutional guarantee of the vindication and protection of life is not qualified by the condition that life must be one which has achieved an independent existence after birth. The right of life is guaranteed to every life born or unborn. One cannot make distinctions between individual phases of the unborn life before birth or between unborn and born life."

31. The plaintiff argues that from the moment of conception there is a continuum and that one cannot or should not make distinctions between the various stages of development of the embryo and the foetus. When one looks further at the judgment of Hederman J. in the *X* case it seems clear that he is talking about "unborn" life in the context of pregnancy. He says at p. 72:

> "The State's duty to protect life also extends to the mother. The natural connection between the unborn child and the mother's life constitutes a special relationship. But one cannot consider the unborn life only as part of the maternal organism. The extinction of unborn life is not confined to the sphere or private life of the mother or family because the unborn life is an autonomous human being protected by the Constitution. Therefore the termination of pregnancy other than a natural one has a legal and social dimension and requires a special responsibility on the part of the State. There cannot be a freedom to extinguish life side by side with guarantee and protection of that life because the termination of pregnancy always means the destruction of an unborn life. Therefore no recognition of a mother's right of self determination can be given priority over the protection of the unborn life. The creation of a new life, involving as it does pregnancy, birth and raising the child, necessarily involves some restriction of a mother's freedom but the alternative is the destruction of the unborn life. The termination of pregnancy is not like a visit to the doctor to cure an illness. The State must, in principle, act in accordance with the mother's duty to carry out the pregnancy and, in principle must also outlaw termination of pregnancy."

32. There can be no doubt that Hederman J. was speaking in the context of the termination of a pregnancy and that the "unborn" that he referred to in his judgment was to be construed in that context. The same can be said of the judgment of McCarthy J. in this case where he stated at pg.79:-

> "The right of the girl here is a right to a life in being; the right of the unborn is to a life contingent; contingent on survival in the womb until successful delivery. It is not a question of setting one above the other but rather of vindicating, as far as practicable, the right to life of the girl/mother (Article 40, s.3, sub-s. 2) whilst with due regard to the equal right to life of the girl/mother indicating as far as practicable the right to life of the unborn. (Article 40, s.3, sub-s.3)."

33. At pg.81 of the judgment McCarthy J. stated:-

> "Before the enactment of the Amendment, the provisions of s.58 of the Offences Against the Person Act, 1861, made it a criminal offence to procure a miscarriage. The terms were wide enough to make the act of the prospective mother or anyone taking part in the procedure guilty of an offence. Abortion, for any purpose, was unlawful. The Eight, like any Amendment to the Constitution, originated in the legislature and, in this instance, was initiated by the executive. The relevant bill was passed by both houses of the Oireachtas and in accordance with the Constitution, it was then voted on

> by the people in a referendum. Its purpose can be readily identified – it was to enshrine in the Constitution the protection of the right to life of the unborn thus precluding the legislature from an unqualified repeal of s.58 of the Act of 1861 or otherwise, in general, legalising abortion."

34. This view was confirmed by the Supreme Court *Baby O. v. The Minister for Justice* [2002] 2 I.R. 169. In the judgment of the Court, Keane C.J. said at p.183 that Article 40.3.3:-

> "...as explained by the judgments of the majority in this Court in *Attorney General v. X.* [1992] 1 I.R. 1, was intended to prevent the legalisation of abortion either by legislation or judicial decision within the State, except where there was a real and substantial risk to the life of the mother which could only be avoided by the termination of the pregnancy."

35. It is interesting to note that O'Flaherty J. at p.86 states:-

> "The enactment of Article 40, s.3, sub-s.3, in 1983 did not I believe bring about any fundamental change in our law. Already, s.58 of the Offences Against the Person Act, 1861, made it an offence unlawfully to bring about the miscarriage of a woman."

36. These remarks seem to further confirm the linking of Article 40.3.3 with the abortion issue. If this is correct then it equates "unborn" with an embryo which has implanted in the womb, or a foetus.

