

JERSEY / JUDGMENT

re X v [2002] JRC 202 (18 October 2002)

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judgment

the bailiff:

Introduction

1. This is a representation by the Attorney General, seeking an order in relation to an aborted foetus presently in the custody of the Health and Social Security Committee ("the Committee") at the General Hospital. The Attorney General seeks a declaration that the Committee would not be acting unlawfully if it released samples from the foetus so as to enable the police to carry out DNA tests in order to ascertain the paternity of the foetus. The application raises novel and, in the Court's view, quite difficult legal and ethical questions.

Background

2. The background can be briefly stated. On 30th April 2001, an abortion was carried out at the General Hospital on a girl born in July 1986 (to whom we shall refer as 'X'. At the time of conception X was aged 14. At the request of X's father, the aborted foetus was retained by the Committee. The abortion was legally performed in accordance with the provisions of the Termination of Pregnancy (Jersey) Law 1997 . Article 4 of the Loi (1895) modifiant le droit criminel makes it a criminal offence to have sexual intercourse with a girl who is over the age of 13 years but below the age of 16 years. 3. The parents of X were divorced in 1997. Custody, care and control were granted to the mother but, by agreement between the parents, X is living with her father. 4. Both parents complained to the police when it became known that their daughter was pregnant. They informed the police of the identity of the man whom they believe to be the father of the aborted foetus. This man is currently aged 32. He has given the police a DNA sample which is stored at Police Headquarters and has, we assume, denied committing the offence. If the police were able to obtain tissue from the aborted foetus it would be possible to establish beyond reasonable doubt whether the man in question is the father of the foetus. 5. The police are, of course, under a duty imposed by Article 2 of the Police Force (Jersey) Law 1974 to take all such lawful measures as may be necessary to bring offenders to justice. They accordingly seek to obtain tissues from the aborted foetus so as to discharge their statutory duty. 6. Both the parents of X wish the Committee to release such tissues to the police. The Committee is willing to do so provided

that it is lawful; in short, they rest upon the wisdom of the Court. X is, however, resolutely opposed to the transfer of these tissues to the police and has declined to give her consent. 7. This representation was accordingly brought by the Attorney General seeking a declaration in the following terms - "...that the Health and Social Services Committee will not be acting unlawfully if it releases samples from the aborted foetus to the Chief Officer of Police for the purpose only of carrying out tests to ascertain whether the suspect is the father of the aborted foetus and for the purpose of any subsequent investigation or prosecution (including any appeal) arising therefrom, and not for any other purpose without the leave of the Court". The representation was brought before the Court on 12th July 2002 when the Court ordered the appointment of a guardian ad litem to X and adjourned the matter to 26th July. On 26th July, at the request of the guardian ad litem Advocate Valérie Stone, the representation was again adjourned to 20th September for argument. 8. It seems to us that the following issues arise for determination - (i) What is the status in law of the foetus? Is it a person or a thing, or neither? If a thing, is it capable of being owned? In any event who has a power of disposition over the foetus after abortion? (ii) If X owns or has a power of disposition over the foetus after abortion, is her consent required before the Committee can release tissues from it to the police? (iii) If the answer to (ii) is in the affirmative, can a refusal to grant that consent be displaced either by X's parents or by the Court? (iv) If the Court has that power, how is the discretion to be exercised? We examine these questions in turn. (i) The status of the foetus 9. Perhaps unsurprisingly there appears to be a dearth of legal authority. We state "unsurprisingly" because the miracle of the creation of life is still far from being understood by medical science, and there is no universal agreement in religious thought either. We have referred thus far to the "foetus" and we should examine the meaning of that word. The Oxford English Dictionary defines "foetus" as meaning "an unborn viviparous animal in the womb esp. an unborn human more than eight weeks after conception". The same dictionary defines "embryo" as "the entity which develops in a woman's womb until it is born as a baby (if not aborted etc.). Now esp. this entity prior to the time at which all the organs are developed, at about the eighth week after conception (cf. FOETUS)". The foetus and the embryo are sometimes distinguished in medical science from a "preembryo" which is said to apply to the collection of cells up to fourteen days after the fertilisation of an egg. We are conscious that we have heard no medical evidence but for the purposes of this decision those definitions will suffice. What is under consideration here is a foetus which was aborted between eight and twelve weeks after conception. 10. Mrs. Sharpe referred us to an article in the Jersey Law Review entitled "The legal implications of the provision of IVF Services in Jersey" (1997) 1 JL Review 117 by Advocate Nicola Davies. The article is concerned with in vitro fertilisation and is not directly in point but nevertheless contains some helpful observations. "As might be expected, Jersey's jurisprudence does not expressly consider the legal status of an unborn child, and therefore the precise status of an embryo or foetus under the customary law is not entirely clear. An edict of King Henry II of France, promulgated in 1556 (reproduced in Isambert's "Recueil Général des anciennes lois françaises" Vol. 13, pp 471-473), made the practice of concealing a pregnancy or the birth of a child a capital offence. It has been argued (Association of Lawyers for the Protection of the

