negligence remains an arguable defence to a claim in *negligence* even when the tortfeasor intended the negligent act ("intended" meaning here that the act was deliberate). Thus, in *Mullin v Richards* [1998] 1 W.L.R. 1304; [1998] 1 All E.R. 920, where the plaintiff was injured during a play fight with the defendant, the plaintiff's damages in negligence had the claim been successful would have been reduced by 50% even though the defendant intentionally engaged in the fight.

It is difficult to see how this distinction can be justified. What difference is there between a tortfeasor that, without intending to injure, commits a battery that results in injury, and a tortfeasor that intends an act that is found to be a breach of duty and that causes (unintended) injury? The mere fact the former was guilty of battery while the latter was guilty of negligence is not itself a compelling reason to deny a defence of contributory negligence to one but not the other. If it is intention to injure that prevents reliance upon contributory negligence, the defence should be available in many cases of battery (and should have been available in *Pritchard*). If it is intention merely in the sense of a deliberate act that prevents reliance upon contributory negligence, the defence should be denied in many cases of negligence. It is true that trespass to the person plays a special role in vindicating the right to bodily integrity (B. Childs (1993) 44 N.I.L.Q. 334), but it is not clear why this justifies denying the defence in all claims for battery (or assault or false imprisonment). Not all trespasses to the person are equal, and negligent acts often cause just as significant bodily harm as acts of trespass. A blanket prohibition upon pleading contributory negligence lacks much needed contextual sensitivity. And in any event, the plaintiff's damages would be reduced only to the extent that the plaintiff's unreasonable conduct contributed to the violation of their bodily integrity.

Irlam v Byrnes continues a regrettable trend in the Anglo-Australian law of torts. There are good reasons to permit a plea of contributory negligence in claims for trespass to the person, and there is nothing that prevents the common law from recognising as much. It is notable that neither *Pritchard* nor *Irlam v Byrnes* is a decision of the apex court of either jurisdiction. Further development of the law of contributory negligence in claims for trespass to the person would be welcome. ⁂

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JENNINGS V HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY: POSTHUMOUS SURROGACY WITH INFERRED CONSENT

In the recent landmark case of *Jennings v Human Fertilisation and Embryology Authority* [2022] EWHC 1619 (Fam); [2022] H.R.L.R. 14 (hereinafter *Jennings*), a widower (TJ) appeared before the High Court requesting permission to use the last stored embryo of his late wife (FMC). They married in 2009 and underwent three unsuccessful *in vitro* fertilisation (IVF) cycles in 2013–2014, had two naturally-conceived miscarriages in 2015–2016, and finally conceived twins via IVF in 2018. Sadly, FMC suffered a fatal uterine rupture during this pregnancy in

⁂ keywords to be inserted by the indexer

February 2019, leaving TJ a widower with one final shared embryo in storage. TJ sought a declaration that it was lawful for him to use the last remaining embryo in a surrogacy arrangement on the premise that, before FMC died, it was their joint wish that they have children of their own. TJ accepted that FMC did not provide written consent to the posthumous use of their shared embryo under Sch.3 of the Human Fertilisation and Embryology Act 1990 (as amended in 2008—hereinafter the 1990 Act), but he contended that she was not given sufficient information or opportunity to provide that written consent and, if she had been, the court could infer that she would have given it. In addition, TJ contended that to be prevented from using his embryo would constitute a significant interference with his art.8 right to respect for his private and family life. The petition was therefore split into three legal grounds:

1) FMC was not provided with proper counselling or such relevant information as is proper under subpara.3(1) of Sch.3 of the 1990 Act in order to sign the relevant consent form for the posthumous use of her embryo;
2) the High Court could infer her consent to a posthumous surrogacy arrangement using its inherent jurisdiction; and
3) failure to do so would breach TJ's art.8 right to a private and family life.

