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Traducción de una sentencia de la Cámara de los Lores del Reino Unido (voto de uno de los miembros)

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Setiembre 2008

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Introducción

El presente trabajo consiste en la traducción de una sentencia de la Cámara de los Lores del Reino Unido –específicamente, del voto de uno de sus miembros– y en el análisis del texto traducido. La elección del texto respondió principalmente a dos razones: mi interés por encontrar –dentro de la amplia gama de textos jurídicos– un texto que no fuera demasiado estereotipado, que de algún modo fuera "creativo", y mi interés por la medicina, dado que mi experiencia como traductora se encuadra particularmente en esa área.

El texto que seleccioné constituye, a mi entender, un texto particularmente atractivo para un traductor debido a la riqueza de expresión, que se manifiesta sobre todo en el uso de diferentes recursos destinados principalmente a la persuasión. No hay en este tipo de texto una estructura sintáctica predeterminada, ni aparecen la cantidad de fórmulas que se repiten una y otra vez en textos jurídicos de otros géneros, como por ejemplo en un contrato. Pueden encontrarse en cambio recursos propios de los textos argumentativos, en virtud de que si bien puede decirse que la función principal del lenguaje de una sentencia es la prescriptiva, la argumentación ocupa la mayor parte del texto. En el texto que traduje, por ejemplo, el juez recurre a la intertextualidad, a la metáfora, y a otras estrategias lingüísticas con fines de persuasión. Podría decirse además que el interés que manifiesta por el lenguaje, por atribuir el significado correcto a las palabras, es similar al interés del traductor, si bien el objetivo de uno y otro es diferente. Los dos se enfrentan a desafíos lingüísticos que deben superar –la polisemia de los términos, la ambigüedad, por nombrar tan sólo alguno- para llegar a una interpretación correcta. Ante la pluralidad de sentidos, por ejemplo, optan por uno en detrimento de otros. Pero en tanto el juez se enfrenta con el lenguaje compartido por los miembros de una misma comunidad, el traductor debe servir de puente entre dos lenguas y dos culturas jurídicas diferentes.

Tal como señalé anteriormente, mi interés por la traducción de textos médicos influyó en la selección del texto. En consecuencia opté por un documento jurídico de los tantos que abordan cuestiones que no pertenecen al campo temático del Derecho, en este caso, la embriología y la fertilización humana. Dentro de ese campo, el constante avance de la tecnología supone un desafío adicional para el traductor, que debe tomar decisiones con respecto a términos que aún no están muy difundidos.

Por último, cabe señalar que para tomar ciertas decisiones a la hora de traducir tuve necesariamente que decidir a qué destinatario estaría dirigida la traducción. Trabajé entonces sobre la base de una hipótesis: la traducción de un texto jurídico para su publicación en una revista de jurisprudencia editada en Argentina.

Traducción inglés-español

HOUSE OF LORDS
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE
Quintavalle (on behalf of Comment on Reproductive Ethics) (Appellant) v. Human Fertilisation and Embryology Authority (Respondents)
[2005] UKHL 28

LORD HOFFMANN

My Lords,

1. Zain Hashmi is a little boy, now aged 6, who suffers from a serious genetic disorder called beta thalassaemia major. His bone marrow does not produce enough red blood cells and in consequence he is often very poorly and needs daily drugs and regular blood transfusions to keep him alive. But he could be restored to normal life by a transplant of stem cells from a tissue compatible donor.
2. The problem is to find compatible tissue which Zain's immune system will not reject. The chances of finding a compatible donor who is not a sibling are extremely low. Even in the case of siblings, the chances are only one in four. None of Zain's three elder siblings is compatible. In addition, the donor must be free of the same disorder. That lengthens the odds even more. Zain's mother, Mrs Hashmi, has twice conceived in the hope of giving birth to a child whose umbilical blood could provide stem cells for Zain. Once the foetus was found to have beta thalassaemia major and she had an abortion. On the second occasion she gave birth to a child whose tissue turned out not to be compatible.
3. There is a way to save the Hashmi family from having to play dice with conception. For 30 years it has been possible to produce a human embryo by fertilisation of egg and sperm outside the body and then to implant that embryo in the womb. In vitro fertilisation (IVF) has enabled many couples who could not achieve natural fertilisation to have children. More recently, it has become possible to perform a biopsy upon the newly fertilised IVF embryo and remove a single cell to test it for genetic disorders. This is called pre-implantation genetic diagnosis (PGD). It provides a woman with information about the embryo proposed to be implanted in her body so that she may decide whether or not to proceed. Mrs Hashmi, for example, would have been spared having to have her foetus carrying beta thalassaemia major aborted if the embryo had been created by IVF and the disorder diagnosed by PGD.
4. Still more recently, and so far only in the United States, it has become possible to use the same single cell biopsy technique to test for tissue compatibility. This involves examination of the human leukocyte antigens (HLA) and is known as HLA typing. That means that if Mr and Mrs Hashmi's sperm and eggs are used to create IVF embryos which are then tested for beta thalassaemia major by PGD and for tissue compatibility with Zain by HLA typing, they can know that the child Mrs Hashmi conceives will have stem cells which could cure Zain. The question in this appeal is whether this can lawfully be done in the United Kingdom.
5. After the birth of the first IVF child or "test tube baby" in 1978, it became clear that the new technique, together with other potential developments in embryology and genetics, could raise serious medical and ethical issues. The government appointed a committee under the chairmanship of Dame Mary Warnock DBE to advise. It reported in 1984 (Report of the Committee of Inquiry into Human Fertilisation and Embryology). The centrepiece of the committee's recommendations was the creation of a statutory licensing authority to regulate all research and treatment which involved the use of IVF embryos.
6. This recommendation was given effect by the Human Fertilisation and Embryology Act 1990, which set up the Human Fertilisation and Embryology Authority ("the authority"). Members are appointed by the Secretary of State and it has to have a lay (ie not medically qualified or engaged in IVF treatment or research) chairman and deputy chairman and a majority of lay members: para 4 of Schedule 1. Members provide a broad range of experience: social, legal, managerial, religious and philosophical, as well as medical and scientific.
7. The source of the authority's power is section 3(1), which makes it a criminal offence to bring about the creation of an embryo or keep or use an embryo except pursuant to a licence from the authority. The proposed treatment of Mrs Hashmi to assist her in bearing a tissue-compatible child involves the creation and use of embryos and therefore requires a licence. In this case, the authority has granted a licence which permits both PGD and HLA typing. But Ms Quintavalle, the claimant in these proceedings, who is director and founder of a group which believes in absolute respect for the human embryo, says that the authority has no power to authorise HLA typing. She brought judicial review proceedings

CÁMARA DE LOS LORES[1]
VOTOS DE LOS LORES ENCARGADOS DE RESOLVER LA APELACIÓN PARA LA SENTENCIA EN LA CAUSA
Quintavalle (en nombre de Comment on Reproductive Ethics) (Apelante) c/ Human Fertilisation and Embriology Authority (Apelados)
[2005] UKHL 28