Unborn "Submission to the States of Jersey Public Health Committee in response to "Abortion in Jersey : Discussion Paper" (1993) unpublished) that in doing so the law was giving tentative recognition to the rights of fetuses, but it is submitted that this is a non sequitur. The law makes it an offence to mistreat animals, but it does not follow that animals have legal rights. Similarly, the fact that the law makes concealment of pregnancy an offence does not necessarily entail an acceptance that a foetus has rights. Nevertheless, it would certainly appear that the Norman Coutume had some regard for the welfare of an unborn child, at least where the pregnancy was well established. In 1694 Basnage reported that the death sentence was sometimes postponed if the condemned was a pregnant woman (Basnage "La Coutume Reformée du Pais et Duché de Normandie" 2nd edition, Rouen, 1694). Basnage cited two cases where pregnant women had been sentenced to death. In the first case, the pregnancy of the woman was held not to be a valid reason to delay the execution, since the pregnancy was thought to be not more than 15 days advanced. In the second case, the execution of a woman who was seven months' pregnant was deferred until after the birth. As is the case with most civil and customary law jurisdictions, there is no detailed analysis of the reasons for these decisions and therefore it is not easy to ascertain whether the courts were trying to distinguish between the legal status of a foetus at two weeks gestation and one which may be capable of survival, or whether the decision in the first case was reached simply because of the inability of doctors at the time to prove the existence of a pregnancy during its very early stages". 11. The author continues in relation to the question whether a frozen embryo (and presumably, preembryo) can be owned. "If Jersey law does not regard an unimplanted embryo as a person, the question arises as to whether it should be considered as the property of its parents. If the status of the embryo remains unclassified, it exists in a legal vacuum, with no certainty as to how it should be treated. Could it be stolen, criminally damaged or bequeathed? Must (or may) it be destroyed if the genitors have died? Is it in being for the purposes of testamentary disposition? What should happen to the embryo if the couple being treated disagree as to what should happen to it (particularly following a divorce)? Foreign courts have on several occasions considered the person versus property dichotomy in relation to embryos, with differing results. In *Del Zio v Presbyterian Hospital* (74 Civ 3588 (SD, NY, 1976) the US District Court for California treated the embryos as chattels, whereas in *Davis v Davis* ([1992] 842 SW 2d 588 [Tenn Sup Ct]). the Tennessee Supreme Court decided that the embryo was neither property nor a person, but a special category of its own over which the gamete ova and sperm providers have dispositional control. This view now seems to be gaining tentative approval in California (*Hecht v Superior Court* (1993) 20 Cal Rptr 2d 275 [Cal CA].) The issue of whether an unimplanted embryo is a chattel has never been considered by the English courts, probably because the [Human Fertilisation and Embryology] Act [1990] confers so many dispositive rights on the gamete providers that there would be little to gain in obtaining a decree that the embryo was property. In Jersey, the 1990 Act does not apply and in these circumstances, the issue of how the embryo should properly be regarded in law is of greater significance. It seems clear that under Jersey law the unimplanted embryo would not be regarded as a person, but would the Jersey courts therefore consider it as property, or would they opt for

the half-way-house adopted in *Davis v Davis*? Certainly, if the Jersey courts look to their French roots it would appear unlikely that they would regard an embryo as a chattel ("L'exigence du respect de la personne en devenir dans l'embryon s'en trouve renforcée" - see Saury R: "L'Ethique Médicale et sa Formulation Juridique" (Sauramps Médicale) p.104), but to do otherwise would entail a significant shift in the Island's customary law principles. Given that there is no obvious solution to what is a question of metaphysical proportions, it would perhaps be futile to predict the outcome." 12. We have no doubt that a foetus is not a person with legal rights of its own. We take that as axiomatic from the enactment of the Termination of Pregnancy (Jersey) Law 1997, which authorizes the abortion of foetuses of less than twelve weeks' gestation. Given that a foetus at that stage of development is not viable, we think that it follows inexorably that the law of persons does not apply to it. 13. Is the foetus however to be regarded as a "thing"? In the case of *Davis v Davis*

