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R. (On the Application of Quintavalle) v Secretary of State for Health

House of Lords

13 March 2003

[2003] UKHL 13

2003 WL 933335

Before: Lord Bingham of Cornhill, Lord Steyn , Lord Hoffmann , Lord Millett , Lord Scott of Foscote

Thursday 13th March, 2003

SESSION 2002-03 on appeal from: [2002] EWCA Civ 29

JUDGMENT

LORD BINGHAM OF CORNHILL

My Lords,

1. The issues in this appeal are whether live human embryos created by cell nuclear replacement (CNR) fall outside the regulatory scope of the Human Fertilisation and Embryology Act 1990 and whether licensing the creation of such embryos is prohibited by section 3(3)(d) of that Act. Crane J at first instance held that such creation fell outside the scope of the Act and was not prohibited by section 3(3)(d) : *[2001] 4 All ER 1013* ; *[2001] EWHC Admin 918* . The Court of Appeal (Lord Phillips of Worth Matravers MR, Thorpe and Buxton LJJ) agreed with the judge on the second point but reversed his ruling on the first: *[2002] QB 628* ; *[2002] EWCA Civ 29* . Both points were re-argued before the House.

2. This case is not concerned with embryos created in the ordinary way as a result of sexual intercourse. Nor is it directly concerned with the creation of live human embryos *in vitro* where the female egg is fertilised by the introduction of male sperm outside the body. CNR, a very recent scientific technique, involves neither of those things. In the Court of Appeal and in the House the parties were content to adopt the clear and succinct explanation given by the judge of what CNR means and involves (*[2001] 4 All ER 1013* , 1016):

> "13. In the ovary the egg is a diploid germ (or reproductive) cell. It is described as 'diploid' because its nucleus contains a full set of 46 chromosomes. By the process of meiotic division the nucleus divides into two parts. Only one of these, a pronucleus containing only 23 chromosomes (described as 'haploid'), plays any further part in the process. Fertilisation begins when the male germ cell, the sperm, whose pronucleus contains 23 chromosomes, meets the haploid female germ cell and is a continuous process taking up to 24 hours. As part of the process the male and female pronuclei fuse to form one nucleus with a full complement of 46 chromosomes, a process known as syngamy. The one-cell structure that exists following syngamy is the zygote. After several hours the cell divides to create a two-cell zygote. At this stage it is generally referred to as an embryo. At about 15 days after fertilisation a heaping-up of cells occurs which is described as the 'primitive streak'. 14. Fertilisation may of course take place in the normal way or *in vitro* . 15. CNR is a process by which the nucleus, which is diploid, from one cell is transplanted into an unfertilised egg, from which … the nucleus has been removed. The [replacement] nucleus is derived from either an embryonic or a foetal or an adult cell. The cell is then treated to encourage it to grow and divide, forming first a two-cell structure and then developing in a similar way to an ordinary embryo. 16. CNR is a form of cloning. Clones are organisms that are genetically identical to each other. When CNR is used, if the embryo develops into a live individual, that individual is genetically identical to the nucleus transplanted into the egg. There are other methods of cloning, for example, embryo splitting, which may occur naturally or be

> encouraged. Identical twins are the result of embryo splitting. 17. The famous Dolly the sheep was produced by CNR. Live young have since been produced by CNR in some other mammals. It has not yet been attempted in humans. 18. … CNR of the kind under consideration does not … involve fertilisation."

The Act

3. The 1990 Act was passed "to make provision in connection with human embryos and any subsequent development of such embryos; to prohibit certain practices in connection with embryos and gametes; to establish a Human Fertilisation and Embryology Authority", and for other purposes. The sections at the heart of this appeal are sections 1 and 3 , which I should quote in full:

> **"Principal terms used**
>
> 1.
>
> (1) In this Act, except where otherwise stated —
>
> (a) embryo means a live human embryo where fertilisation is complete, and
>
> (b) references to an embryo include an egg in the process of fertilisation,
>
> and, for this purpose, fertilisation is not complete until the appearance of a two cell zygote.
>
> (2) This Act, so far as it governs bringing about the creation of an embryo, applies only to bringing about the creation of an embryo outside the human body; and in this Act —
>
> (a) references to embryos the creation of which was brought about *in vitro* (in their application to those where fertilisation is complete) are to those where fertilisation began outside the human body whether or not it was completed there, and
>
> (b) references to embryos taken from a woman do not include embryos whose creation was brought about *in vitro* .
>
> (3) This Act, so far as it governs the keeping or use of an embryo, applies only to keeping or using an embryo outside the human body.
>
> (4) References in this Act to gametes, eggs or sperm, except where otherwise stated, are to live human gametes, eggs or sperm but references below in this Act to gametes or eggs do not include eggs in the process of fertilisation.
>
> …
>
> 3.
>
> (1) No person shall —
>
> (a) bring about the creation of an embryo, or
>
> (b) keep or use an embryo,
>
> except in pursuance of a licence.
>
> (2) No person shall place in a woman —
>
> (a) a live embryo other than a human embryo, or
>
> (b) any live gametes other than human gametes.
>
> (3) A licence cannot authorise —
>
> (a) keeping or using an embryo after the appearance of the primitive streak,

(b) placing an embryo in any animal,

(c) keeping or using an embryo in any circumstances in which regulations prohibit its keeping or use, or

(d) replacing a nucleus of a cell of an embryo with a nucleus taken from a cell of any person, embryo or subsequent development of an embryo.