LORD HOFFMANN

Vuestras Excelencias,

1. Zain Hashmi es un niño de seis años de edad que padece una enfermedad grave de origen genético denominada beta-Talasemia Mayor. Su médula ósea no produce la cantidad necesaria de glóbulos rojos, por lo que el niño a menudo se siente muy mal y necesita ser medicado todos los días, así como también recibir transfusiones de sangre periódicamente para mantenerse con vida. Pero si recibiera un transplante de células madre obtenidas del tejido de un donante compatible, Zain podría llevar una vida normal.
2. El problema radica en encontrar tejido compatible que el sistema inmunológico de Zain no rechace. Las posibilidades de hallar un donante compatible que no sea hermano del niño son ínfimas. Incluso si el donante es un hermano, hay sólo una posibilidad entre cuatro de que exista compatibilidad. Ninguno de los tres hermanos mayores de Zain es compatible. Además, el donante no debe padecer la misma enfermedad, lo que reduce aún más las posibilidades. La señora Hashmi, madre de Zain, concibió dos niños más con la esperanza de dar a luz a uno de cuyo cordón umbilical pudieran obtenerse células madre para Zain. En la primera ocasión, se descubrió que el feto padecía Talasemia Mayor, por lo que la madre se sometió a un aborto. La segunda vez, dio a luz a un niño cuyo tejido resultó no ser compatible.
3. Hay una manera de evitar que la familia Hashmi tenga que jugar a los dados con la concepción. Desde hace treinta años existe la posibilidad de fecundar un óvulo fuera del cuerpo de una mujer para producir un embrión humano, que luego se implanta en el útero. La fecundación *in vitro* (FIV) ha permitido tener hijos a muchas parejas que no podían lograrlo por fecundación natural. Más recientemente se ha hecho posible realizar una biopsia de un embrión recién fecundado mediante FIV y extraer una sola célula para analizarla con el fin de detectar alteraciones genéticas. Esa técnica se denomina diagnóstico genético preimplantatorio (DGP). Permite que una mujer obtenga información acerca del embrión que va a implantarse en su cuerpo de modo que pueda decidir si seguir adelante con el procedimiento o no. La señora Hashmi, por ejemplo, no habría tenido que someterse al aborto del feto portador de beta-Talasemia Mayor si el embrión hubiera sido creado por FIV y la enfermedad hubiera sido diagnosticada por DGP.
4. Aún más recientemente, y hasta el momento sólo en los Estados Unidos, se ha vuelto posible utilizar la misma técnica de biopsia de una única célula para detectar compatibilidad de tejidos. Esa técnica supone un análisis de antígenos leucocitarios humanos (HLA, por sus siglas en inglés) y recibe el nombre de tipificación HLA. Puede decirse entonces que si se utilizan los espermatozoides del señor Hashmi y los óvulos de la señora Hashmi para crear embriones por FIV, y luego se analizan para detectar beta-Talasemia Mayor mediante DGP y para determinar si existe compatibilidad con los tejidos de Zain por tipificación HLA, los Hashmi pueden estar seguros de que el niño que la señora Hashmi concebirá tendrá células madre que podrían curar a Zain. La cuestión que se plantea en esta apelación es si el procedimiento es legal en el Reino Unido o no.
5. Después del nacimiento del primer bebé concebido mediante FIV, o "bebé de probeta", en 1978, no quedaron dudas de que la nueva técnica, junto con otros posibles avances en embriología y genética, podría dar lugar a serios problemas éticos y médicos. El Gobierno designó un comité de asesoramiento presidido por Dame Mary Warnock, DBE (*Dame of the British Empire*: Dama del Imperio Británico). El comité presentó un informe en 1984 [*Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Informe del Comité de Investigación sobre Fecundación y Embriología Humana)]. La principal de las recomendaciones fue la creación de un órgano legal con el objeto de otorgar licencias y regular así todas las investigaciones y todos los tratamientos que impliquen el uso de embriones producidos mediante FIV.
6. Esa recomendación fue puesta en práctica mediante la Ley de Fertilización Humana y Embriología de 1990 (*Human Fertilisation and Embriology Act 1990*), que creó el Organismo de Embriología y

1. Además de cumplir con su labor parlamentaria, la Cámara de los Lores desempeña funciones judiciales dado que constituye la última instancia de apelación en el Reino Unido.

for a declaration to that effect. It was granted by Maurice Kay J but an appeal was allowed and the application dismissed by the Court of Appeal (Lord Phillips of Worth Matravers MR and Schiemann and Mance LJJ) [2004] QB 168.

8. Whether the authority can grant such a licence depends on the extent of its powers under the 1990 Act. Section 11 provides that the authority may grant three kinds of licences and no others. Licences must be (a) "authorising activities in the course of providing treatment services" or (b) "authorising the storage of gametes and embryos" or (c) "authorising activities for the purposes of a project of research". The specific activities which may be authorised in the course of providing treatment services or for the purposes of research are then set out in Schedule 2.
9. In this case we are particularly concerned with the activities which may be authorised to be done in the course of providing treatment services. "Treatment services" are defined by section 2(1) to mean, among other things, medical services provided to the public for the purpose of assisting women to carry children. IVF is of course such a service; the proposal is to assist Mrs Hashmi to carry a child conceived by the implantation of an IVF embryo. So the question is whether PGD and HLA typing are activities which the authority can authorise to be done "in the course" of providing her with IVF treatment.
10. To find the answer, one must look at the list of activities in para 1 of Schedule 2. Para 1(3) provides that the authority may licence an activity on the list only if it appears to the authority to be "necessary or desirable for the purpose of providing treatment services". The activities include:
    "(d) practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose".
11. The authority's case is that both PGD and HLA typing are to determine whether an embryo would be suitable for the purpose of being placed in Mrs Hashmi. The definition of treatment services focuses upon the woman as the person to whom the services are provided. The authority says that Mrs Hashmi is entitled to regard an embryo as unsuitable unless it is both free of abnormality and tissue compatible with Zain. Without such testing, she cannot make an informed choice as to whether she wants the embryo placed in her body or not. The authority considers it desirable for the purpose of providing her with treatment services, ie IVF treatment, that she should be able to make such a choice. Mr Pannick QC, who appeared for the authority, pointed out that the Act does not require that PGD or HLA typing should *constitute* treatment services. They must be activities *in the course* of such services, ie in the course of providing IVF treatment.
12. The claimant, on the other hand, says that this gives far too wide a meaning to the notion of being suitable. It would enable the authority to authorise a single cell biopsy to test the embryo for whatever characteristics the mother might wish to know: whether the child would be male or female, dark or blonde, perhaps even, in time to come, intelligent or stupid. Suitable must therefore have a narrower meaning than suitable for that particular mother. Maurice Kay J thought that suitable meant only that the embryo would be viable. That would rule out a good deal of PGD, because many genetic abnormalities do not affect the viability of the foetus. The abnormality manifests itself after birth. Before your Lordships, Lord Brennan QC, for the claimant, disavowed so narrow a construction. I think that he was right to do so. The narrower meaning is particularly difficult to support when paragraph 3(2)(e) lists, among the research projects which may be licensed, "developing methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation." It would be very odd if Parliament contemplated research to develop techniques which could not lawfully be used. So Lord Brennan accepts that suitable means more than viable. Building on paragraph 3(2)(e), he says that an embryo is suitable if it is capable of becoming a healthy child, free of abnormalities. PGD to establish that the embryo is free from genetic abnormalities is therefore acceptable. But not HLA typing. A baby which is not tissue compatible with Zain would not be in any way abnormal. It just would not answer the particular needs of the Hashmi family.
13. "Suitable" is one of those adjectives which leaves its content to be determined entirely by context. As my noble and learned friend Lord Scott of Foscote put it in argument, a suitable hat for Royal Ascot is very different from a suitable hat for the Banbury cattle market. The context must be found in the scheme of the 1990 Act and the background against which it was enacted. In particular, one is concerned to discover whether the scheme and background throw light on the question of whether the concept of suitability includes taking into account the particular wishes and needs of the mother. If so, the authority may authorise tests to determine whether the embryo is in that sense suitable for implantation in her womb. It may, but of course it is not obliged to do so. It may consider that allowing the mother to select an embryo on such grounds is undesirable on ethical or other grounds. But the breadth of the concept of suitability is what determines the breadth of the authority's discretion.
14. The Warnock Report discussed possible future developments in embryology. Some of these, such

Fertilización Humana (*Human Fertilisation and Embriology Authority*; HFEA, por sus siglas en inglés) ("el organismo regulador"). Los miembros son nombrados por el Ministro de Salud, y el presidente y vicepresidente del organismo, así como la mayoría de sus miembros, deben ser legos, es decir, no deben ser profesionales de la medicina ni dedicarse a investigaciones o tratamientos que impliquen el uso de embriones creados por FIV (apartado 4 del Anexo 1). Los miembros aportan conocimientos multidisciplinarios: sociales, legales, administrativos, religiosos y filosóficos, así como también médicos y científicos.