(1992) Tennessee Lexis 400 referred to by Advocate Davies, the Supreme Court of Tennessee considered this question in relation to preembryos. The defendant ex-wife appealed against a decision of the Court of Appeals (Tennessee) which reversed a trial court order awarding her "custody" of frozen embryos following a divorce. The Court of Appeals held that the plaintiff ex-husband had a constitutionally protected right not to beget a child where no pregnancy had taken place and held that there was no compelling state interest to justify ordering implantation against the will of either party. During the marriage the parties had attempted in vitro fertilization, but failed. The parties divorced. The ex-wife initially wanted the frozen preembryos implanted in her but later asked that they be donated to childless couples. The father initially asked for them to remain frozen but later asked that they be discarded. The Court of Appeals concluded that preembryos were not "persons" but did not specifically hold that they were "property", nevertheless awarding joint custody based on an undefined shared interest. On appeal, the Supreme Court agreed that the preembryos were not persons and held that the progenitors had equal rights of privacy that included the right to be free of state interference in procreational choices. The Court held that in disputes as to embryos, any prior agreement should be honoured, but if there was no prior agreement, the relative interests of the parties in using or not using the embryos must be weighed. In this case the interest of the ex-husband in not becoming a parent outweighed the interest of the ex-wife who wished to donate the embryos to other persons. The court authorized the clinic to follow its normal procedures in dealing with unused preembryos. 14. As to the legal status of the embryos Justice Martha Craig Daughtrey stated - "In this case, by citing to *York v Jones* but failing to define precisely the "interest" that Mary Sue Davis and Junior Davis have in the preembryos, the Court of Appeals has left the implication that it is in the nature of a property interest. For purposes of clarity in future cases, we conclude that this point must be further addressed. To our way of thinking, the most helpful discussion on this point is found not in the minuscule number of legal opinions that have involved "frozen embryos", but in the ethical standards set by The American Fertility Society, as follows: Three major ethical positions have been articulated in the debate over preembryo status. At one extreme is the

view of the preembryo as a human subject after fertilization, which requires that it be accorded the rights of a person. This position entails an obligation to provide an opportunity for implantation to occur and tends to ban any action before transfer that might harm the preembryo or that is not immediately therapeutic, such as freezing and some preembryo research. At the opposite extreme is the view that the preembryo has a status no different from any other human tissue. With the consent of those who have decision-making authority over the preembryo, no limits should be imposed on actions taken with preembryos. A third view - one that is most widely held - takes an intermediate position between the other two. It holds that the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissue because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential. Although the report alludes to the role of "special respect" in the context of research on preembryos not intended for transfer, it is clear that the Ethics Committee's principal concern was with the treatment accorded the transferred embryo. Thus, the Ethics Committee concludes that "special respect is necessary to protect the welfare of potential offspring ...[and] creates obligations not to hurt or injure the offspring who might be born after transfer (by research or intervention with a preembryo)" Id. At 35S. In its report, the Ethics Committee then calls upon those in charge of IVF programs to establish policies in keeping with the "special respect" due to preembryos and suggests: 'Within the limits set by institutional policies, decision-making authority regarding preembryos should reside with the persons who have provided the gametes ... As a matter of law, it is reasonable to assume that the gamete providers have primary decision-making authority regarding preembryos in the absence of specific legislation on the subject. A person's liberty to procreate or to avoid procreation is directly involved in most decisions involving preembryos'. We conclude that preembryos are not, strictly speaking, either "persons" or "property", but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the preembryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning the disposition of the preembryos, within the scope of policy set by law". 15. In the absence of any other authority, we find the reasoning of the Tennessee Supreme Court to be persuasive. Is there any distinction to be drawn in this context between a preembryo and an aborted foetus? It is true that a preembryo has a "potential to become a person" that an aborted foetus clearly does not. Nonetheless, both are concerned with a person's liberty to procreate or to avoid procreation. The aborted foetus is the result of a person's decision to avoid procreation. In our judgment, the foetus in this case is not capable of forming the subject of a true property interest. However X has an interest in it that is in the nature of ownership in the sense that she has authority, within the bounds of public decency and the general law, to make decisions concerning its

disposition.