37. In the *Smeaton* case Munby J. looked that the history of the 1861 Act and in his judgement stated at p.185-:-

> "The fact is that some of the leading and most authoritative medical works of the time available to parliament in 1861 – I have in mind John Ramsbotham, Burns and, in particular, Francis Ramsbotham are strongly supportive of the idea that miscarriage becomes possible only after implantation."

38. What clearly emerges from the authorities I have referred to is that the Courts have declared that the Eight Amendment to the Constitution giving rise to the wording in Article 40.3.3 was for the purpose of making secure the prohibition on abortion expressed in s.57 and 58 of the Offences Against the Person Act, 1861 and not to permit abortion or termination of pregnancy except where it is established as a matter of probability that there is a real and substantial risk to the life of the mother if such termination were not effected. The Courts have never, thus far, considered whether the word "unborn" in Article 40.3.3 includes embryos *in vitro*. In the *Smeaton* case Munby J. referred to a number of commentaries on the issue of law and medical ethics and medical legal aspects of reproduction. He cited a publication called *Post-Coital Anti Pregnancy Techniques and the Law* by K. Norrie who, he said puts the argument very clearly:-

> "…The question of when human life begins as a matter of morality, or indeed biology, is not the same as the question of when pregnancy begins for the purpose of the law. Human life may – or may not – begin in a test-tube, but the mere existence of a fertilised egg in a test-tube does not make the woman who produced the egg pregnant…" See p.211.

39. If Article 40.3.3 and the 1861 Act are concerned with the termination of pregnancy this does not mean that they are concerned with embryos *in vitro*. There has been no evidence adduced to establish that it was ever in the mind of the people voting on the Eight Amendment to the Constitution that "unborn" meant anything other than a foetus or child within the womb. To infer that it was in the mind of the people that "unborn" included embryos outside the womb or embryos *in vitro* would be to completely ignore the circumstances in which the amendment giving rise to Article 40.3.3 arose. While I accept that Article 40.3.3 is not to be taken in isolation from its historical background and should be considered as but one provision of the whole Constitution, this does not mean that the word "unborn" can be given a meaning which was not contemplated by the people at the time of the passing of the Eight Amendment and which takes it outside the scope and purpose of the amendment. In *P.J. Carroll & Co. v. Minister for Health* [2005] 2 I.L.R.M., 481 at 486, Geoghegan J. stated at 486:-

> "Although Courts in this jurisdiction interpret statutes by reference to the words used, they do not do so in a vacuum. There is always a contextual background of which the Courts are perfectly well aware. There can be no question of course in a constitutional challenge, of the State adducing evidence as to what were the intentions as such of the Oireachtas or particular members thereof. But that is quite different from suggesting that there cannot be evidence of objective external facts existing at the time that the legislation was enacted."

40. The Courts have already pronounced on the purpose of the Eight Amendment to the Constitution. The plaintiff in this case assumes the burden of proving that the word "unborn" meant something more than the foetus or child in the womb since the clear purpose of the amendment was to deal with the issue of termination of pregnancy. Evidence has been adduced by the plaintiff as to when human life begins, but there is much disagreement on this question among the medical and scientific community and, indeed, among the witnesses in this case. The question of when human life begins is not what the Court is concerned with in the interpretation of Article 40.3.3. No evidence has been adduced by the plaintiff which would enable the Court to hold that the word "unborn" in Article 40.3.3 includes embryos outside the womb or *in vitro*. I have therefore come to the conclusion that the word "unborn" within Article 40.3.3 does not include embryos *in vitro* and therefore does not include the three frozen embryos which are at the heart of the dispute between the plaintiff and the first named defendant.

