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## **Attorney General's Reference 2 of 2003**

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Court of Appeal (Criminal Division)

1 April 2004

**Neutral Citation Number: [2004] EWCA Crim 785**

**2004 WL 960868**

Before: Lord Justice Judge, Mr Justice Elias and Mr Justice Stanley Burnton

Thursday 1st April, 2004

On Appeal from Crown Court at Southampton HHJ Boggis QC

### **Representation**

Mr A. Jafferjee for the Crown.

Mr A. Jenkins for the Respondent.

Miss K. Stern for the Interested Parties.

### **JUDGMENT**

1. This Reference by the Attorney General under [section 36 of the Criminal Justice Act 1972](#) concerns the delicate and sensitive issue of human fertilisation and embryology.
2. The defendant at trial was a consultant obstetrician and gynaecologist, a specialist in assisted conception, practising in and from two clinics in the south west of the country, both of which were licensed for the purposes of the [Human Fertilisation and Embryology Act 1990](#).
3. The relevant facts can be briefly summarised. The defendant was the “person responsible” for the supervision of the activities authorised by licences granted to and carried out at the clinics. At the relevant time, the sole embryologist at both clinics was a man of apparently high reputation and skill. Unfortunately he was dishonest. He was convicted of making false claims for the cost of thawing frozen embryos, procedures which, contrary to the instructions of the patients, he had not carried out. In effect, he had kept these embryos when he should not have done so. He was further convicted of assaulting and occasioning actual bodily harm to female patients who, contrary to their expectations, did not have their own embryos implanted.
4. It was never suggested that the defendant even remotely participated in any of these criminal activities, nor that he knew of them. His offences were said to arise from the terms of the 1990 Act which imposed criminal liability on him for the criminal activities of a professional colleague at the clinic for whom, at most, he had no more than supervisory responsibility, and whose professional function and authority at the clinic might well equal his own. His alleged offences therefore arose from a rare form of vicarious criminal liability.
5. The indictment against the defendant alleged six counts of keeping an embryo except in pursuance of a licence, contrary to [section 3\(1\)\(b\) and section 41\(2\)\(a\) of the Human Fertilisation and Embryology Act 1990](#). The particulars of each offence were in identical terms. It is unnecessary to identify the relevant patients, nor the dates of the alleged offences. The relevant words in the particulars of offence alleged that the defendant “kept an embryo ... otherwise than in pursuance of a licence issued under the provisions of the [Human Fertilisation and Embryology Act 1990](#)”.
6. The trial judge at Southampton Crown Court (HHJ Boggis QC) ruled that there was no case to

answer. He held that as a matter of law the defendant was not a “keeper” of the embryos. He directed the jury to return verdicts of “not guilty” on each count, which they did.

7. The judge's decision was based on two conclusions. He held, first, that the defendant

“... cannot be criminally responsible by virtue of his status as the Person Responsible. The remedy for failure by the person responsible to fulfil his supervisory responsibility is revocation or variation of the licence as provided by section 18. If a person responsible is to be criminally liable for failing in his supervisory obligations, I would expect the Act to say so. In my judgment (the defendant) can only be criminally responsible under section 3 if as a matter of fact he was the person keeping the embryos ...”

8. He further ruled that,

“In this context “keeping” connotes care and control. The defendant had neither. The embryos were under the care and control of the embryologist physically in dewars in his laboratory and kept in condition which (the defendant) was unqualified to interfere. A visitor to the clinic asking to speak to the keeper of the embryos would be directed to the embryologist ... It is noteworthy that notice of withdrawal of consent to retain the embryos was never seen by (the defendant). If he had seen the notice and was told by the embryologist to ignore it, the position might be different if (it could be) said then that there was an element of exercising control.”

9. The question for the opinion of this Court is:

“Is the ‘Person Responsible’ as defined by the [Human Fertilisation Embryology Act 1990](#) a person who as a matter of law “keeps” the embryos at the assisted conception unit at which he is named in the licence as being the ‘Person Responsible’?”

10. The judge's analysis of the relevant statutory provisions is criticised. It is submitted that for the purposes of the 1990 Act, the person responsible also “keeps” the embryos. Accordingly we are invited to give an affirmative answer to the question.