(4) For the purposes of subsection (3)(a) above, the primitive streak is to be taken to have appeared in an embryo not later than the end of the period of 14 days beginning with the day when the gametes are mixed, not counting any time during which the embryo is stored."

4. The Act imposes three levels of control. The highest is that contained in the Act itself. As is apparent, for example from section 3(2) and (3) , the Act prohibits certain activities absolutely, a prohibition fortified by a potential penalty of up to ten years' imprisonment (section 41(1)). The next level of control is provided by the Secretary of State, who is empowered to make regulations for certain purposes subject (so far as relevant here) to an affirmative resolution of both Houses of Parliament (section 45(1), (4)). Pursuant to section 3(3)(c) the Secretary of State may make regulations prohibiting the keeping or use of an embryo in specified circumstances. The third level of control is that exercised by the Authority. Section 3(1) prohibits the creation, keeping or use of an embryo except in pursuance of a licence, and the Act contains very detailed provisions governing the grant, revocation and suspension of licences and the conditions to which they may be subject: see, among other references, sections 11–22 of and Schedule 2 to the Act. A power is also conferred on the Authority to give binding directions: sections 23–24 .

5. The first argument of the Alliance is squarely based on the wording of section 1(1)(a) of the Act, fortified by that of subsection (1)(b) . It hinges on the words "where fertilisation is complete". That makes clear, it is argued, that the live human embryos to which the Act applies are such embryos as are the product of fertilisation, for the obvious reason that if there is no fertilisation there can be no time when fertilisation is complete (and there is never an egg in the process of fertilisation). Therefore the Act does not apply to embryos created by CNR, unsurprisingly since in 1990 the creation of live human embryos was unknown to Parliament. The second argument of the Alliance is put as an alternative: if embryos created by CNR are, contrary to the first argument, embryos within the scope of the Act, then the CNR process is specifically prohibited by section 3(3)(d) and cannot be licensed.

The approach to interpretation

6. By the end of the hearing it appeared that the parties were divided less on the principles governing interpretation than on their application to the present case. Since, however, the Court of Appeal were said to have erred in their approach to construction, it is necessary to address this aspect, if relatively briefly.

7. Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.

8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to

give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

9. There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking. If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of “cruel and unusual punishments” has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so. The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language: see Bennion, *Statutory Interpretation* , 4th ed (2002) Part XVIII, Section 288. A revealing example is found in *Grant v Southwestern and County Properties Ltd [1975] Ch 185* , where Walton J had to decide whether a tape recording fell within the expression “document” in the RSC . Pointing out (page 190) that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that the tape recording was a document.

10. Limited help is in my opinion to be derived from statements made in cases where there is said to be an omission in a statute attributable to the oversight or inadvertence of the draftsman: see *Jones v Wrotham Park Settled Estates [1980] AC 74* at 105; *Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586* . This is not such a case. More pertinent is the guidance given by the late Lord Wilberforce in his dissenting opinion in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800* . The case concerned the Abortion Act 1967 and the issue which divided the House was whether nurses could lawfully take part in a termination procedure not known when the Act was passed. At page 822 Lord Wilberforce said:

> “In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot by asking the question ‘What would Parliament have done in this current case — not being one in contemplation — if the facts had been before it?’ attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.”

Both parties relied on this passage, which may now be treated as authoritative. Mr Gordon QC for the Alliance submitted that the Court of Appeal had fallen into error by asking the question which Lord Wilberforce said should not be asked, and by themselves supplying the answer.

The background to the Act

11. The birth of the first child resulting from *in vitro* fertilisation in July 1978 prompted much ethical and scientific debate which in turn led to the appointment in July 1982 of a Committee of Inquiry under the chairmanship of Dame Mary Warnock DBE to

> “consider recent and potential developments in medicine and science related to human fertilisation and embryology; to consider what policies and safeguards should be

> applied, including consideration of the social, ethical and legal implications of these developments; and to make recommendations."

The Committee reported in July 1984 (Cmnd 9314). A White Paper was published in November 1987 (Cm 259) when the Department of Health and Social Security recognised (paragraph 6) "the particular difficulties of framing legislation on these sensitive issues against a background of fast-moving medical and scientific development".