41. It is not for the Courts to decide whether the word "unborn" should include embryos *in vitro*. This is a matter for the Oireachtas, or for the people, in the event that a Constitutional Amendment is put before them. In 2000 the Government established a Commission on Assisted Human Reproduction to make recommendations in the area of *in vitro* fertilisation practices. The members of the Commission included a wide range of experts in the fields of reproductive medicine embryology genetics law and other relevant areas which can be ascertained from the description of the members of the Commission published at the commencement of their report. The Commission also invited a number of additional experts with complementary expertise in specific areas including Philosophers, Sociologists, a Director of Ecumenical Studies and a Roman Catholic Theologian. In March, 2005 the Commission published its report in which it made forty recommendations, most of which were unanimous. The first recommendation (unanimous) was that "a regularity body should be established by an Act of the Oireachtas to regulate A.H.R. services in Ireland". (By A.H.R. they meant Assisted Human Reproduction). A majority of the Commission recommended that "the embryo formed by IVF should not attract legal protection until placed in the human body, at which stage it should attract the same level of protection as the embryo formed in vivo". It is a matter for the Oireachtas as to whether they implement the recommendations of the Commission. In the meantime the Courts are being ask to deal with a complex dispute involving social issues which should be governed by a regulatory regime established by an Act of the Oireachtas.

42. If the frozen embryos which are the subject matter of this case are not "unborn" within the meaning of Article 40.3.3 of the

Constitution and are not given protection by the Constitution they do not have "personal rights" under the Constitution.

43. Since the three frozen embryos are not "unborn" within the meaning of article 40.3.3, this raises the issue as to what protection (if any) is currently afforded these embryos. While there is considerable disagreement as to whether embryos, before implantation in the womb, constitute viable human life, there seems to be almost complete agreement on the fact that, because of their nature, embryos are deserving of respect. I have already referred to the ethical guidelines of the Medical Council. These ethical guidelines do not have the force of law and offer only such limited protection as derives from the fear on the part of a doctor that he might be found guilty of professional misconduct with all the professional consequences that might follow.

44. The fact that something is not prohibited by the law does not of itself mean that it is morally acceptable to carry out that act. There may be many people who, because of their moral or religious outlook regard the process of IVF as unacceptable even though it is permitted by the law. There are others who see this a great advance in medical science giving the opportunity to infertile couples to have children. In issues such as this there may well be a divide between Church and State, and between one religion and another. It is not for the Courts to weigh the views of one religion against another, or to choose between one moral view point and another. All are entitled to equal respect provided they are not subversive of the law, and provided there are no public policy reasons requiring the Courts to intervene. Moral responsibility exists even in the absence of law and arises out of the freedom of choice of the individual. People have many different ideas of morality. Society is made up of people of various religious traditions and none. If the law is to enforce morality then whose morality is it to enforce? The function of the Courts is to apply the law, which are the rules and regulations that govern society. Where these rules and regulations are to be found in articles of the Constitution they are approved of by the people, and where they are to be found in legislation they are passed by the Houses of the Oireachtas. Laws should, and generally do, reflect society's values and will be influenced by them. But at the end of the day it is the duty of the Courts to implement and apply the law, not morality.

45. In many countries I.V.F. treatment is governed by strict rules and regulations. It seems to me that in the absence of any rules or regulations in this jurisdiction embryos outside the womb have a very precarious existence. In the present case I have held that the first named defendant did not give his consent to the transfer of the three frozen embryos into the uterus of the plaintiff. The second named defendant has indicated that it will not release the frozen embryos without the consent of both parties. It is clear that there is no agreement between the plaintiff and the first defendant as to what is to happen to the frozen embryos. It is most unlikely that agreement can be reached on this matter. That being so the likely fate of the embryos is to remain in a state of cryo-preservation for an indefinite period. Eventually there will come a time when these embryos cannot be implanted in the plaintiff's uterus with any hope of success as she is getting older. But that doesn't appear to be any basis on which the Court can intervene in this matter.

46. I have considered the arguments made by the first defendant that it would be abhorrent to force him to become a parent against his will. For the plaintiff it is argued that he cannot simply change his mind once he has agreed to his sperm being mixed with the plaintiff's ova. Since I have already concluded that these embryos are not "unborn" within the meaning of Article 40.3.3 the issue of whether or not the first defendant, as a matter of law, can be forced to become a parent by the implantation of the embryos in the plaintiff's uterus does not arise. Until the law or the Constitution is changed this issue remains within the sphere of ethics and morality. In closing submissions counsel for the plaintiff accepted that the first defendant could not have paternity imposed on him if the un-implanted embryos are not "unborn" for the purposes of Article 40.3.3.