7. La fuente de las facultades del organismo regulador es el artículo 3 (1), en el que se establece que crear, conservar o utilizar un embrión constituye delito, a menos que se hubiera otorgado una licencia a tales efectos. El tratamiento que se propuso brindar a la señora Hashmi para ayudarla a dar a luz un niño cuyo tejido fuera compatible con el de Zain supone la creación y la utilización de embriones, por lo que es necesario obtener una licencia. En este caso, el organismo regulador ha concedido una licencia que autoriza tanto el DGP como la tipificación HLA. Pero la señora Quintavalle –parte demandante en estas actuaciones–, fundadora y directora de una asociación que considera que el embrión humano es digno de respeto pleno, manifiesta que el organismo regulador no tiene facultades para autorizar la tipificación HLA. Promovió una acción en la que solicitó revisión judicial para obtener una sentencia que respaldara su reclamación. Esa sentencia fue dictada por el juez Maurice Kay, pero se hizo lugar a una apelación, y la petición de la señora Quintavalle fue rechazada por el Tribunal de Apelación. (Lord Phillips of Worth Matravers MR (*Master of the Rolls*[2]) y Schiemann y Mance LJJ (*Lord Justices*[3])) [2004] QB (*Queen´s Bench*[4]) 168.
8. La capacidad del organismo regulador para otorgar una licencia de esa índole depende del alcance de las facultades que le corresponden conforme a la Ley de 1990. En virtud del artículo 11, el organismo regulador puede otorgar únicamente tres tipos de licencia. Debe tratarse de licencias que: (a) "autoricen a llevar a cabo actividades en el transcurso de un tratamiento", (b) "autoricen el almacenamiento de gametos y embriones" o (c) "autoricen a realizar actividades con fines de investigación". En el Anexo 2, se detallan las actividades específicas que pueden ser autorizadas durante un tratamiento o con fines de investigación.
9. En este caso, nos interesan particularmente las actividades que pueden autorizarse en el transcurso de un tratamiento. Conforme al artículo 2 (1), "tratamiento" significa, entre otras cosas, servicios médicos brindados a la comunidad para ayudar a las mujeres a quedar embarazadas. La FIV es sin duda un servicio de esa índole; la propuesta consiste en ayudar a la señora Hashmi a quedar embarazada de un niño concebido mediante la implantación de un embrión fecundado por FIV. Por lo tanto, la cuestión que se plantea es si el DGP y la tipificación HLA son actividades que el organismo regulador está facultado a autorizar para que se lleven a cabo "en el transcurso" del tratamiento de FIV.
10. La respuesta debe buscarse en la lista de actividades que figuran en el apartado 1 del Anexo 2. En el apartado 1 (3) se establece que el organismo regulador sólo puede permitir que se lleve a cabo una de las actividades incluidas en la lista si estima que es "necesario o conveniente a los fines del tratamiento". Entre las actividades se incluyen:
    "(d) las prácticas diseñadas para asegurar que los embriones se encuentren en condiciones adecuadas para ser implantados en el útero de una mujer o para determinar si los embriones son adecuados para tal fin."
11. El organismo regulador esgrime como defensa que tanto el DGP como la tipificación HLA sirven para determinar si un embrión sería adecuado para ser implantado en el útero de la señora Hashmi. La definición de "tratamiento" se centra en la mujer como la persona a quien se presta el servicio. El organismo regulador opina que la señora Hashmi tiene el derecho de considerar que un embrión no es adecuado, a menos que no tenga ninguna anomalía y sea compatible con los tejidos de Zain. Sin las mencionadas pruebas genéticas, la señora Hashmi no puede tomar una decisión informada para resolver si quiere que se implante el embrión en su cuerpo. El organismo regulador considera que para brindarle tratamiento –es decir, tratamiento de FIV– es conveniente que la señora Hashmi pueda tomar una decisión de esa índole. El señor Pannick QC (*Queen´s Counsel*[5]), quien compareció en representación del organismo regulador, señaló que la Ley no exige que el DPG o la tipificación HLA *constituyan* tratamientos. Deben ser actividades que se realicen *en el transcurso* de tales tratamientos, es decir, en el transcurso del tratamiento de FIV.

2. Juez que preside la Sala en lo Civil del Tribunal de Apelación.
3. *Lord Justice* es el título que se otorga a los jueces que integran el Tribunal de Apelación.
4. Se denomina *Queen´s Bench* a una de las tres salas que componen el Tribunal Superior.
Su competencia es principalmente de primera instancia en lo civil.
5. Título conferido a un *barrister* (abogado autorizado a actuar en litigios judiciales ante tribunales superiores) que tiene más de diez años en ejercicio de sus funciones. Originalmente se confería para representar a la Corona, pero en la actualidad el *Queen´s Counsel* puede representar también a los particulares, y el título se otorga en reconocimiento al prestigio y experiencia.

as creating children in vitro or the gestation of human embryos in other species, it recommended should be unequivocally banned. On others, it made no such recommendations. One of these was embryonic biopsy, such as can now be used for PGD and HLA typing. It described (in para 12.13) the advantages of PGD in detecting abnormalities before implantation ("avoiding the difficult decision for the parents of whether to seek a termination where abnormality is detected") and its disadvantages, namely the need to use IVF. It concluded that it was unlikely that embryonic biopsy would become a feasible method of detecting abnormal embryos for some considerable time.

15. For present purposes, the most relevant discussion in the Warnock Report concerned gender identification. The report considered (in para 9.8) the possibility of gender identification of an IVF embryo by single cell biopsy. Such information could be used to select embryos to "prevent the birth of a child with a sex-linked hereditary disease". The committee saw no reason why this should not be done: para 9.11. It then went on to consider the use of gender identification to select the sex of a child "for purely social reasons". After some discussion of the social issues (population distribution, the role of women in society), the committee said that it was unable to make any positive recommendations. Nevertheless:

"the whole question of the acceptability of sex selection should be kept under review (See chapter13)."

16. Chapter 13 was devoted to recommending the establishment of what became the authority. The committee said in para 13.3 that:

"The authority should be specifically charged with the responsibility to regulate and monitor practice in relation to those sensitive areas which raise fundamental ethical questions."

17. Because the authority would be concerned not merely with medical or scientific matters but with "broader matters and with the protection of the public interest" the committee recommended (in para 13.4) substantial lay representation:
"If the public is to have confidence that this is an independent body, which is not to be unduly influenced by sectional interests, its membership must be wide-ranging and in particular the lay interests should be well represented."

18. The conclusion which I draw is that the committee contemplated that the authority would decide the circumstances, if any, in which sex selection on social grounds should be authorised. As sex selection on social grounds is the most obvious case of selecting an embryo on grounds other than its health, I would infer that the Warnock Committee did not intend that selection of IVF embryos on grounds which went beyond genetic abnormality should be altogether banned.

19. It does not of course follow that Parliament gave effect to this recommendation in the 1990 Act. But the Act was preceded by a White Paper, Human Fertilisation and Embryology: A Framework for Legislation, published in November 1987, which suggests acceptance of the views of the Warnock Committee on this point. In this paper, the Government set out the general principles upon which it proposed to legislate. In para 13 it accepted the "basic principle underlying the Warnock Report recommendations - namely the need 'to regulate and monitor practice in relation to those sensitive areas which raise fundamental ethical questions.' " The authority would therefore exercise its functions in areas which included "any [research or] treatment involving human embryos created in vitro." (The square brackets were to leave Parliament to decide, as it subsequently did, whether to allow research at all). The intention was therefore to define the functions of the authority in very broad terms. To ensure that the legislation was flexible enough to deal with "as yet unforeseen treatment developments which may raise new ethical issues", the Bill would:

"contain powers to make regulations (subject to the affirmative resolution procedure) to add to or subtract from the range of matters coming within the regulatory scope of the authority." (Para 14).

20. On prohibited areas of research (assuming that any research was to be allowed) the government did not think that the Warnock Committee had gone far enough. It had proposed (in para 12.16) that the authority should promulgate guidance on research which was "unlikely to be considered ethically acceptable in any circumstances". The government thought (in para 36) that the legislation should "clearly prohibit" some such activities, but with a power for Parliament itself, by affirmative resolution, to make exceptions if new developments made them appropriate.