(ii) Is X's consent required for the release of tissue? 16. It follows from the conclusion set out above that X's consent is required before the Committee can release tissue from the foetus to the police. The Committee has custody of the foetus but does not own it and does not have the power to release tissues from it without X's consent. Clearly, in the ordinary course of events, consent to the disposal of an aborted foetus in accordance with the hospital's general procedures may be implied. We have heard no evidence as to the written form of consent signed by a patient prior to a termination of pregnancy being performed. It may, however, be desirable for the Committee to review that form in the light of this

judgment.

(iii) Can X's refusal to grant consent be displaced? 17. X was fourteen at the time when the abortion took place. She is now sixteen. She is still, of course, a minor, and is living with her father. Both her parents have sworn affidavits in relation to this representation by which they express their consent to the Committee's releasing tissues from the aborted foetus to the police for the purpose of ascertaining whether the man suspected of being the father of the foetus did have sexual intercourse with X. Is that parental consent sufficient to override the absence of consent by X? There is, it appears, no authority directly in point, but some guidance may be obtained by considering the law in relation to consent to medical treatment. 18. The Consent to Medical Treatment (Jersey) Law 1973 provides at Article 1 that - "The consent of a person who has attained the age of sixteen years but is under twenty years of age to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he had attained the age of twenty years; and where such a person has by virtue of this Article given an effective consent to any treatment it shall not be necessary to obtain any further consent from his parent or guardian". At the time of enactment of that Law the age of majority was of course twenty; it is now eighteen but nothing turns upon that. 19. This article is in virtually identical terms to section 8 of the Family Law Reform Act 1969. Both English and Jersey law provide that a medical man can rely upon the consent of his sixteen year old patient even against the wishes of the patient's parents. It is clear however that a person under the age of sixteen of sufficient maturity and understanding may also consent to medical treatment. In *Gillick-v-West Norfolk and Wisbech Area Health Authority*

[1988] 3 All ER 402 the question arose whether a parent could effectively veto medical treatment of a child under the age of sixteen by failing or refusing to consent to treatment to which the child might consent. Mrs. Gillick contended that, but for section 8, no minor could ever consent to medical treatment and that section 8 was designed only to lower the age of consent to such treatment from eighteen to sixteen. The Health Authority contended that at common law a minor of sufficient intelligence and understanding could always consent to medical treatment and that section 8 merely produced an irrebuttable presumption that a person over sixteen had such intelligence and understanding. The House of Lords rejected Mrs. Gillick's contentions and held that at common law a child of sufficient

understanding and intelligence (the 'Gillick competent' child) could consent to treatment, notwithstanding the absence of the parents' consent and even an express prohibition by the parents. 20. We are of course concerned not with the question whether the consent of X can override an express prohibition by her parents but whether the parents can grant a consent which X has expressly refused to give. It seems to us however that this is but the other side of the same coin. When Gillick was before the English Court of Appeal Parker LJ opined that a parent had the right "completely to control the child". In the House of Lords Lord Fraser stated, at page 410 - "My Lords, I have, with the utmost respect, reached a different conclusion from that of Parker LJ. It is, in my view, contrary to the ordinary experience of mankind, at least in Western Europe in the present century, to say that a child or a young person remains in fact under the complete control of his parents until he attains the definite age of majority, now 18 in the United Kingdom, and that on attaining that age he suddenly acquires independence. In practice most wise parents relax their control gradually as the child develops and encourage him or her to become increasingly independent. More over, the degree of parental control actually exercised over a particular child does in practice vary considerably according to his understanding and intelligence and it would, in my opinion, be unrealistic for the courts not to recognise these facts. Social customs change, and the law ought to, and does in fact, have regard to such changes when they are of major importance". 21. We respectfully agree with those observations. Although she was advised by her guardian ad litem that there was no obligation to do so, X attended the hearing of this representation. We heard no evidence from her, but we think it is likely that at the time when she was first asked to give her consent to the release of tissues she was a 'Gillick competent' child. However that is now immaterial. She is now sixteen and entitled, as a matter of law, to consent to sexual intercourse. We were told that she was no longer at school. She has reached that stage of development where her right to privacy and indeed her own views, particularly in so far as her own body is concerned, are entitled to respect. Her parents may properly try to influence her choices but in this sphere her decisions are essentially her own. We reach the conclusion that her parents are not empowered to override her refusal to grant consent for tissues from the foetus to be made available to the police. This is not to say that the parents' wishes are to be ignored. Albeit that the authority of a parent dwindles until that moment when the child attains his majority at the age of eighteen, a parent retains the right and the duty to be heard as to what is in the best interests of a child even of sixteen or seventeen. We advert to this again below. 22. Neither counsel suggested however that this Court did not have power to override X's refusal to grant consent. That power stems from the Court's inherent jurisdiction in relation to minors. The jurisdiction was asserted in *Re an Infant*