Other Issues

47. One of the issues raised by the plaintiff in this case is whether or not she is entitled to the return of the embryos to her uterus by virtue of Article 41 of the Constitution. In *McGee v- the Attorney General* [1974] I.R. 284 the Supreme Court decided that a married couple enjoy a right of privacy and a right of autonomy in making decisions with regard to their family and issues such as family planning. Neither the Courts nor the Oireachtas can interfere with such decisions except in limited circumstances. For example the Courts could intervene if a decision was made to carry out an abortion other than where there was a real and substantial risk to the life of the mother. Since the issue of when human life begins is so uncertain and not capable of resolution by this Court and since I have held that the frozen embryos are not "unborn" within the meaning of Article 40.3.3. it seems to me that the question of rights arising under Article 41 of the Constitution does not arise in this case.

48. In the course of submissions made on behalf of the Attorney General the Court was invited to consider, whether, in adopting Article 40.3.3. the People intended that the use of widely available forms of contraception would in fact be rendered unconstitutional. In this context reference is made, *inter alia*, to "the morning-after pill". In view of the conclusions I have reached I do not think it is necessary for me to consider this issue.

49. Another issue which arose in the course of the evidence was the question of the attrition rate of embryos in the in vivo situation. There was general agreement that in the *in vitro* situation there is a significant attrition rate insofar as embryos are concerned. Professor Clynes and Professor Rager disagreed that the attrition rate to be found in *in vitro* embryos could properly be applied to the situation of in vivo embryos. Counsel for the Attorney General argued that if it were necessary to resolve the matter that it is appropriate to extrapolate from known attrition rates in *in vitro* fertilisation to the in vivo situation. He argued that while one cannot be certain about the attrition rates in the in vivo situation all the circumstantial evidence suggests that as a matter of probability there is a very high attrition rate and that nature is quite wasteful. Insofar as this is an argument to be considered in determining when human life begins I do not feel it necessary to form a view on this. Furthermore, whether or not there is a significant attrition rate of embryos in the *in vitro* situation does not appear to be relevant to determining whether they are "unborn" for the purposes of Article 40.3.3.

50. I have also considered the arguments of the first named defendant indicating that the Court should take into account what he describes as:-

> "…The two key stages of the biological process following sexual intercourse."

51. These are fertilisation and implantation. These matters may be of relevance in seeking to determine when human life begins or at what stage embryos should be given legal protection. But they are not matters the Court can decide.

52. All I can do as a judge is to decide whether or not the three frozen embryos have the protection of the Constitution or the law. I cannot amend the law, that is the function of the Oireachtas. In *Norris v. The Attorney General* [1984] I.R. 36 at p.33, O'Higgins C.J said:-

> "The sole function of this Court…is to interpret the Constitution and the law and to declare with objectivity and impartiality the result of that interpretation on the claim being considered. Judges may, and do, share with other citizens a concern and interest in desirable changes in reform in our laws; but, under the Constitution, they have no function in

> achieving such by judicial decision. It may be regarded as emphasising the obvious, but, nevertheless, I think it proper to remind the plaintiff and others interested in these proceedings that the sole and exclusive power of altering the laws of Ireland is, by the Constitution, vested in the Oireachtas. The Courts declare what the law is – it is for the Oireachtas to make changes if it so thinks proper."

53. In my opinion those words eloquently express the different functions of the Courts and the Oireachtas, and the extent to which it is permissible for the Courts to review or interpret legislation.

54. Having considered the evidence and the submissions in this case and reviewed the law I have come to the conclusion that the three frozen embryos are not "unborn" with the meaning of Article 40.3.3. and it is a matter for the Oireachtas to decide what steps should be taken to establish the legal status of embryos *in vitro*.