21. Included in the matters which were to be prohibited were what journalists commonly call "designer babies" or, as the White Paper put it, in para 37:
"the artificial creation of human beings with certain pre-determined characteristics through modification of an early embryo's genetic structure."
Another was the cloning of individuals by nuclear substitution. But, relevantly for present purposes, there was no proposal to include in the "clearly prohibited" list the testing of embryos to enable the mother to choose to carry a child with characteristics of her choice. One infers that the White Paper

12. Por otro lado, la parte demandante opina que de ese modo se atribuye al concepto de "adecuado" un significado demasiado amplio, lo que permitiría que el organismo regulador autorizara la biopsia de una célula para realizar pruebas en el embrión y determinar si tiene ciertas características que la madre podría querer conocer: si el niño será varón o mujer, si tendrá el cabello oscuro o rubio, incluso tal vez, en un futuro, si será inteligente o tonto. Por lo tanto, "adecuado" tiene que tener un significado más restringido que "adecuado para una madre en particular". El juez Maurice Kay interpretó que "adecuado" tan sólo significaba que el embrión fuera viable. Esa interpretación descartaría buena parte del DGP, porque muchas anomalías genéticas no afectan la viabilidad del feto. La anomalía se manifiesta después del nacimiento. Ante Vuestras Excelencias, Lord Brennan QC, por la parte demandante, rechazó una interpretación tan restringida. Creo que tuvo razón al hacerlo. El significado más restringido es particularmente difícil de respaldar toda vez que el apartado 3 (2) (e) enumera los proyectos de investigación que pueden ser autorizados, entre ellos: "el desarrollo de métodos para detectar la presencia de anomalías genéticas o cromosómicas en embriones antes de su implantación". Sería muy extraño que el Parlamento contemplara la posibilidad de que se lleven a cabo investigaciones destinadas a desarrollar técnicas que legalmente no pudieran utilizarse. De modo que Lord Brennan acepta que "adecuado" significa algo más que "viable". Tomando como base el apartado 3 (2) (e), dice que un embrión es adecuado si es capaz de convertirse en un niño sano, sin anomalías. El DGP utilizado para determinar que el embrión no tiene anomalías genéticas es por lo tanto aceptable. Pero no así la tipificación HLA. Un bebé que no tenga tejidos compatibles con los de Zain no sería anormal en ningún sentido. Sencillamente no satisfaría las necesidades particulares de la familia Hashmi.
13. "Adecuado" es uno de esos adjetivos cuyo sentido sólo puede determinarse cabalmente dentro de un contexto. Tal como argumentó mi distinguido y docto amigo Lord Scott of Foscote, un sombrero que es adecuado para asistir a la carrera de caballos Royal Ascot es muy diferente al que es adecuado para ir a la feria de ganado de Banbury. El contexto debe buscarse en el contenido de la Ley de 1990 y en los antecedentes que llevaron a su aprobación. En particular, nos interesa descubrir si el contenido y los antecedentes aclaran si el concepto de "adecuado" incluye tener en cuenta los deseos y las necesidades particulares de la madre. De ser así, el organismo regulador puede autorizar que se hagan pruebas para determinar si el embrión es adecuado en ese sentido para ser implantado en el útero materno. Puede hacerlo, pero por supuesto no está obligado a ello. Es posible que considere que permitir que la madre seleccione un embrión alegando tales motivos es inconveniente por razones éticas o de otra naturaleza. Pero la amplitud del concepto de "adecuado" es lo que determina la amplitud de la discrecionalidad del organismo regulador.
14. En el Informe Warnock se analizaron posibles avances futuros en embriología. Allí se recomendó que algunos de ellos, tales como la creación de niños *in vitro* o la gestación de embriones humanos en otras especies, debían quedar claramente prohibidos. Pero no se hizo tal recomendación con respecto a otros avances. Uno de ellos fue la biopsia embrionaria, como la que puede realizarse actualmente para el DGP y la tipificación HLA. En el informe se describieron las ventajas que ofrece el DGP para detectar anomalías antes de la implantación ("y así evitar que los padres tengan que tomar la difícil decisión de interrumpir el embarazo cuando se detecta una anomalía") y las desventajas, concretamente la necesidad de utilizar FIV (apartado 12.13). Se llegó a la conclusión de que era improbable que la biopsia embrionaria se convirtiera en poco tiempo en un método que hiciera factible detectar embriones anormales.
15. A los fines que nos ocupan, el análisis más importante contenido en el Informe Warnock fue el relacionado con la identificación del sexo. En el informe se contempló la posibilidad de identificar el sexo de un embrión obtenido por FIV mediante la biopsia de una única célula (apartado 9.8). Tal información podría utilizarse para seleccionar embriones con el objeto de "evitar el nacimiento de un niño con una enfermedad hereditaria ligada al sexo". El Comité no encontró motivos por los cuales esa selección no debiera hacerse (apartado 9.11). Luego pasó a tratar el tema del uso de la identificación del sexo para seleccionar el sexo de un niño "por razones puramente sociales". Tras analizar en buena medida las cuestiones sociales (distribución de la población, el papel que desempeña la mujer en la sociedad), el Comité manifestó que no podía dar ninguna recomendación definitiva. No obstante:
    "el tema de la aceptabilidad de la selección del sexo debería seguir analizándose en su conjunto (véase el capítulo 13)."
16. El capítulo 13 estuvo totalmente dedicado a recomendar la creación de lo que luego sería el organismo regulador. En el apartado 13.3, el Comité expresó que:

> "El organismo regulador debería tener la responsabilidad específica de regular y controlar la práctica en lo concerniente a aquellas áreas delicadas que pueden dar lugar a problemas éticos fundamentales."

intended the fundamental ethical issues which such activities might raise to be determined by the statutory authority, subject to the regulation-making power by which Parliament could impose its own decision.

22. The structure of the 1990 Act reflects the scheme foreshadowed in the White Paper. Section 3(3)(a) prevents, as the Warnock Committee recommended, the development of the foetus in vitro by providing that a licence may not authorise the keeping or use of an embryo after the appearance of the primitive streak. Nor may the authority authorise the placing of an embryo in an animal (subsection (3)(b)) or the cloning of an embryo (subsection (3)(d)). By para 1(4) of Schedule 2, a licence may not authorise altering the genetic structure of any cell while it forms part of an embryo. These activities are all clearly prohibited. In addition, section 3(3)(c) enables the Secretary of State and Parliament by affirmative resolution to add other activities involving the keeping or using of embryos to the prohibited list.
23. Subject to these prohibitions, the licensing power of the authority is defined in broad terms. Paragraph 1(1) of Schedule 2 enables it to authorise a variety of activities (with the possibility of others being added by regulation) provided only that they are done "in the course of" providing IVF services to the public and appear to the authority "necessary or desirable" for the purpose of providing those services. Thus, if the concept of suitability in sub-paragraph (d) of 1(1) is broad enough to include suitability for the purposes of the particular mother, it seems to me clear enough that the activity of determining the genetic characteristics of the embryo by way of PGD or HLA typing would be "in the course of" providing the mother with IVF services and that the authority would be entitled to take the view that it was necessary or desirable for the purpose of providing such services.
24. The chief argument of Lord Brennan against interpreting suitability in this sense was that, once one allowed the mother's choice to be a legitimate ground for selection, one could not stop short of allowing it to be based upon such frivolous reasons as eye or hair colour as well as more sinister eugenic practices. It was, he said, inconceivable that Parliament could have contemplated the possibility of this happening.
25. Let it be accepted that a broad interpretation of the concept of suitability would include activities highly unlikely to be acceptable to majority public opinion. It could nevertheless be more sensible for Parliament to confine itself to a few prohibitions which could be clearly defined but otherwise to leave the authority to decide what should be acceptable. The fact that these decisions might raise difficult ethical questions is no objection. The membership of the authority and the proposals of the Warnock Committee and the White Paper make it clear that it was intended to grapple with such issues.
26. In this case, as I have said, Maurice Kay J thought that suitable meant no more than suitable to produce a viable foetus but Lord Brennan, understandably unwilling to argue that Parliament might have outlawed PGD, said that it meant suitable to produce a healthy foetus, free of genetic defects. But this definition is itself not free from difficulty. What amounts to a genetic defect? Marie Stopes, an enthusiastic believer in eugenics, cut off relations with her son because she considered that the woman he chose to marry suffered from a genetic defect: she was short-sighted and had to wear spectacles. Surely it would be more sensible to concentrate on whether choice on such grounds was ethically acceptable rather than to argue over whether it counted as a genetic defect. The great advantage which Parliament would have seen in using broad concepts to define the remit of the authority is that it would avoid sterile arguments over questions of definition and focus attention upon the ethical issues.
27. Even in cases in which one could clearly say that the ground for selection was not a genetic defect, a total prohibition might exclude cases which many people would think ethically acceptable. Mr Pannick drew attention to the facts of *Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FLR 1091. In the course of providing IVF treatment to a husband and wife, the hospital mixed up the sperm provided by the husband with that of another man. As a result, a woman gave birth to twins, the father of whom was a stranger. But they suffered from no genetic defects and Mr Pannick points out that if the muddle had been suspected before implantation of the embryo, Lord Brennan's construction of suitability would have prevented any tests to check the embryo's DNA. Likewise, many people might agree with the authority that the tests proposed to be conducted in the present case would be ethically acceptable. It often seemed that an unstated assumption in Lord Brennan's argument was that the authority was likely to authorise anything that it was not positively prohibited from authorising or that it could not be trusted to make proper ethical distinctions. But these assumptions are in my opinion illegitimate. The authority was specifically created to make ethical distinctions and, if Parliament should consider it to be failing in that task, it has in reserve its regulatory powers under section 3(3)(c).
28. Perhaps the most telling indication that Parliament did not intend to confine the authority's powers to unsuitability on grounds of genetic defects is, as Mance LJ pointed out [2004] QB 168, 209, para 143, the absence of any reference in the Act to selection on grounds of sex. It could be said that the Act