12. There is no doubting the sensitivity of the issues. There were those who considered the creation of embryos, and thus of life, *in vitro* to be either sacrilegious or ethically repugnant and wished to ban such activities altogether. There were others who considered that these new techniques, by offering means of enabling the infertile to have children and increasing knowledge of congenital disease, had the potential to improve the human condition, and this view also did not lack religious and moral arguments to support it. Nor can one doubt the difficulty of legislating against a background of fast-moving medical and scientific development. It is not often that Parliament has to frame legislation apt to apply to developments at the advanced cutting edge of science.

13. The solution recommended and embodied in the 1990 Act was not to ban all creation and subsequent use of live human embryos produced *in vitro* but instead, and subject to certain express prohibitions of which some have been noted above, to permit such creation and use subject to specified conditions, restrictions and time limits and subject to the regimes of control briefly described in paragraph 4 above. The merits of this solution are not a matter for the House in its judicial capacity. It is, however, plain that while Parliament outlawed certain grotesque possibilities (such as placing a live animal embryo in a woman or a live human embryo in an animal), it otherwise opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all.

Section 1(1)(a)

14. It is against this background that one comes to interpret section 1(1)(a) . At first reading Mr Gordon's construction has an obvious attraction: the Act is dealing with live human embryos "where fertilisation is complete", and the definition is a composite one including the last four words. But the Act is only directed to the creation of embryos *in vitro* , outside the human body (section 1(2)). Can Parliament have been intending to distinguish between live human embryos produced by fertilisation of a female egg and live human embryos produced without such fertilisation? The answer must certainly be negative, since Parliament was unaware that the latter alternative was physically possible. This suggests that the four words were not intended to form an integral part of the definition of embryo but were directed to the time at which it should be treated as such. This was the view taken by the judge (in paragraph 62 of his judgment) and by the Court of Appeal (paragraphs 29, 53, 58) and I agree with it. The somewhat marginal importance of the four words is in my opinion indicated by the fact that section 1(1)(b) appears to contradict them. The crucial point, strongly relied on by Mr Parker QC in his compelling argument, is that this was an Act passed for the protection of live human embryos created outside the human body. The essential thrust of section 1(1)(a) was directed to such embryos, not to the manner of their creation, which Parliament (entirely understandably on the then current state of scientific knowledge) took for granted.

15. Bearing in mind the constitutional imperative that the courts stick to their interpretative role and do not assume the mantle of legislators, however, I would not leave the matter there but would seek to apply the guidance of Lord Wilberforce quoted above in paragraph 10:

> (1) Does the creation of live human embryos by CNR fall within the same genus of facts as those to which the expressed policy of Parliament has been formulated? In my opinion, it plainly does. An embryo created by *in vitro* fertilisation and one created by CNR are very similar organisms. The difference between them as organisms is that the CNR embryo, if allowed to develop, will grow into a clone of the donor of the replacement nucleus which the embryo produced by fertilisation will not. But this is a difference which plainly points towards the need for regulation, not against it.
>
> (2) Is the operation of the 1990 Act to be regarded as liberal and permissive in its operation or restrictive and circumscribed? This is not an entirely simple question. The Act intended to permit certain activities but to circumscribe the freedom to pursue them which had previously

been enjoyed. Loyalty to the evident purpose of the Act would require regulation of activities not distinguishable in any significant respect from those regulated by the Act, unless the wording or policy of the Act shows that they should be prohibited.

(3) Is the embryo created by CNR different in kind or dimension from that for which the Act was passed? Plainly not: as already pointed out, the organisms in question are, as organisms, very similar.

While it is impermissible to ask what Parliament would have done if the facts had been before it, there is one important question which may permissibly be asked: it is whether Parliament, faced with the taxing task of enacting a legislative solution to the difficult religious, moral and scientific issues mentioned above, could rationally have intended to leave live human embryos created by CNR outside the scope of regulation had it known of them as a scientific possibility. There is only one possible answer to this question and it is negative.