- (1995) JLR 296 when the Court authorized the Health and Social Services Committee and its medical staff to discontinue medical treatment to a five year old child who was in a vegetative state. It has its counterpart in England in the *parens patriae* jurisdiction asserted by the High Court in relation to children. (iv) Should the Court override X's

refusal to grant consent? 23. Although the Court does have an unlimited inherent jurisdiction over minors, it is a jurisdiction to be exercised with caution. In *Re W (a minor) (medical treatment)*

[1992] 4 All ER 627 the English Court of Appeal considered whether it should override the refusal of a sixteen year old to receive certain medical treatment. The headnote to the report sets out - "W, a 16-year-old girl who had had an unhappy childhood and was under local authority care, suffered from anorexia nervosa so severely that she was admitted to a specialist adolescent residential unit run by a consultant psychiatrist. Because of concern about W's deteriorating physical condition it was proposed that W be moved to a hospital specialising in the treatment of eating disorders. W wished to stay where she was and to cure herself when she decided it was right to do so and refused to move to the hospital. The local authority applied to the court under s. 100(3) and (4) of the Children Act 1989 for a direction that it be at liberty to place W in the hospital for treatment and that W be given medical treatment without her consent if necessary. The judge held that, although W had sufficient understanding to make an informed decision, he had inherent jurisdiction to make the order sought and he authorised the removal of W to, and her treatment at, the specialist hospital. W appealed. The question arose whether under S 8 of the Family Law Reform Act 1969, which provided that the consent of a minor who had attained the age of 16 to, inter alia, any medical treatment was to be 'as effective as it would be if he were of full age', such a minor had an exclusive right to consent to such treatment and therefore an absolute right to refuse medical treatment because no one else would be in a position to consent. Before the hearing of the appeal W's condition deteriorated to such an extent that at the hearing of the appeal the Court of Appeal made an emergency order that she be removed to hospital for treatment. Held- The court, exercising its unlimited inherent jurisdiction over minors, could in the child's own best interests, objectively considered, override the wishes of a child who had sufficient intelligence and understanding to make an informed decision who sought to refuse medical treatment in circumstances which would in all probability lead to the death of the child or to severe permanent injury. However, before exercising that jurisdiction the court should approach its decision with a strong predilection to give effect to the child's wishes. The purpose of s 8 of the 1969 Act was to enable a minor aged 16 or over to consent to medical treatment which in the absence of consent by the child or its parents would constitute a trespass to the person and the section had no application to whether such a minor had an absolute right to refuse medical treatment. On the facts and having regard to the deterioration in W's condition between the hearing before the judge and the hearing of the appeal, W's wishes had to be overridden and the judge's order confirmed. The appeal would therefore be dismissed." 24. There is a further passage in the judgment of Lord Donaldson MR at page 637 which is of relevance - "There is ample authority for the proposition that the inherent powers of the court under its *parens patriae* jurisdiction are theoretically limitless and that they certainly extend beyond the powers of a natural parent (see eg *Re R (a minor) (wardship: medical treatment)* [1991] 4 All ER 177 at 186, 189, [1992] Fam 11 at 25, 28). There can