17. Dado que el organismo regulador no sólo se ocuparía de cuestiones médicas o científicas, sino también de "cuestiones más generales y de la protección del interés público", el Comité recomendó que debía haber una proporción importante de miembros que fueran legos en la materia (apartado 13.4):
    "Para que la comunidad tenga la certeza de que este es un organismo independiente, que no estará influenciado indebidamente por intereses sectoriales, sus miembros deben provenir de diversas áreas, y los intereses de los legos en la materia deben estar particularmente representados."
18. He llegado a la conclusión de que el Comité contempló la posibilidad de que el organismo regulador decida en qué circunstancias, si las hubiera, debería autorizarse la selección del sexo por motivos sociales. Dado que la selección del sexo por razones sociales constituye el caso más evidente de selección de un embrión por razones que no están relacionadas con la salud, mi deducción sería entonces que el Comité Warnock no tuvo la intención de prohibir totalmente la selección de embriones obtenidos mediante FIV en los casos en que mediaban razones que trascendían las anomalías genéticas.
19. Por supuesto, no se desprende de ello que el Parlamento puso en práctica esa recomendación en la Ley de 1990. Pero la Ley fue precedida por un informe oficial, *Human Fertilization and Embryology: A Framework for Legislation* (Fertilización humana y embriología: un marco para la legislación), publicado en noviembre de 1987, en el que se sugiere la aceptación del punto de vista del Comité Warnock sobre ese tema. En ese informe, el Gobierno estableció los principios generales sobre los que proponía que se legislara. En el apartado 13 aceptó el "principio básico implícito en las recomendaciones del Informe Warnock, concretamente, la necesidad 'de regular y controlar la práctica en lo concerniente a aquellas áreas delicadas que dan lugar a problemas éticos fundamentales'". Por lo tanto, el organismo regulador ejercería su función en áreas que incluyeran "cualquier [investigación o] tratamiento que involucre embriones humanos creados *in vitro*". (Se utilizaron corchetes para dejar que el Parlamento decidiera, tal como lo hizo después, si permitiría algún tipo de investigación). Por consiguiente, la intención fue definir las funciones que cumpliría el organismo regulador en términos muy generales. Con el fin de garantizar que la legislación fuera suficientemente flexible para que en ella estuvieran contemplados los "avances en el tratamiento, hasta ahora imprevistos, que pueden dar lugar a nuevos problemas éticos", en el proyecto de ley:
    "se incluirían facultades reglamentarias (sujetas a la aprobación de ambas cámaras) con el fin de ampliar o reducir el abanico de temas sobre los cuales el organismo regulador tiene facultades" (apartado 14).
20. Con respecto a los campos de investigación prohibidos (en el supuesto caso de que se permitiera algún tipo de investigación), el Gobierno opinó que la recomendación del Comité Warnock no era suficientemente exhaustiva. Había propuesto que el organismo regulador difundiera orientación acerca de las investigaciones que "probablemente no se considerarían éticas bajo ninguna circunstancia" (apartado 12.16). En la opinión del Gobierno, la legislación debía "prohibir claramente" algunas de esas actividades (apartado 36), pero el Parlamento debía tener facultades, sujetas a la aprobación de ambas cámaras, para establecer excepciones si los nuevos avances lo hacían necesario.
21. Entre las actividades que debían quedar prohibidas se encontraba la creación de lo que los periodistas habitualmente llaman "bebés de diseño" o, según el informe oficial (apartado 37):
    "la creación artificial de seres humanos con ciertas características predeterminadas mediante la modificación de la estructura genética de un embrión prematuro".
    Otra de las actividades era la clonación de individuos mediante sustitución nuclear. Sin embargo, cabe señalar a los fines que nos ocupan que no hubo ninguna propuesta destinada a incluir en la lista de actividades "claramente prohibidas" las pruebas realizadas en embriones para permitir que la madre decida quedar embarazada de un niño que tenga características que ella eligió. Uno puede inferir que existió la intención en el informe oficial de que el organismo regulador determinara los problemas éticos fundamentales a que tales actividades podrían dar lugar, con sujeción a la facultad reglamentaria mediante la cual el Parlamento podría imponer su propia decisión.
22. El contenido de la Ley de 1990 refleja el anticipado por el informe oficial. Conforme al artículo 3 (3) (a), se impide, tal como recomendó el Comité Warnock, el desarrollo de un feto *in vitro*, al establecerse que una licencia no puede autorizar la conservación o el uso de un embrión una vez que ha aparecido la línea primitiva. El organismo regulador tampoco puede autorizar la implantación de un embrión en un animal (inciso (3) (b)) ni la clonación de un embrión (inciso (3) (d)). Conforme al apartado 1 (4) del Anexo 2, una licencia no puede autorizar la alteración de la estructura genética de ninguna célula mientras forma parte de un embrión. Esas actividades están todas claramente prohibidas. Además, en virtud del artículo 3 (3) (c), el Ministro de Salud y el Parlamento, mediante la aprobación de ambas cámaras, pueden agregar a la lista de actividades prohibidas otras que impliquen la conservación o el uso de embriones.

made no reference to HLA typing because neither the Warnock Committee nor Parliament in 1990 foresaw it as a possibility. But there was intense discussion, both in the report and in Parliament, about selection for sex on social grounds. If ever there was a dog which did not bark in the night, this was it. It is hard to imagine that the reason why the Act said nothing on the subject was because Parliament thought it was clearly prohibited by the use of the word "suitable" or because it wanted to leave the question over for later primary legislation. In my opinion the only reasonable inference is that Parliament intended to leave the matter to the authority to decide. And once one says that the concept of suitability can include gender selection on social grounds, it is impossible to say that selection on the grounds of any other characteristics which the mother might desire was positively excluded from the discretion of the authority, however unlikely it might be that the authority would actually allow selection on that ground.

29. Lord Brennan referred to the well known remarks of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800. The question in that case was whether section 1(1) of the Abortion Act 1967, which in certain circumstances legitimated abortion "when a pregnancy is terminated by a registered medical practitioner" could include the case in which it was terminated by a nurse under the general supervision of a medical practitioner who was not actually present. The question arose because of the development since the passing of the Act of a new method for terminating pregnancy. Lord Wilberforce said (at p 822):
"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."
30. Lord Brennan commended in particular Lord Wilberforce's opinion that the Abortion Act should be construed with caution because it was dealing with "a controversial subject involving moral and social judgments on which opinions strongly differ." That, he said, was equally true of the 1990 Act.
31. Lord Wilberforce's remarks provided valuable assistance to the House in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687. The question there was whether the definition of an embryo in the 1990 Act, which contemplated that it would be created by fertilisation, extended to embryos created by cell nuclear replacement in an unfertilised egg. This was a method of creating embryos which was not contemplated at the time of the Act and the language of the definition was to some extent inappropriate to describe it, but the House nevertheless held that the policy of the Act was to regulate the use of embryos however created. The House followed Lord Wilberforce's guidance in holding that there was a "clear purpose in the legislation" which could "only be fulfilled if the extension was made".
32. But, like all guidance on construction, Lord Wilberforce's remarks are more appropriate to some cases than others. This is not a case in which one starts with the presumption that Parliament's intention was directed to the state of affairs existing at the time of the Act. It obviously intended to regulate research and treatment which were not possible at the time. Nor is it a case, like the first *Quintavalle* case, in which the statutory language needs to be extended beyond the "expressed meaning". The word "suitable" is an empty vessel which is filled with meaning by context and background. Nor is it helpful in this case to ask whether some new state of affairs falls within "the same genus" as those to which the expressed policy has been formulated. That would beg the question because the dispute is precisely over what the genus is. If "suitability" has the meaning for which the authority contends, then plainly PGD and HLA typing fall within it. If not, then not. Finally, Lord Wilberforce's recommendation of caution in the construction of statutes concerning controversial subjects "involving moral and social judgments on which opinions strongly differ" would be very much to the point if everything which the Act did not forbid was permitted. It has much less force when the question is whether or not the authority has power to authorise it.
33. Lord Brennan and Mr Pannick each relied upon different statements made by ministers in Parliament during the debates on the Bill which became the 1990 Act. As is almost invariably the case when