16. In support of his argument on construction Mr Gordon drew attention to three provisions of the Act which, he submitted, could not be applied to embryos created by CNR. The first of these was the starting point for the protection provided by the Act, specified in section 1(1) in relation to an embryo created by fertilisation but otherwise unprovided for. The second was the 14 day time limit provided in section 3(4) , “beginning with the day when the gametes are mixed”, inapplicable in a case where gametes are not mixed. Third was the absence of any requirement of consent by the donor of the replacement nucleus, in contrast with the stringent requirement of consent in other cases as provided by section 12(c) and Schedule 3 . These are relevant points, and account must be taken of them when forming an overall judgment on the interpretation of section 1(1)(a) . But once it is accepted that Parliament did not have embryos created by CNR specifically in mind when passing the Act, it almost inevitably follows that discrepancies will arise if the Act is applied to another member of the same genus. The real question is whether these discrepant features are of structural significance such that effect cannot be given to the intention of Parliament without observing them. Neither singly nor cumulatively do these three features have that effect. The appearance of a two cell zygote (section 1(1)), which occurs however the embryo is created, provides a satisfactory starting point, there is a period before that occurs, but like the Master of the Rolls (paragraph 45) I do not think this is of practical significance. The 14 day time limit (section 3(4)) is alternative to appearance of the primitive streak (section 3(3)(a)), and it is open to the Secretary of State to prescribe a period shorter than 14 days (section 3(3)(c)). The Authority may impose a requirement of consent as a condition of any licence to create an embryo by CNR, and could be expected to do so. Given the clarity of Parliament's purpose, I do not regard these discrepancies as significant.

17. The criticisms made of the Court of Appeal's judgments are not, save in very minor respects, soundly based. I agree with the decision which that court reached on this interpretation question and substantially with the reasons given for it.

Section 3(3)(d)

18. It seems to me quite clear that CNR does not involve “replacing a nucleus of a cell of an embryo” because there is no embryo until the nucleus of the recipient cell is replaced by the nucleus of the donor cell. I accordingly conclude that section 3(3)(d) , which cannot have been drafted to prohibit CNR, does not, almost fortuitously, have that result. The target of section 3(3)(d) is in my opinion made plain by paragraph 12.14 of the Warnock Report, which need not be quoted but which was directed to a particular form of genetic manipulation, replacement of the nucleus of a fertilised human egg. The White Paper (paragraph 36) referred to “techniques aimed at modifying the genetic constitution of an embryo”, and proposed that legislation “should clearly prohibit all such activities, but with a power for Parliament itself, by affirmative resolution, to make exceptions to these prohibitions if new developments made that appropriate”. Section 3(3)(d) was, I infer, enacted to give effect to this recommendation. If, as Mr Gordon contended, Parliament intended to ban all cloning by section 3(3)(d) , it would have been possible so to provide; but it seems clear that Parliament did not intend to prohibit embryo-splitting, which creates clones, and to which the Warnock Report referred in paragraph 12.11. In my opinion, the subsection cannot be interpreted to prohibit CNR.

19. For these reasons I would dismiss the appeal with costs.

LORD STEYN

My Lords,

20. Section 1 (1) of the Human Fertilisation and Embryology Act 1990 defines the scope of the regulatory system created by the Act. It provides:

> "… except where otherwise stated —
>
> (a) embryo means a live human embryo where fertilisation is complete, and
>
> (b) references to an embryo include an egg in the process of fertilisation,
>
> and, for this purpose, fertilisation is not complete until the appearance of a two cell zygote."

In so legislating Parliament acted on the scientific insight of a decade ago, viz that an embryo could only be created by fertilisation. The ordinary and obvious meaning of section 1(1) reflects that understanding. Since 1990 the development of cell nuclear replacement has made possible the creation of an embryo without the means of fertilisation. The question arose whether embryos created by cell nuclear replacement were covered by the 1990 Act. Overruling a first instance decision *([2001] 4 All ER 1013), the Court of Appeal* held that such embryos are subject to the Act: *R (Quintavalle) v Secretary of State for Health [2002] QB 628* . It is of some importance to consider how as a matter of interpretative method the House should approach the central question. I turn in the first place to three aspects of this matter.

Purposive Interpretation

21. In reaching a conclusion that cell nuclear replacement is a process covered by section 1(1) of the Human Fertilisation and Embryology Act 1990 the Court of Appeal adopted a purposive approach: para 27. The extensive interpretation adopted by the Court of Appeal could only be justified by a purposive approach. It was a necessary step in the reasoning of the Court of Appeal but not a sufficient one. The Court of Appeal found the basis for such an approach in the fact that the Human Rights Act 1998 extended "the boundaries of purposive interpretation … where needs must". Given that the 1998 Act is not applicable in the present case I would accept the submission of counsel for the appellant that this approach is not appropriate. On the other hand, the adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In Cabell v Markham (1945) 148 F 2d 737 Justice Learned Hand explained the merits of purposive interpretation, at p 739:

> "Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in River Wear Commissioners v Adamson (1877) 2 App Cas 743 , 763. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, eg social welfare legislation and tax statutes may have to be approached somewhat differently. For these slightly different reasons I agree with the conclusion of the Court of Appeal that section 1(1) of the 1990 Act must be construed in a purposive way.