Theis J. granted the application on the 22 June 2022. In relation to the first ground, the IVF consent forms for men and women were slightly different: TJ had a clear opportunity to consent to the posthumous use of his sperm whereas FMC was simply instructed to "speak to your clinic for more information" (see at [13]) and complete a surrogacy form. Theis J. concluded that it was not clear to FMC how to consent to TJ's use of their embryo after her death and therefore "did not consider that [FMC] was given sufficient opportunity to consent in writing" (see at [90]). In relation to the second ground, Theis J. concluded (at [93]) that FMC "would have wanted [TJ] to have their children in the event of her death" and inferred her consent to a posthumous surrogacy arrangement in place of a written consent under Sch.3 of the 1990 Act. This decision was partly based on the lack of opportunity to consent, and partly based on things that she had said to family members before she died (detailed below). In relation to the third ground, Theis J. concluded that TJ's art.8 right to respect for his decision to become a genetic parent had been interfered with because "in circumstances where I conclude that [FMC] would have given consent, the interference [for TJ] would be significant, final and lifelong" (see at [102]).

Jennings was described as a landmark case because TJ was the first known male applicant to seek court permission to create a posthumous surrogate pregnancy. In addition, TJ was requesting that statutory consent under the notoriously strict 1990 Act be substituted for an inferred consent based on the facts of the case. The first ground of the judgment regarding the ambiguous consent form is uncontroversial and will not be subject to any further analysis; the Human Fertilisation and Embryology Authority was asked by Theis J. to "review its forms to provide the clarity required" (see at [105]). However, the posthumous use of embryos based on an inferred consent, and the threat of a human rights action

should it not be authorised, is more problematic as both appear to be in contravention of the current law.

Pursuant to the second ground of TJ's application, Theis J. acknowledged that consent under subpara.1(1) of Sch.3 was "the cornerstone of the statutory scheme" but she added (at [82] and [101]):

> "[T]his cannot, in my judgment, be considered in a vacuum. It is necessary to consider the circumstances in which such consent is considered, the information that was available and what opportunity was given for that consent to be given … the reference to written consent is an evidential rule with the obvious benefits of certainty but it is not inviolable".

This wider approach to consent is problematic. The 1990 Act is emphatically clear in its mandate for written consent to fertility treatment to protect (and limit) the use of our genetic material and to support our reproductive autonomy. The relevant provisions under Sch.3 state as follows:

> "Schedule 3
>
> Consents to use or storage of gametes, embryos or human admixed embryos etc Consent …
>
> 1.—(1) A consent under this Schedule … must be in writing and … must be signed by the person giving it. …
>
> 2.—(1) A consent to the use of any embryo must specify one or more of the following purposes—
>
> (a) use in providing treatment services to the person giving consent, or that person and another specified person together,
>
> (b) use in providing treatment services to persons not including the person giving consent."

There is only one alternative form of consent offered by Parliament: a signature by proxy at the direction of the person unable to sign because of illness, injury or physical disability under subpara.1(2) of Sch.3. The 1990 Act was intended to be strict on consent. The Warnock Report (*Report of the Committee of Enquiry into Human Fertilisation and Embryology, Department of Health and Social Security* (1984), Cmnd.9314) underpinned the foundation of the 1990 Act, and preferred "consent in writing from both partners, obtained on an appropriate consent form" (see at p.16). The courts in subsequent years have appeared to agree. In the first posthumous conception case of *R. v Human Fertilisation and Embryology Authority Ex p. Blood* [1999] Fam. 151; [1997] 2 All E.R. 687 Lord Woolf M.R. refused to authorise the use of posthumously stored sperm because of "the absence of the necessary written consent [for] the treatment of Mrs Blood and the storage of Mr Blood's sperm" (see [1999] Fam. 151 at 179). The 1990 Act was found to "lay great emphasis upon consent" by Hale L.J. (as she then was) in *Centre for Reproductive Medicine v U* [2002] EWCA Civ 565; [2002] Lloyd's Rep. Med. 259 at [24], and Lord Bingham agreed in *R. (on the application of Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 A.C. 687 at [13] that "[Parliament] opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all". In the prominent case of *Evans*

v United Kingdom (6339/05) (2006) 43 E.H.R.R. 21; [2006] 2 F.L.R. 172, the ECtHR refused a woman's request to use her frozen embryos because the male gamete provider (her ex-fiancé) had withdrawn his written consent to storage:

> "[T]he Court finds that strong policy considerations underlay the decision of [the 1990 Act] to favour a clear or 'bright-line' rule which would serve both to produce legal certainty and to maintain public confidence in the law in a highly sensitive field" (at [65]).