23. Con sujeción a esas prohibiciones, la facultad que tiene el organismo regulador de otorgar licencias se define en términos generales. Conforme al apartado 1 (1) del Anexo 2, el organismo tiene la facultad de autorizar diversas actividades (y la posibilidad de añadir otras mediante reglamentación) siempre que se realicen "en el transcurso de" la prestación de servicios de FIV a la comunidad y que el organismo regulador estime que son "necesarias o convenientes" para la prestación de tales servicios. De ese modo, si en el sub-apartado (d) del apartado 1 (1), el concepto de "adecuado" es suficientemente amplio para incluir aquello que es adecuado para el propósito de una madre en particular, queda a mi juicio suficientemente claro que la determinación de las características genéticas del embrión mediante el DGP o la tipificación HLA se haría "en el transcurso" del tratamiento de FIV que se brinda a la madre y que el organismo regulador tendría derecho a considerar que fue necesaria o conveniente para dicho tratamiento.
24. El principal argumento presentado por Lord Brennan en contra de la interpretación de lo que es "adecuado" en ese sentido fue que una vez que se permite que la decisión de la madre sea un motivo suficiente para la selección, se deberían admitir también decisiones basadas en motivos tan superfluos como el color de los ojos o del cabello o en prácticas eugenésicas más siniestras. Era inconcebible, según manifestó, que el Parlamento pudiera haber contemplado la posibilidad de que eso ocurriera.
25. Asumamos que una interpretación amplia del concepto de adecuado incluiría actividades que gran parte de la opinión pública muy probablemente no aceptaría. Aun así sería más sensato que el Parlamento se limitara a establecer unas pocas prohibiciones que podrían definirse claramente y que en los demás casos dejara que el organismo regulador decida qué es lo que debería aceptarse. El hecho de que esas decisiones podrían dar lugar a problemas éticos no constituye una objeción. La membresía del organismo regulador y las propuestas planteadas por el Comité Warnock y en el informe oficial dejan en claro que existió la intención de lidiar con esos problemas.
26. En este caso, como dije anteriormente, el juez Maurice Kay consideró que "adecuado" sólo significaba "adecuado para producir un feto viable"; pero Lord Brennan, que como es comprensible no quería argumentar que el Parlamento podría haber declarado que el DGP era ilegal, opinó que significaba "adecuado para producir un feto sano, sin defectos genéticos". Pero esa definición no deja de presentar dificultades en sí misma. ¿Qué se entiende por defecto genético? Marie Stopes, una creyente entusiasta en la eugenesia, rompió relaciones con su hijo porque pensaba que la mujer que él había elegido por esposa tenía un defecto genético: era miope y tenía que usar anteojos. Sin duda sería más sensato reflexionar acerca de si era aceptable desde el punto de vista ético hacer una elección por esas razones en vez de discutir si se trataba de un defecto genético. La gran ventaja que el Parlamento debe haber encontrado en la utilización de conceptos amplios para definir las atribuciones del organismo regulador es que se evitarían así discusiones estériles sobre cuestiones de definición y se prestaría atención a los problemas éticos.
27. Incluso en casos en los que uno diría con certeza que el motivo para la selección no fue la presencia de un defecto genético, una prohibición absoluta podría dejar excluidos del ámbito de aplicación de la ley casos que a criterio de gran cantidad de personas son éticamente aceptables. El señor Pannick dirigió la atención a los hechos del caso *Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FLR 1091. Mientras se le brindaba tratamiento de FIV a un matrimonio, en el hospital confundieron los espermatozoides del marido con los de otro hombre. Como consecuencia, una mujer dio a luz mellizos, cuyo padre era un desconocido. Pero no tenían ningún defecto genético, y el señor Pannick señala que si se hubiera sospechado la confusión antes de que el embrión fuera implantado, la interpretación de Lord Brennan del concepto de "adecuado" hubiera impedido que se hicieran pruebas para verificar el ADN del embrión. Asimismo, muchas personas podrían estar de acuerdo con el organismo regulador en cuanto a que las pruebas que se propusieron llevar a cabo en el caso que nos ocupa serían éticamente aceptables. A menudo dio la impresión de que en el alegato de Lord Brennan había una suposición implícita: era probable que el organismo regulador autorizara todo lo que no estuviera categóricamente prohibido o no podía confiarse en que tomara decisiones apropiadas en materia de ética. Pero, en mi opinión, tales suposiciones no son válidas. El organismo regulador fue creado específicamente para tomar decisiones en materia de ética, y si el Parlamento considerara que no cumple esa tarea, puede recurrir a su facultad reglamentaria, en virtud de lo dispuesto en el artículo 3 (3) (c).
28. Tal vez el indicio más elocuente de que el Parlamento no tuvo la intención de limitar las facultades del organismo regulador a los casos en que se alegaran defectos genéticos sea la ausencia en la Ley a referencia alguna a la selección por razones de sexo, como señaló el juez Mance LJ [2004] QB 168, 209, apartado 143. Podría decirse que en la Ley no se hizo referencia a la tipificación HLA

such statements are tendered under the rule in *Pepper v Hart* [1993] AC 593, I found neither of any assistance.

34. I would therefore accept Mr Pannick's argument and hold that both PGD and HLA typing could lawfully be authorised by the authority as activities to determine the suitability of the embryo for implantation within the meaning of paragraph 1(1)(d).
35. Lord Brennan made some criticism of the way in which the authority had from time to time stated its policy and relaxed some of the conditions upon which licences were granted. For example, the authority originally gave a licence for HLA typing only if the cell biopsy was also required for PGD, because it considered that the risk to the embryo from removal of a cell did not warrant it being done for HLA typing alone. More recently, after further study of the effects of a cell biopsy, it has decided that the risk is low enough to justify a licence for HLA typing alone. That seems to me exactly in accordance with the duty of the authority to keep the state of the art under constant review.
36. Another point on which the authority has shifted its position is the use of bone marrow rather than umbilical cord blood as a source of stem cells. Bone marrow may in some cases be more suitable but involves a far more intrusive operation upon the donor child than taking cord blood. The policy formulated by the authority in 2001 (under which the licence which authorised the treatment of Mrs Hashmi was granted) required a condition that "the intention" should be only to take cord blood. After a review in 2004, the authority decided to delete this condition. It was in practice unenforceable because once the embryo had been implanted and the child conceived, the case passed out of the jurisdiction of the authority. On 21 July 2004 the authority endorsed with amendment the following recommendation of its Ethics and Legal Committee:
    "It was acknowledged that the HFEA did not have any power to impose a condition that would prohibit any future attempt to obtain bone marrow. However the committee noted that obtaining bone marrow for the treatment of siblings from children from the age of one year was a relatively routine treatment strategy where no other matched donor was available. The committee also noted that under common law the test for the type of medical procedures that may be performed on a child is very much higher when such treatment is non-therapeutic. Although parents usually give consent to a child's medical treatment, the courts always have the power to overrule their consent where the procedure would not be in the child's best interests."
37. These reasons appear to be valid. I have no doubt that medical practitioners take very seriously the law that any operation upon a child for which there is no clinical reason relating to the child itself must be justified as being for other reasons in the child's best interests. If the question appears to be doubtful, a ruling from the court may be obtained. The authority is in my opinion entitled to assume that a child conceived pursuant to its licence will, after birth, receive the full protection of the law.
38. In my opinion, however, it is unnecessary to express any view about Lord Brennan's criticisms of the way the authority has exercised its jurisdiction. There has never been any suggestion that the authority acted unreasonably in granting a licence. The case has always been that it had no power to do so. In my opinion it did, and I would therefore dismiss the appeal.

porque ni el Comité Warnock ni el Parlamento en 1990 previeron que esa técnica podría llegar a utilizarse; pero hubo intenso debate tanto en el Informe como en el Parlamento acerca de la selección de sexo por razones sociales. Si alguna vez el silencio dijo más que mil palabras, fue en esa oportunidad. Cuesta imaginar que en la Ley no se hace ninguna referencia al tema porque el Parlamento consideró que el uso del término "adecuado" prohibía claramente esa técnica o porque quiso que el asunto fuera resuelto más adelante mediante la sanción de una ley del Parlamento. En mi opinión, la única inferencia razonable que puede hacerse es que el Parlamento tuvo la intención de dejar que fuera el organismo regulador el que decidiera la cuestión. Y una vez que se afirma que el concepto de "adecuado" puede incluir la selección de sexo por razones sociales, es imposible afirmar que la selección por cualquier otra razón que la madre pudiera dar queda definitivamente excluida de la discrecionalidad del organismo regulador, aun cuando es improbable que el organismo autorice la selección fundada en esas razones.