therefore be no doubt that it has power to override the refusal of a minor, whether over the age of 16 or under that age but 'Gillick competent'. It does not do so by ordering the doctors to treat, which, even if within the court's powers, would be an abuse of them, or by ordering the minor to accept treatment, but by authorising the doctors to treat the minor in accordance with their clinical judgment, subject to any restrictions which the court may impose. The remaining issue is how this power should be exercised in the context of a case in which a minor is refusing treatment or, whilst consenting to one form of treatment, is refusing to consent to another. Mr. James Munby QC, appearing as *amicus curiae*, in his most helpful skeleton argument approached the matter as if 16- and 17-year-olds were in a special category. In a sense, of course, they are because s 8 applies to them. But Mr. Munby so treated them because, in his submission, s 8 conferred complete autonomy on such minors, thus enabling them effectively to refuse medical treatment irrespective of how parental responsibilities might be sought to be exercised. That submission I have already rejected. This is not, however, to say that the wishes of 16- and 17-year-olds are to be treated as no different from those of 14- and 15-year-olds. Far from it. Adolescence is a period of progressive transition from childhood to adulthood and as experience of life is acquired and intelligence and understanding grow, so will the scope of the decision-making which should be left to the minor, for it is only by making decisions and experiencing the consequences that decision-making skills will be acquired. As I put it in the course of the argument, and as I sincerely believe, 'good parenting involves giving minors as much rope as they can handle without an unacceptable risk that they will hang themselves'. As Lord Hailsham of St. Marylebone LC put it in *Re B (a minor) (wardship: sterilisation)* [1987] 2 All ER 206 at 212,

[1988] AC 199 at 202, the 'first and paramount consideration [of the court] is the well-being, welfare or interests [of the minor]' and I regard it as self-evident that this involves giving them the maximum degree of decision-making which is prudent. Prudence does not involve avoiding all risk, but it does involve avoiding taking risks which, if they eventuate, may have irreparable consequences or which are disproportionate to the benefits which could accrue from taking them". 25. In *Re W* was another case concerned with consent to medical treatment and not therefore directly in point. But it does serve to emphasize that the jurisdiction to override the refusal of X to grant consent is one to be exercised in the best interests of X. It is the well-being and welfare of X that is the first and paramount consideration. It is tempting to think that the Court's discretion is a balancing exercise between the desire of X to put her experience behind her and (perhaps) to avoid incriminating the father of the foetus on the one hand and the public interest in bringing to justice a person who has committed a criminal offence on the other. But that is, in our judgment, not the proper approach to the exercise of our discretion. We are concerned to do what is in the best interests of X. If the police lack the power to obtain the evidence that they seek from the foetal remains, that is a matter for consideration by the legislature. It is not for the Court to supplement police powers by usurping an inherent jurisdiction that exists for the benefit of minors. 26. What then are the material considerations for the

Court in determining whether the refusal by X to grant consent should be overridden? It is possible to envisage circumstances where the identification and prosecution of the man who had unlawful sexual intercourse with X might be in her best interests. If the relationship, and the offending, were continuing and X were still under sixteen, it could well be argued that the identification of the offender would prevent further sexual activity which the legislature has decided is not in the interests of a girl under sixteen, and which is unlawful. But that is apparently not the case here. Mrs. Stone told us that the relationship between X and this man is over. Furthermore, whereas X was fourteen when she became pregnant, she is now sixteen. This delay is indeed another material consideration to which we refer below. 27. If there were evidence that the sexual activity which led to X's pregnancy had been other than consensual, or that some form of duress or pressure were being applied to X to withhold her consent, that might be a reason for overriding her view. But there is no such evidence. 28. We must not ignore the wishes of X's parents. Both of them have stated in their respective affidavits that they have been informed that the father of the aborted foetus has committed a criminal offence by having sexual intercourse with their daughter whilst under the age of sixteen and that it is their wish that this man be identified and prosecuted. This is an entirely understandable desire with which the Court has great sympathy. But, as we have stated, the desire to bring an offender to justice is not necessarily relevant to what is in the best interests of X. Neither affidavit contains any reference to a reason why the wishes of X should be overridden in the interests of her welfare. 29. Mrs. Stone told us that X's reason for refusing to grant her consent was that she wished to put this experience behind her and to get on with her life. It may be that there is a conscious or sub-conscious desire to protect the father of the foetus but this was not conceded. Counsel said that X was in a vulnerable and fragile state and the stress caused by the continuing uncertainty as to the outcome of these proceedings was engendering friction between X and her family. Mrs. Stone also submitted that X had not been consulted before the foetus was retained by the Committee; indeed she had been told by the hospital authorities prior to the operation that the foetus would be destroyed. Counsel submitted that this was another reason why the Court's discretion should be exercised against the granting of the Attorney General's application.