Historical or Updating Interpretation

22. That leads to the question whether it is appropriate to construe the 1990 Act in the light of the new

scientific knowledge. In the case law two contradictory approaches are to be found. It reminds one of the old saying that rules of interpretation "hunt in pairs": that for every rule there is a rule to the contrary effect: see *Burrows, Statute Law* , 3rd ed (2003), p 277 and chapter 12 generally. In the older cases the view often prevailed that a statute must be construed as if one were interpreting it on the day after it was passed: The Longford (1889) 14 PD 34 , 36. This doctrine was dignified by the Latin expression *contemporanea expositio est optima et fortissima in lege* . But even in older cases a different approach sometimes prevailed. It was the idea encapsulated by Lord Thring, the great Victorian draftsman, that statutes ought generally to be construed as "always speaking statutes". In the Court of Appeal, Lord Phillips of Worth Matravers MR cited the early illustration of Attorney General v Edison Telephone Co of London (1880) 6 QBD 244 . The Telegraph Act 1869 gave the Postmaster-General an exclusive right of transmitting telegrams. Telegrams were defined as messages transmitted by telegraph. A telegraph was defined to include "any apparatus for transmitting messages or other communications by means of electric signals". When the Act was passed the only such means of communication was the process of interrupting and re-establishing electric current, thereby causing a series of clicks which conveyed information by morse code. Then the telephone was invented. It conveyed the human voice by wire by means of a new process. It was argued that because this process was unknown when the Act was passed, it could not apply to it. The court held "that absurd consequences would follow if the nature and extent of those powers and duties [under the Act] were made dependent upon the means employed for the purpose of giving the information": p 255. Another illustration is *Christopher Hill Ltd v Ashington Piggeries Ltd [1972] AC 441* when Lord Diplock observed, at p 501 E–H:

> "Unless the Sale of Goods Act 1893 is to be allowed to fossilise the law and to restrict the freedom of choice of parties to contracts for the sale of goods to make agreements which take account of advances in technology and changes in the way in which business is carried on today, the provisions set out in the various sections and subsections of the code ought not to be construed so narrowly as to force upon parties to contracts for the sale of goods promises and consequences different from what they must reasonably have intended. They should be treated rather as illustrations of the application to simple types of contract of general principles for ascertaining the common intention of the parties as to their mutual promises and their consequences, which ought to be applied by analogy in cases arising out of contracts which do not appear to have been within the immediate contemplation of the draftsman of the Act in 1893."

A third illustration is the case law which held that "bodily harm" in the Offences against the Person Act 1861 may be interpreted as extending to psychiatric harm which was unknown at the time of the passing of the legislation: *R v Chan-Fook [1994] 1 WLR 689* ; *R v Burstow [1997] 1 Cr App R 144* , R v Burstow sub nom *R v Ireland [1998] AC 147* : see also *McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277* , per Lord Bingham, at p 292; my judgment, at pp 295–296; *Victor Chandler International Ltd v Customs and Excise Commissioners [2000] 1 WLR 1296* , pp 1303–1305, paras 27–33 per Sir Richard Scott V-C.

23. How is it to be determined whether a statute is an always speaking statute or one tied to the circumstances existing when it was passed? In R v Burstow, supra, the House of Lords held, at p 158:

> "In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the 'always speaking' variety: see *Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800* for an example of an 'always speaking' construction in the House of Lords."

In response to a specific question counsel for the appellant did not contend that the 1990 Act falls in the exceptional category. Given its subject matter he was right not to do so. The result is that the 1990 Act may be construed in the light of contemporary scientific knowledge. This conclusion also does not solve the problem before the House. It does, however, make it possible to consider whether the new technique of cell nuclear replacement, despite the restrictive literal wording of section 1(1) of

the 1990 Act, is covered by the Parliamentary intent.

Applying a statute to new technology

24. The critical question is how the court should approach the question whether, in the light of a new scientific development, the Parliamentary intent covers the new state of affairs. In a dissenting judgment in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800* Lord Wilberforce analysed the position with great clarity. He observed, at p 822 B–E:

> "In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case, when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the Parliamentary intention. They may be held to do so, if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take, under the law of this country; they cannot fill gaps; they cannot be asking the question 'What would Parliament have done in this current case — not being one in contemplation — if the facts had been before it?' attempt themselves to supply the answer, if the answer is not be found in the terms of the Act itself." (Emphasis added)

In *Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27* Lord Wilberforce's analysis was approved: see in particular Lord Slynn of Hadley, at 33F; Lord Nicholls of Birkenhead, at 45F; Lord Hutton, at 63F–64A; Lord Hobhouse of Woodborough, 67H–68A. The analysis of Lord Wilberforce can now be regarded as authoritatively settling the proper limits of the type of extensive interpretation now under consideration.