29. Lord Brennan hizo alusion al conocido comentario de Lord Wilberforce en el caso *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800. En ese caso la cuestión consistía en determinar si el artículo 1 (1) de la Ley de Aborto de 1967, que legitimó el aborto en determinadas circunstancias – "cuando un embarazo es interrumpido por un médico matriculado" –, podría incluir los casos en que es interrumpido por un enfermero, bajo la supervisión general de un médico que en realidad no está presente en ese momento. El problema surgió debido al descubrimiento de un nuevo método para interrumpir el embarazo, descubrimiento que fue posterior a la aprobación de la Ley. Lord Wilberforce afirmó (p. 822):

> "Al interpretar una ley del Parlamento, corresponde –y de hecho es necesario- tener en cuenta la situación que existía en el momento de su sanción, situación que el Parlamento conoce. Es bastante razonable suponer que la política legislativa o la intención del Parlamento se centran en esa situación. Si dejamos de lado los casos de omisión involuntaria –dado que no es este uno de ellos–, cuando aparece una nueva situación o una nueva serie de hechos que están relacionados con la política legislativa, los tribunales deben tener en cuenta si quedan incluidos en los casos que el Parlamento tuvo la intención de regular. Puede considerarse que es así, si están comprendidos dentro del mismo género de hechos para los que se formuló la política específica. También puede considerarse que es así si puede detectarse en la legislación un propósito claro que sólo puede cumplirse si se amplía la interpretación. En qué medida pueden estos principios aplicarse libremente dependerá de la naturaleza de la ley escrita y de la rigurosidad o flexibilidad del léxico que se empleó en ella. Los tribunales deberían estar menos dispuestos a ampliar significados explícitos si no existen dudas de que la ley en cuestión fue diseñada para ser restrictiva en su aplicación y no para ser amplia en su alcance. Estarán mucho menos dispuestos a hacerlo si el tema es de otro tipo o es diferente en algún aspecto a aquél para el cual se aprobó la ley.

30. Lord Brennan elogió en particular la recomendación de Lord Wilberforce de interpretar la Ley de Aborto con cautela porque trataba sobre "un tema controvertido que involucra apreciaciones morales y sociales sobre las cuales existen grandes divergencias." Eso mismo, dijo, era válido en el caso de la Ley de 1990.
31. Los comentarios de Lord Wilberforce fueron de gran ayuda para la Cámara en la causa *R. (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687. En ese caso se trataba de decidir si la definición de embrión contenida en la Ley de 1990, en la que se contemplaba que el embrión sería creado mediante fertilización, se aplicaba también a embriones creados mediante sustitución del núcleo celular de un óvulo que no había sido fertilizado. Se trataba de un método para crear embriones que no estaba previsto en el momento en que se aprobó la ley, y el lenguaje utilizado en la definición era en cierta medida inadecuado para describirlo; no obstante, la Cámara sostuvo que el propósito de la ley era regular la utilización de embriones creados mediante cualquier método. La Cámara coincidió con el criterio de Lord Wilberforce al sostener que había un "propósito claro en la ley" que "sólo podía cumplirse si se ampliaba la interpretación".
32. Pero, como toda guía para la interpretación del Derecho, las palabras de Lord Wilberforce son más indicadas para unos casos que para otros. Este no es un caso en que se parta de la presunción de que la intención del Parlamento se centró en la situación imperante en el momento de aprobar la Ley. Es evidente que la intención era regular investigaciones y tratamientos que no podían llevarse a cabo en aquel momento. Tampoco se trata de un caso, a diferencia del primer caso *Quintavalle*, en el que sea necesario extender el lenguaje legal más allá del "significado explícito". La palabra "adecuado" es un recipiente vacío que se llena de sentido mediante el contexto y los antecedentes. Tampoco resulta útil en este caso preguntarse si alguna nueva situación está comprendida dentro del "mismo género" de hechos para los que se formuló la política específica. Esa pregunta conduciría a un argumento circular porque precisamente lo que se está discutiendo es cuál es ese género de hechos.

Si “adecuado” tiene el significado que el organismo regulador sostiene que posee, es evidente que el DGP y la tipificación HLA quedan comprendidos dentro de ese concepto. Si no, no. Por último, la recomendación que hiciera Lord Wilberforce de interpretar con cautela las leyes referidas a temas controvertidos “que involucran apreciaciones morales y sociales sobre las cuales existen grandes divergencias” sería muy pertinente si todo aquello que la Ley no prohibiese estuviera permitido. Tiene mucho menos peso cuando la cuestión radica en determinar si el organismo regulador tiene o no la facultad de autorizarlo.

33. Lord Brennan y el señor Pannick se basaron en dos declaraciones diferentes formuladas por Ministros de Gobierno ante el Parlamento durante los debates sobre el proyecto de ley que se convirtió en la Ley de 1990. Tal como ocurre casi siempre que se recurre a ese tipo de declaraciones al amparo de lo dispuesto en el caso *Pepper v Hart* [1993] AC 593, ninguna de las dos resultaron, a mi juicio, de utilidad.
34. Opino que corresponde aceptar entonces el argumento presentado por el señor Pannick y resolver que tanto el DGP como la tipificación HLA podrían ser autorizados legalmente por el organismo regulador como actividades destinadas a determinar si un embrión es adecuado para su implantación con arreglo al párrafo 1 (1) (d).
35. Lord Brennan criticó en cierta medida la manera en que el organismo regulador periódicamente había manifestado cuál era su posición y había flexibilizado algunas de las condiciones necesarias para otorgar licencias. Por ejemplo, originalmente el organismo regulador otorgaba una licencia para la tipificación HLA sólo si la biopsia celular era también necesaria para el DGP, porque dado el riesgo que corría el embrión al extraerse una sola célula no se justificaba que se hiciera la biopsia exclusivamente para la tipificación HLA. Más recientemente, tras estudiarse en mayor profundidad los efectos de la biopsia celular, el organismo regulador decidió que el riesgo es tan bajo que justifica el otorgamiento de una licencia sólo para la tipificación HLA. Creo que esa decisión concuerda exactamente con el deber que tiene el organismo regulador de mantener los últimos adelantos de la ciencia sometidos a revisión constante.
36. Otro tema en el que el organismo regulador ha cambiado de parecer es la utilización de médula ósea en lugar de sangre del cordón umbilical para obtener células madre. En algunas ocasiones, la médula ósea puede ser más apropiada como fuente de células madre, pero implica someter al niño donante a un procedimiento mucho más invasivo que si se extrajera sangre del cordón umbilical. La política formulada por el organismo regulador en 2001 (conforme a la cual se otorgó la licencia que autorizó el tratamiento de la señora Hashmi) exigía como requisito que “la intención” fuera únicamente extraer sangre del cordón umbilical. Con posterioridad a una revisión llevada a cabo en 2004, el organismo regulador decidió suprimir esa condición. Su cumplimiento era imposible en la práctica porque una vez que el embrión había sido implantado y el niño concebido el caso quedaba fuera de la jurisdicción del organismo regulador. El 21 de julio de 2004, el organismo aprobó con modificaciones la siguiente recomendación de su Comité Jurídico y de Ética:
    “Se reconoció que la HFEA no tenía facultades para imponer condiciones que prohibieran intentos posteriores de obtener médula ósea. Sin embargo, el Comité observó que la obtención de médula ósea de niños de más de un año de edad para el tratamiento de hermanos constituía una estrategia de tratamiento que era prácticamente de rutina cuando no había otro donante compatible. El Comité también observó que conforme al derecho judicial los criterios que aplican los tribunales para determinar el tipo de procedimiento médico que puede llevarse a cabo en un niño son mucho más exigentes si se trata de un tratamiento que no es terapéutico. Si bien es habitual que los padres presten su consentimiento para el tratamiento médico de sus hijos, los tribunales están facultados en todos los casos para revocar ese consentimiento si el tratamiento no atendiera al interés superior del niño”.
37. Esos motivos parecen ser válidos. No tengo dudas de que los profesionales de la medicina tienen muy en cuenta el principio según el cual toda intervención que se lleve a cabo en un niño para la que no existe una razón clínica relacionada con el niño en sí debe justificarse alegando otros motivos que atiendan al interés superior del niño. Si la cuestión es en apariencia dudosa, se puede obtener una autorización judicial. En mi opinión, el organismo regulador tiene el derecho de suponer que un niño concebido en conformidad con la licencia otorgada estará, después del nacimiento, plenamente amparado por la ley.
38. Sin embargo, considero que es innecesario expresar opinión alguna acerca de las críticas de Lord Brennan en cuanto a la manera en que el organismo regulador ejerció sus facultades. No se ha sugerido en ningún momento que el organismo haya actuado de modo irrazonable al otorgar una licencia. El argumento de la apelante siempre fue el mismo: no estaba facultado para hacerlo. En mi opinión, sí lo estaba; y por lo tanto propongo que se rechace la apelación.