Conclusion

30. Counsel for the Attorney General helpfully referred us to the report of the Royal Liverpool Children's Hospital Inquiry published by the House of Commons in January 2001. This inquiry was prompted by the revelation that medical staff in certain hospitals had been retaining for the purpose of medical research and instruction, organs and tissue from deceased children without the knowledge or consent of their parents. The report criticized the medical profession for a paternalistic attitude and for ignoring the provisions of the Human Tissue Act 1961. Paragraph 9.11 of the report stated - "It was not the intention of the Act to leave the essential decision to the doctors, with an exercise in window-dressing under the guise of reasonable enquiry of relatives. Such a construction would offend the clear

language and intent of the Act. In any event we are impressed by the reasoning within the Polkinghorne Report at paragraph 6.2 on the issue of informed consent as long ago as 1989. We have slightly adapted the following quotation from that report to substitute 'child/organs' for 'fetus' but otherwise leaving the meaning unaltered. [We have reinstated the word 'foetus']. 'Discussion of consent has been affected by the consideration that a 'mother' may be distressed if she has to consider too closely the possibility of her foetus being used for 'medical education or research purposes'. The Peel Committee had this in mind when reaching the form of words in their Code at Paragraph 3(ii) that there should be no known objection on the part of parents. We regard this as insufficient. We are conscious of the need to avoid distress but are even more strongly opposed to formulations which disguise the reality of what is to take place. Distress will be caused to the mother if she later feels that she did not know what was going to happen to her foetus. We recommend that positive explicit consent should be obtained from mothers to the use of the foetus. We see the process of consent as requiring the mother to be counselled and given all the information in a form that is 'comprehensible to enable her to make a proper judgement of whether or not to allow the foetus to be used for 'medical or research purposes....' While we also would wish to avoid needless upset, the immediate upset at the time of the enquiry has to be balanced by that to be caused in later years if parents eventually discover what has happened, as this Inquiry all too poignantly demonstrates.' 31. The emphasis upon the desirability of obtaining positive explicit consent from the mother of a foetus before it is used for medical or research purposes underlines the sensitivity of the issue with which we are dealing. Lord Balniel put the matter succinctly when the Human Tissue Bill was being debated in the United Kingdom Parliament. He stated - "This is an important Bill because it touches on some of the most deeply felt instincts of man; instincts that say that the human body, once life has been extinguished from it, should be treated with the utmost dignity and respect, and that pending internment or cremation, it should be left in peace. These instincts are felt by most persons whatever religious - or indeed, irreligious - beliefs they may have". These observations apply, in our judgment, to a large degree in relation to a foetus as they do to a human body. 32. We cannot refrain from stating that the delay in bringing this representation to court has been regrettable. We understand very well the pressures upon all those concerned. We accept that this case has raised difficult and novel issues. Nonetheless the fact remains that it was not until fourteen months after X's abortion that this Court was asked to override the refusal of this young girl to give the consent sought by the police. Having had the opportunity to consider the submissions, we are also left with an uncomfortable feeling that we might not have the full picture of the background against which we are asked to exercise our discretion. What views, for example, do X's parents hold as to the best interests of their daughter? We know only that they wish to see the man who impregnated their daughter prosecuted and brought to justice. We have found that this is not a relevant consideration in determining what is in the best interests of X. But perhaps there are other matters affecting X's welfare of which we are ignorant. We have considered whether we ought to defer giving judgment so that X's parents and (possibly) X, can be called to give evidence. It is principally because this matter has already taken too long to resolve

that we have concluded that it would be unfair on X to prolong the indecision. The decision to have an abortion, particularly for one so young, must inevitably have been emotionally traumatic. The scars of that emotional trauma are likely to remain with X for some time. We well understand her wish to put the experience of her abortion behind her. 33. We will therefore reach our conclusion on the basis of the material placed before us. In the exercise of our discretion we have concluded that we have not been satisfied that the interests of X would be served by overriding her consistent refusal to consent to the release of tissues from the foetus to the police. We accordingly dismiss the application and authorize the Committee to deal with the foetus in accordance with its normal procedures. Authorities Termination of Pregnancy (Jersey) Law 1997. Loi (1895) modifiant le droit criminel: Article 4. Police Force (Jersey) Law 1974: Article 2. Advocate Nicola Davies: The legal implications of the provision of IVF Services in Jersey"

(1997) 1 JL Review 117. Davis v Davis

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[1988] 3 All ER 402. Re an Infant

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[1992] 4 All ER 627. Royal Liverpool Children's Hospital Inquiry (published by the House of Commons: January 2001). Page Last Updated: 28 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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