Charles J. reiterated this sentiment in the more recent posthumous conception case of *L v Human Fertilisation and Embryology Authority* [2008] EWHC 2149 (Fam); [2008] 2 F.L.R. 1999 at [77]: "in my judgment the 1990 Act set an absolute, clear and bright line which prevents storage [and] use in the UK without effective consent"—"effective consent" meant "in writing and signed" as described by subpara.1(1) of Sch.3 of the 1990 Act). This was supported in *ARB v IVF Hammersmith* [2018] EWCA Civ 2803; [2020] Q.B. 93, where Nicola Davies L.J. described consent as "the cornerstone of the 1990 Act" (see at [59]). The same approach is taken in other jurisdictions, such as the recent British Columbia case of *LT v DT Estate* [2020] BCCA 328.

It is not likely to have been the intention of Parliament, when drafting subpara.1(1) of Sch.3 of the 1990 Act to state that consent should be in writing, also to intend for consent to be considered in the round, described by Theis J. (at [82]) as including: "considered circumstances", "available information" and "given opportunities". The signature of the gamete provider creates the vacuum that it is intended to create: a person must evidence their consent to sharing their genetic material with another person to create a child using assisted reproductive technology. In order to protect our reproductive autonomy, the treatment cannot go ahead without the signature. The opportunities to provide that signature, and the circumstances of the signature provider, are not overly relevant if it is the signature that is required by law. FMC provided her written consent under subpara.2(1)(a) of Sch.3 (above) to the use of her eggs and embryos in providing treatment services to herself with a specified person together (TJ). She did not, however, provide her written consent under subpara.2(1)(b) of Sch.3 to provide treatment services to "other" persons (i.e. a surrogate). Theis J. relied on two cases to support her suggestion that *written* consent is not necessarily required—*Warren v Care Fertility (Northampton) Ltd* [2014] EWHC 602 (Fam); [2015] Fam. 1 and *B v University of Aberdeen* [2020] CSIH 62; 2020 S.L.T. 1124—but these cases can be distinguished from *Jennings* on the basis that written signatures were provided by both deceased men in both cases; they were simply on the wrong forms (the former was on a gamete storage form and the latter was on a testamentary disposition consenting to posthumous conception). The problem in the immediate case of *Jennings* is that FMC did not turn her mind to posthumous surrogacy *at all*—it was not even discussed between herself and her husband because, as TJ admitted to the court:

> "[W]e were caught up in the process of trying to create a life and had no reason to consider the risks or implications of [FMC's] death" (see at [43]).

Theis J. therefore chose to infer FMC's consent to a posthumous surrogacy arrangement under subpara.2(1)(b) of Sch.3 by placing great weight on the additional testimony of TJ, who stated in the High Court that FMC wished "for the [twin] girls to be saved" should anything happen to her (see at [93]). FMC also decided not to donate their final embryo to research in case they needed it for a final surrogacy attempt (see at [17]). This testimony was supported by her family members, one of whom was asked to be the surrogate carrier (see at [21]). Theis J. considered this evidence and concluded (at [92] and [104]) that:

> "in the circumstances of this case, the court can infer from all the available evidence that [FMC] would have consented to [TJ] being able to use their partner-created embryo in treatment with a surrogate in the event of her death … the court can and should read down the requirement in Schedule 3 to dispense with the requirement for written and signed consent in this limited situation where a person has been denied a fair and reasonable opportunity to provide consent for the posthumous use of their embryos and there is evidence that if that opportunity had been given, that consent by that person would have been provided in writing. This does not, in these very limited circumstances, go against the grain of the legislation".

The decision to infer consent in this case is problematic, as it not only usurps the clear intentions of Parliament for written consent to be provided under Sch.3 of the 1990 Act, but it does so on weak evidence. An inferred consent would "go against the grain" of the statute and looks to be "[incompatible] with the underlying thrust of the legislation being construed" as cautioned against in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 by Lord Rodger (at [121]) and Lord Nicholls (at [33]) respectively. Theis J. appears to have acted in contravention of the 1990 Act by reading down the consent provisions of Sch.3 to remove the *evidence* of consent (the signature) from its remit. To put this more relaxed interpretation of the law into context, it is hard to imagine a patient undergoing any other treatment service that required the sharing of their genetic and reproductive material without a signature evidencing their consent to it. It is accepted that the consent forms were unclear on how to consent to posthumous surrogacy, but an administrative oversight and a lack of information does not equate to consent to posthumous surrogacy. The connection is too tenuous; there must surely be stronger evidence to support the desire to procreate posthumously before consent to it can be inferred? For example, while it could be agreed that FMC reserved her final embryo for a surrogacy attempt and wished for her twins to be saved should she suffer complications, these sentiments do not equate to her consenting to her husband gestating her baby with another woman (a surrogate) when she was no longer around to enjoy raising the child for herself. It is accepted that reproductive autonomy depletes in value when the gamete provider is deceased, but a signature evidences their living will to leave behind a genetic legacy after their death. Bereaved family members will also be highly subjective witnesses because they benefit directly from the court order in keeping a part of their much-loved wife, daughter and sister alive, but their wishes cannot take the place of a signature on a contract to activate the treatment proposed. It is submitted that