25. In such a case involving the application of a statute to new technology it is plainly not necessary to ask whether the express statutory language is ambiguous. Since nobody suggests the contrary, I say no more about the point. Reference was made to authorities such as *Jones v Wrotham Park Settled Estates [1980] AC 74* and *Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586* , which deal with the limited circumstances in which a court may correct a clear drafting mistake. Here there was no drafting mistake. But in order to give effect to a plain parliamentary purpose a statute may sometimes be held to cover a scientific development not known when the statute was passed. Given that Parliament legislates on the assumption that statutes may be in place for many years, and that Parliament wishes to pass effective legislation, this is a benign principle designed to achieve the wishes of Parliament.

The Primary Argument

26. The Master of the Rolls dealt with the primary argument in trenchant terms. He said (at para 38)

> "To the question of whether it is necessary to bring embryos created by cell nuclear replacement within the regulatory regime created by the Act in order to give effect to the intention of Parliament, there can only be one answer. It is essential. There is no factor that takes embryos created by cell nuclear replacement outside the need, recognised by Parliament, to control the creation and use of human organisms. The consequence of Crane J's judgment is that anyone is free to create embryos by cell nuclear replacement and to experiment with these without limitation of time or any other restriction. There is

> no bar to placing a human embryo created in this way inside an animal. There is no bar to placing an animal embryo created in this way inside a woman. Until the Government intervened with the Human Reproductive Cloning Act 2001 it was legal to use the process of cell nuclear replacement to produce and use an embryo to create a human clone. It is clear that these results are wholly at odds with the intention of Parliament when introducing the 1990 Act."

I agree. I would summarise my reasons as follows. The long title of the 1990 Act makes clear, and it is in any event self-evident, that Parliament intended the protective regulatory system in connection with human embryos to be comprehensive. This protective purpose was plainly not intended to be tied to the particular way in which an embryo might be created. The overriding ethical case for protection was general. Not surprisingly there is not a hint of a rational explanation why an embryo produced otherwise than by fertilisation should not have the same status as an embryo created by fertilisation. It is a classic case where the new scientific development falls within what Lord Wilberforce called "the same genus of facts" and in any event there is a clear legislative purpose which can only be fulfilled if an extensive interpretation is adopted. As Lord Bingham has demonstrated the makeweight arguments based on the difficulty of applying some regulatory provisions to the new development cannot possibly alter the clear legislative purpose. In the result I would either treat the restrictive wording of section 1(1) as merely illustrative of the legislative purpose or imply a phrase in section 1(1) so that it defines embryo as "a live human embryo where [if it is produced by fertilisation] fertilisation is complete". If it is necessary to choose I would adopt the former technique. It fits readily into section 1(1) since the words of 1(1)(b) plainly make otiose the words "where fertilisation is complete" in section 1(1)(a) . Treating the latter as merely illustrative requires no verbal manipulation.

27. For my part I am fully satisfied that cell nuclear replacement falls within the scope of the carefully balanced and crafted 1990 Act.

The Alternative Argument

28. The alternative argument was based on section 3(3)(d) which provides that a licence cannot authorise "replacing a nucleus of a cell of an embryo with a nucleus taken from a cell of any person, embryo or subsequent development of an embryo". The argument was that the development of cell nuclear replacement is prohibited under section 3(3)(d) . The Master of the Rolls observed that he could see no basis for arguing that an unfertilised egg, prior to the insertion of the nucleus by the cell nuclear replacement process, is required to be treated under the Act as if it is an embryo: para 51. I agree.

Disposal

29. For the reasons given by Lord Bingham of Cornhill and Lord Hoffmann, as well as the reasons I have given, I would also dismiss the appeal.

LORD HOFFMANN

My Lords,

30. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill, with which I agree. I gratefully adopt his statement of the facts and the relevant legislation.

31. The issue in this appeal concerns the application of the 1990 Act to embryos produced by cell nuclear replacement in unfertilised eggs. I shall call them "cloned embryos". The creation of embryos by cloning was unknown at the time of the Act and the definition of an embryo in section 1(1) , as well as certain other provisions, assumes that it will be created by fertilisation.

32. The argument for the respondent is that the clear policy of the Act is to regulate the creation, keeping or use of embryos. Cloned embryos are embryos and therefore the Act should apply to them in the same way as to fertilised embryos. This involves treating some of the words in the definition and elsewhere in the Act as confined in their application to fertilised embryos and failing of reference in relation to cloned embryos. But that can be accommodated within the orthodox principles of construction explained by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800* , 822 and enables the court to give effect to

the policy of the statute.

33. Mr Gordon QC, in his admirably clear reply on behalf of the appellants, was inclined to accept that such a construction would be legitimate and proper if it was clear that the only relevant policy of the Act was to regulate the use of embryos. But he said that section 3(3)(d) disclosed another relevant policy, which was altogether to prohibit cloning. It is true that it referred only to replacing the nucleus of a cell of an embryo and not to cloning an unfertilised egg. But that was for the same reason as the definition of an embryo contemplated that it would have been fertilised: because cloning unfertilised eggs was unknown at the time of the Act.