11. Our decision depends exclusively on the proper construction of the 1990 Act. Its essential structure is readily understood. None of the relevant activities can be carried out without a licence granted by the authority. The licence in the present case authorised

“the following activities to be carried out under the supervision of the individual who has been designated as the person responsible.”

The particular activities are then specified. The licence is issued to the clinics themselves, not to the person responsible, and is subject to a series of conditions which are attached to the licence in the form of an annex. It is unnecessary to recite the numerous conditions attached to this particular licence. All licences are in any event granted subject to the provisions in [Schedule III](#). [Schedule III](#) arises under [s 12](#), which is concerned with the general conditions of the licence, which naturally enough must address the important issue of consent, and does so in carefully structured provisions by which, if consent is to be withdrawn or varied, notice must be given to the person “keeping” the relevant embryos.

12. The person responsible is identified in the licence, and his duties are also specified. They follow the precise wording of [section 17\(1\)](#) of the Act, which defines the duty of every person responsible including the defendant, as the person under whose supervision the activities authorised by a licence are carried on. Echoing the language of [s 17\(1\)](#) the defendant was required to secure:

“(a) that the other persons to whom the licence applies are of such character, and are so qualified by training and experience, as to be suitable persons to participate in the activities authorised by the licence;

- (b) that proper equipment is used;
- (c) that proper arrangements are made for the keeping of gametes and embryos and for the disposal of gametes and embryos that have been allowed to perish;
- (d) that suitable practices are used in the course of the activities;
- (e) that the conditions of the licence are complied with.”

In addition to these duties, as part of the conditions attached to the licence and as the person responsible, the defendant expressly agreed to pay the appropriate fees.

13. Non-compliance with the conditions of the licence, or any failure by the person responsible properly to discharge his supervisory duty over the activities authorised by a licence would, where appropriate, result in the revocation of the licence, or variation of its terms (s 18). This regulatory mechanism, and the obligations of the person responsible, and the potential consequences of non-compliance, are clearly defined. They represent one strand of the control mechanism available to the Authority.

14. The second strand is the identification of prohibited activity, enforced by criminal rather than regulatory sanctions. The criminal offences created by the Act are specified in [section 41](#), in descending order of gravity. We immediately recognise that regulatory mechanisms and criminal sanctions are not mutually exclusive. Criminal activity may bring the regulatory mechanisms into operation. Equally however, it does not follow that activity which infringes the licence conditions, and may trigger the regulatory mechanisms, necessarily attracts the sanctions of the criminal law. It was suggested that perhaps the regulatory mechanism is less efficacious, or an inconvenient means of enforcement of compliance with licence conditions. We are unable to accept that the proper exercise of the Authority's functions is somehow impeded by deficiencies in the regulatory mechanism. In any event, even if such deficiencies were demonstrated, it would hardly be appropriate to make them good by adopting an artificial construction of the provisions which create criminal sanctions.

15. The most serious group of offences absolutely prohibits the placing of an embryo or any live gamete other than a human embryo or human gamete into a woman ([s 3\(2\)](#)) or the use of female germ cells taken or derived from an embryo or a foetus created by using such cells ([s 3\(a\)](#)). The mixing of human with live animal gametes, and other activities defined in [s 4\(1\)](#) except pursuant to a licence, are also prohibited.

16. The next most serious group of offences includes a contravention of [section 3\(1\)](#), which provides:

“No person shall —

- (a) bring about the creation of an embryo, or
  - (b) keep or use an embryo,
- except in pursuance of a licence”

The offence is created by [s 41\(2\)](#) which provides:

“A person who

- (a) contravenes section 3(1) of this Act, otherwise than by doing something which, by virtue of section 3(3) of this Act, cannot be authorised by a licence,
  - (b) keeps or uses any gametes in contravention of section 4(1)(a) or (b) of this Act,
  - (c) contravenes section 4(3) of this Act or
  - (d) fails to comply with any directions given by virtue of section 24(7)(a) of this Act,
- is guilty of an offence.”

These sections, and [s 3\(1\)\(b\)](#) and [s 41\(2\)\(a\)](#) in particular, form the basis of this prosecution. We need not address the remaining paragraphs of [s 41\(2\)](#).