the second ground of the *Jennings* decision may sit beyond the powers of the 1990 Act.

Pursuant to the third ground of TJ's application, TJ argued that to deprive him of his last remaining embryo with his late wife would breach his art.8 right to respect for his private and family life. This is difficult to reconcile with the current law laid down by *Evans v United Kingdom* (6339/05) (2008) 46 E.H.R.R. 34. Evans wished to use her frozen embryos but her ex-fiancé revoked his written consent to do so; both argued their conflicting rights under art.8. In regard to the strict consent regime of the 1990 Act, the Court of Appeal in *Evans v Amicus Healthcare Ltd* [2004] EWCA Civ 727; [2005] Fam. 1 stated that judges "should be extremely slow to recognise or to create a principle of waiver that would conflict with the Parliamentary scheme" so as not to cause "new and even more intractable difficulties of arbitrariness and inconsistency" (per Thorpe L.J. and Sedley L.J. at [37] and [69]). Ms Evans appealed that this breached her human rights (she was rendered infertile following chemotherapy so the embryos were her only chance of having biological children), but it was held by the ECtHR that the 1990 Act was proportionate under art.8 for public policy reasons:

> "The Grand Chamber agrees that it is relevant that the 1990 Act was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology … the Court does not find that the absolute nature of the law is, in itself, necessarily inconsistent with art.8. Respect for human dignity and free will underlay the legislature's decision to enact provisions permitting of no exception, [so] no use could be made of his or her genetic material without consent" (*Evans v United Kingdom* (2008) 46 E.H.R.R. 34 at [86] and [89]).

The decision of Theis J. in *Jennings* on this matter appears to be in conflict with *Evans* as follows:

> "[TJ's] art.8 right to respect for the decision to become a parent in the genetic sense has been interfered with … there was a lack of opportunity to [FMC] to provide consent in writing … where I conclude she would have given that consent, the interference with [TJ's] art.8 right would be significant, final and lifelong" (see [2022] H.R.L.R. 14 at [102]).

This can be construed to read that because one party (FMC) was not given enough information about a particular matter, a second party (TJ) suffered a breach of their human rights, despite the first party not providing unequivocal consent to the matter at hand. This looks confusing, and was not subject to further explanation. *Evans* and *Jennings* can be distinguished from one another on one ground: the gamete provider in *Evans* was alive and revoked his consent to implantation, whereas the gamete provider in *Jennings* was deceased and failed to consent to implantation. It could be argued therefore, that the breach of human rights in *Evans* was more disproportionate than the breach in *Jennings* (i.e. forced parenthood). However, the legal point is the same: written consent to the implantation of embryos, as required by law, was absent in both cases. Public policy suggests that no gamete or embryo is to be used without the consent of the originator to support the reproductive autonomy of both parties and to protect our genetic material from

misuse. TJ in *Jennings* appears to have a human right to use a joint embryo with a surrogate without the written consent of the other gamete provider. This is contrary to the law. Theis J. contends that her decision will not open the floodgates, but like *Blood*, *Warren* and *B* (above), there is a chance that it might.

In conclusion, *Jennings* was an erroneous decision that escalated into a usurping of the strict consent regime of the Human Fertilisation and Embryology Act 1990 with an alternative form of consent. The Human Fertilisation and Embryology Authority now have the opportunity to appeal this decision, and it is hoped that they do so, for reasons of clarity, social policy, personal sovereignty and the safeguarding of genetic material. ☙

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☙ keywords to be inserted by the indexer