34. So Mr Gordon said that another approach to the construction of the Act would be to concentrate less upon the fact that cloned embryos were embryos and more on the fact that they were cloned. The policy shown by section 3(3)(d) means that one cannot simply assume that cloned embryos would have been regulated like ordinary fertilised embryos. They might have been prohibited like the cloning of fertilised embryos already in existence.

35. My Lords, I can see that this argument might have created a genuine dilemma if Mr Gordon had been able to take the next step and put forward, as an alternative construction, a reading of the Act which brought cloned embryos within the prohibition in section 3(3)(d) . It would then have been necessary to decide which of these alternative constructions was supported by the better arguments. But Mr Gordon, rightly in my opinion, felt unable to do so. Section 3(3)(d) does not prohibit cloning in general but only cloning when the host is an existing embryo.

36. This left Mr Gordon having to say that one should not construe the Act as either regulating or prohibiting cloned embryos because one could not tell whether Parliament, if it had been aware of them, would have done one or the other. To make that choice was, he said, a legislative act. But, as Lord Wilberforce pointed out in the Royal College of Nursing case, a decision about whether a statute applies to unforeseen circumstances does not involve speculating about what Parliament would have done. It is a decision about what best gives effect to the policy of the statute as enacted. Even if it were as plausible to read the Act as prohibiting cloned embryos as it was to read it as regulating them, the one reading which would be entirely implausible and irrational would be to leave them neither prohibited nor regulated. The court has to choose between the other two constructions and as Mr Gordon acknowledges that section 3(3)(d) cannot be construed as applying to cloned embryos, it follows that they must come within the definition of embryos in section 1(1) .

LORD MILLETT

My Lords,

37. The primary question in this case is whether embryos created by the process of cell nuclear replacement (“CNR”) are wholly outside the scope of the Human Fertilisation and Embryology Act 1990 (“the Act”). When the Act was passed the only known processes by which a human embryo could be created, including the process of nuclear substitution, took a fertilised egg as the starting point, and accordingly involved a degree of genetic manipulation. An embryo created by CNR, however, is not the product of fertilisation and does not involve genetic manipulation. This was a later development in embryology which was not foreseen by the Warnock Committee whose Report led to the passing of the Act or by Parliament when the Act was passed.

38. The question is one of statutory construction. In construing a statute the task of the court is to ascertain the intention of Parliament as expressed in the words it has chosen. The Parliamentary intention is to be derived from the terms of the Act as a whole read in its context. Once it has been ascertained, the court must give effect to it so far as the legislative text permits.

39. The search in every case is for what Parliament did intend, not what it would have intended had it foreseen later developments. In the present case the question is not whether Parliament positively intended to cover embryos produced by a process such as CNR which does not involve the use of a fertilised egg; it plainly did not, for it did not foresee the possibility. The question is whether Parliament intended to legislate only for embryos created by a process which does involve the use of a fertilised egg or whether it intended to legislate for embryos by whatever process they are created.

40. The scope of the Act is to be found in section 1 . Subsection (1) defines the word “embryo”. It is in the following terms:

"1.—

(1) In this Act, except where otherwise stated —

(a) embryo means a live human embryo where fertilisation is complete, and

(b) references to an embryo include an egg in the process of fertilisation …."

41. Before I turn to the proper construction of this subsection, I would make two general observations about the statutory scheme. First, as appears from the long title to the Act, it is an Act

> "to make provision in connection with human embryos and any subsequent development of such embryos."

These are wide words in completely general terms. In themselves they are apt to refer to human embryos however created.

42. Secondly, the Act not only makes provision for the licensing and regulation of the creation of embryos, but also for their subsequent use for treatment or research (section 3(1)). In particular it prohibits activities which Parliament evidently regarded as peculiarly objectionable, such as the placing in a woman of a live embryo other than a human embryo (section 3(2)(a)) and the placing of a human embryo in an animal (section 3(3)(b)).

43. Now whatever may be the status of an organism created by CRN before its single cell has split into two, once it has reached the two-cell stage it is an embryo in every accepted sense of that term. In the case of a human embryo, it is a live human organism containing within its cell or cells a full set of 46 chromosomes with the normal potential to develop and, if planted in a woman, to become a foetus and eventually a human being. While there may or may not be good reasons for distinguishing between the different processes by which embryos may be created when it comes to regulating their creation, no one has been able to suggest a reason why Parliament should differentiate between the different processes when it comes to regulating their subsequent use. The placing of a human embryo in an animal is not the less abhorrent because the embryo was created by CNR.

44. These considerations indicate to my mind that Parliament intended to make comprehensive provision for the protection of human embryos however created, and that the failure of particular provisions to capture embryos produced by a process not involving fertilisation is not because Parliament intended to leave them unregulated but because Parliament did not foresee the need to deal with them.