17. Further offences are created to prevent the provision of false or misleading information to obtain a licence, or to disclosing confidential information, and to ensure co-operation with the Authority to enable it to perform its functions. Again these need no further analysis.

18. A distinct offence to prevent the unauthorised giving or receipt of money or other benefit in respect of any supply of gametes or embryos is created. This offence is confined to persons “to whom a licence applies” or who is “the nominal licensee”. By [s 17\(2\)](#) this includes the person responsible for supervising the activities authorised by the licence. No provision creates a general offence arising simply from non-compliance or failure to achieve compliance with the licence conditions, unless such contraventions already fall within the ambit of the offences expressly proscribed in the remaining subsections of [s 41](#).

19. The remaining provisions of [s 41](#) create defences. [S 41\(10\)](#) creates a distinct statutory defence in relation to offences which contravene [s 3\(1\)](#) and [s 4\(1\)](#). [S 41\(11\)](#) is more general in its application. It extends to any offence under the Act, but is then confined to those persons “to whom a licence applied or to whom directions had been given”. It therefore extends to anyone falling within the broad ambit of [s 17\(2\)](#) and, by operation of [s 2\(1\)](#), [s 23](#) as well. In argument, [s 41\(11\)](#) was described as the “superior’s” defence and contrasted with [s 41\(10\)](#) described as the “subordinate’s” defence. Whatever the attractions of the forensic shorthand in the context of the “subordinate’s” defence, the description “superior’s” defence is liable to mislead if it is thought to be available only to the person responsible. These provisions are perfectly clear and understandable. They provide defences. They are not triggered until the ingredients of the alleged offences are established. In particular they are not adequate to create criminal liability in the person responsible if the remaining provisions of the Act do not.

20. We must therefore consider [s 3\(1\)\(b\)](#). In the context in which it is used, although expressly concerned with keeping an embryo “outside the human body” ([s 1\(3\)](#)) and extending to storage ([s 2\(2\)](#)), “keep”, like “use” in the same paragraph, is undefined. It is a perfectly ordinary English word. In summary, anyone lacking an appropriate licence, or acting outside the ambit or in breach of the terms of a licence, is prohibited from keeping or using an embryo. If he does so, he commits an offence contrary to [s 41\(2\)\(a\)](#). The offence, however, is committed by the person who contravenes [s 3\(1\)](#). The language is simple. It is difficult to see how it extends to create criminal liability for keeping an embryo otherwise than authorised by the licence to an individual who, notwithstanding his statutory responsibilities, does not in fact keep the embryo at all.

21. The person responsible may, of course, personally keep or use an embryo in circumstances not covered by the licence, or he may participate in such activities by someone else. If so, he would be liable to prosecution. However neither [s 3](#) itself, nor [s 17](#), nor [s 41](#), suggest, let alone provide for, criminal liability in the person responsible solely by virtue of his appointment. He is not “deemed” to be the keeper of an embryo. Rather he must ensure that proper arrangements are available at the clinic both for keeping and disposing of the embryos. Failure to do so may attract the operation of the regulatory mechanism. If it had been intended that the person responsible should, as a matter of law, have been criminally liable for any contravention of [s 3\(2\)](#) by anyone else, or for administrative failures within the clinic in relation to the keeping and use of embryos, this could have been achieved, if Parliament had so intended, by clear language. Such language is not used.

22. In this context it is perhaps significant that [s 41\(8\)](#) creates the specific criminal offence which applies to persons falling within [s 17\(2\)](#), including the person responsible. An offence could equally readily have been created to criminalise inadequate supervision, or failures by the person responsible either to secure the performance of his own duties, or compliance with some or all of the conditions of the licence. That was not done, perhaps because it would positively discourage anyone accepting appointment as the person responsible, so damaging a programme of considerable public importance. In effect, we are invited to conclude that although this potential criminal liability is not expressed in clear and unequivocal terms, it nonetheless exists. We are not so persuaded.

23. Accordingly, the answer to the question in the Reference, which is exclusively concerned with a proposition of law, not one of fact, is “No”.