45. With this introduction I can turn to the wording of section 1(1) . The definition in para (a) is in part circular, since it contains the very term to be defined. It assumes that the reader knows what an embryo is. The purpose of the opening words of the paragraph is not to define the word "embryo" but to rather to limit it to an embryo which is (i) live and (ii) human. These are the essential characteristics which an embryo must possess if it is to be given statutory protection. The important point is that these characteristics are concerned with what an embryo is, not how it is produced. They are clearly necessary; the question is whether they are sufficient.

46. The concluding words of the paragraph ("where fertilisation is complete") have a different function. They do not describe the essential characteristics of an embryo, and do not form part of the definition of the word "embryo". They merely indicate the stage of development which an embryo must reach before it qualifies for protection. They are obviously inapplicable to embryos created by a process which does not involve fertilisation, and accordingly say nothing about the status of such embryos.

47. Para (b) is likewise inapplicable to embryos created by a process which does not involve the use of a fertilised egg. Its presence, however, makes the retention of the concluding words of para (a) puzzling. It is difficult to discern any reason why Parliament should take pains to exclude the application of the Act to embryos produced by the use of a fertilised egg while fertilisation is still incomplete by para (a) only to reapply it during the same period by para (b). It may merely be due to the fact that once a two-cell zygote emerges the organism is undoubtedly an embryo, whereas before that stage is reached its description as an embryo is more problematic and calls for a deeming provision.

48. But it is more likely to owe its provenance to the vagaries of the Parliamentary process. Para (b)

was introduced into the Bill at Report stage. Its evident purpose was to bring the protection of the Bill forward by some 30 hours from the completion of the process of fertilisation to its beginning. It cannot have been its purpose to reduce the scope of the Bill. In these circumstances I am satisfied that para (b) is also directed to the stage of development which an embryo must reach before it qualifies for the protection of the Act. Like the concluding words of para (a) it can have no application to embryos produced by a process which does not involve fertilisation and does not operate to cut down the scope of the opening words of para (a). In my opinion, this is where the essential definition of "embryo" is to be found, and it is defined by what it is and not by the process by which it is created.

49. This construction does not require words to be written into the section. There is no gap to be filled by implication. Nor is it a matter of updating the meaning of the word embryo by reference to subsequent developments. It is simply a matter of giving the opening words of para (a) their natural meaning, recognising the function of the concluding words, and confining their operation to the case where they are capable of application. Once it is accepted that the embryo is defined by reference to what it is and not by reference to the process by which it is created, all need for updating falls away. The result is to bring within the regulatory scope of the Act embryos produced by a process which was unknown to Parliament when the Act was passed. But such embryos are in all respects save the method of their creation indistinguishable from other embryos. They are alive and human, and accordingly possess all the features which Parliament evidently considered make it desirable to regulate their use for treatment or research. A construction which allowed for the regulation of embryos produced by fertilisation and not of embryos produced without fertilisation would not only defeat the evident purpose of Parliament to make comprehensive provision for the creation and use of human embryos but would produce an incoherent and irrational regulatory code. While this could be the inevitable result of legislation enacted at a time of rapid technological development, a construction which leads to this result should not be adopted where it can be avoided.

50. A secondary question is whether CNR is prohibited by section 3(3)(d) . In my opinion it is not. The subsection is directed to nuclear substitution. It prohibits "replacing a nucleus of a cell of an embryo". CRN does not involve any such process.

51. Of course, Parliament did not positively intend to prohibit CNR, the possibility of which it did not foresee. It might or might not have prohibited it if it had done so. But such considerations are irrelevant. Even if Parliament had intended to prohibit CNR it failed to do so. The court cannot give effect to Parliament's intention if the legislative text does not permit it. The only question is whether CNR falls within the statutory language. It manifestly does not.

52. Reliance was placed on the limited nature of the prohibition in section 3(3)(d) to argue that logically Parliament must have intended either to leave embryos created by processes such as CNR outside the scope of the Act altogether, thereby compelling a different answer to the primary question, or to prohibit their creation.

53. The argument assumes that it would be illogical to prohibit nuclear substitution while permitting CNR. This has not been demonstrated to my satisfaction. But in any case the argument from logic is fallacious. Given that Parliament intended to make comprehensive provision for the creation and use of embryos however created and to prohibit the process of nuclear substitution, its failure to bring CNR within the prohibition, even if illogical, is sufficiently explained by the fact that Parliament did not foresee the need to do so.

54. I would dismiss the appeal.

LORD SCOTT OF FOSCOTE

My Lords,

55. I have had the advantage of reading in advance the opinions of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn. For the reasons they give, with which I am in full agreement, I too would dismiss this appeal.


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