Fundamentación de la traducción

Al abordar la traducción de un texto jurídico redactado en el Reino Unido, el trabajo del traductor no sólo consiste en servir de enlace entre dos lenguas sino –particularmente- entre dos sistemas jurídicos diferentes. Ese es uno de los escollos que tuve que salvar en la traducción del texto que me ocupa. La organización de la justicia en el Reino Unido es completamente distinta a la de nuestro país, y la equivalencia es en ocasiones difícil –si no imposible- de encontrar. La única manera de suplir esa falta es conocer el ordenamiento jurídico al que pertenece el texto fuente. Internet constituye hoy en día un recurso invalorable a tales efectos, siempre que se tenga en cuenta la fiabilidad de la fuente. Fue de gran utilidad en este caso la página del Parlamento del Reino Unido, que cuenta con gran cantidad de información y un glosario terminológico con la jerga empleada en esa institución, y la página de la Red Judicial Europea, que contiene textos traducidos a diferentes idiomas –entre ellos, al español- acerca de la organización de la justicia de los Estados miembro. A esas páginas y a otras fuentes de información recurrí para solucionar los distintos problemas que se fueron presentando y que detallo a continuación.

El texto fuente tiene un registro formal, que puede apreciarse sobre todo en las reglas de etiqueta que observan los jueces al dirigirse a sus colegas. El juez encabeza el texto con la expresión "*My Lords*". Analicé distintas alternativas de traducción: "Milores", "Señorías", "Excelencias". Descarté en primer lugar el término "Milores", dado que su uso es más propio del ámbito literario. Entre "Señorías" o "Excelencias", decidí que esta última opción era la más apropiada en este contexto. En Argentina, un juez de primera instancia se dirige a un colega empleando la expresión "Vuestra Señoría". Pero el tratamiento de cortesía utilizado para dirigirse a un juez de Cámara o de la Suprema Corte es "Vuestra Excelencia". Me incliné entonces por el uso de ese tratamiento por ser la Cámara de los Lores –en su función de tribunal de última instancia– un equivalente funcional de la Corte Suprema de Justicia de nuestro país.

En el caso del tratamiento mencionado fue posible recurrir a la equivalencia funcional para arribar a una solución. Sin embargo, no puede decirse lo mismo del resto de los títulos y cargos que aparecen a lo largo del texto fuente (*Master of the Rolls, Queen´s Counsel, Lord Justice*), para los que fue necesario recurrir a una aclaración de los conceptos –en ocasiones mediante una explicación parentética y en otros casos mediante una nota al pie–por no existir una equivalencia y porque considero que una traducción literal sería un obstáculo para la comprensión. *Queen´s Counsel*, por ejemplo, se traduce a menudo como "abogado de la Corona" o "asesor letrado de la Corona". Pero esa traducción daría a entender que un *Queen´s Counsel* representa únicamente a la Corona, algo que no siempre es así en la actualidad.

Hay además en el texto fuente otras expresiones que no tienen equivalente en nuestro sistema jurídico. A modo de ejemplo, cito dos de ellas: "*common law*" y "*affirmative resolution procedure"*. En ninguno de los dos casos me pareció procedente hacer una traducción literal. En cuanto a "*common law*", si bien una de las acepciones es, conforme al diccionario jurídico Cabanellas, "el Derecho común de un país, en contraposición a las normas especiales que se aplican sólo a ciertas personas, regiones o materias", en otros casos se utiliza la expresión para designar al sistema jurídico anglosajón, en contraposición con el sistema continental europeo. En este último sentido, habitualmente no se traduce la expresión por tratarse de un concepto que no tiene un equivalente funcional exacto en español. Sin embargo, cabe señalar que dentro del contexto del texto fuente, se hace referencia al *common law* como contraparte de *statutory law* (derecho legislado). En este sentido la expresión "*common law*" está empleada para referirse al Derecho creado por los jueces (*judge-made law)* por lo que decidí traducirla por "derecho judicial". En lo que se refiere a "*affirmative resolution procedure*", se trata de un proceso por el cual toda reglamentación redactada por un ministerio, organismo, etc., debe contar con la aprobación de ambas Cámaras del Parlamento. Una traducción literal hubiera obstaculizado la comprensión, dado que se trata de un concepto jurídico que no se conoce en la lengua meta. La solución fue entonces recurrir a una explicación del concepto.

En cuanto a los términos que no presentan un problema para el traductor a nivel de la equivalencia, hay algunos que plantean un desafío debido a la polisemia. Una de las palabras que a mi entender merecen mencionarse particularmente es "case". No es infrecuente que en los textos jurídicos aparezca invariablemente la palabra "caso" como traducción del término "case". Pero debe prestarse atención a la polisemia del término para no caer en errores de sentido. En el texto que traduje, por ejemplo, "*the authority´s case*" no es "el caso del organismo" sino "los argumentos que el organismo esgrime como defensa". Del mismo modo, en la oración "*The case has always been that it had no power to do so*", "*case*" se refiere al argumento de la apelante. Son tantas las instancias en que aparece el término "*case"* a lo largo del texto que intenté no abusar en lo posible de la palabra "caso" en expresiones de uso corriente como "as is almost invariably the case when…" (tal como ocurre casi siempre que…), "in some cases" (en algunas ocasiones), etc.

Otro de los problemas que tuve que resolver fue el de la intertextualidad: decidir en cada caso qué estrategia de traducción debía seguir para traducir las referencias textuales de manera inteligible. Una de ellas se encuentra en la frase "…*play dice with conception*". Dentro de esa frase hay un elemento extraño a la referencia textual: "*conception*". El resto de la expresión proviene de una famosa frase de Einstein: "*God does not play dice with the universe*". En el texto que traduje, el juez reemplaza "*the universe*" por "*conception*" para adaptar la referencia al contexto. Dado que la frase de Einstein es conocida en la lengua meta y se ha traducido generalmente por "Dios no juega a los dados con el universo", no creí conveniente en este caso apartarme de la traducción literal. Por supuesto, "jugar a los dados con la concepción" no es una frase habitual en español, como tampoco lo es la versión en inglés. Pero la referencia intertextual es familiar en los dos idiomas, por lo que decidí mantenerla. Otro ejemplo de intertextualidad puede observarse en la frase: "*If ever there was a dog which did not bark in the night, this was it*". En este caso, una traducción literal carecería de sentido en el texto meta. La frase hace alusión a un cuento de Sherlock Holmes en el que el hecho de que un perro no ladrara al presenciar un asesinato constituye la clave para resolver el misterio. Se trata entonces de una expresión que inmediatamente remite al lector británico al cuento mencionado y le permite comprender la idea expresada. Pero su traducción literal no significa nada para otros lectores. Opté por lo tanto por recurrir a una metáfora en español que exprese la idea de la referencia textual y traduje: "Si alguna vez el silencio dijo más que mil palabras, fue en esa oportunidad".

Por último, quisiera referirme a la traducción de nombres propios, en este caso, nombres de organismos, informes, leyes, etc. El criterio que utilicé no fue uniforme, dado que en algunos casos encontré una traducción "oficial" y en otros no. En estos últimos, decidí dejar el nombre en inglés y dar una traducción en español, encerrada entre paréntesis y con un tipo de letra diferente, para dar a entender que se trata de una aclaración del traductor.

Los problemas que se fueron presentando al traducir el texto seleccionado fueron, sin duda, más de los que señalo en este análisis. Intenté aquí presentar los que considero son más relevantes. Para su solución recurrí no sólo a páginas confiables de Internet, sino también a diccionarios especializados, diccionarios generales, libros de texto y documentos en español. Por último, cabe señalar que si bien el traductor puede alcanzar un cierto conocimiento de los distintos sistemas jurídicos, lo hace sólo a los fines instrumentales. En consecuencia, a pesar de haber realizado una investigación minuciosa, también recurrí en ciertos casos a profesionales del Derecho.

Apéndice

-Texto completo-

HOUSE OF LORDS
OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
IN THE CAUSE
Quintavalle (on behalf of Comment on Reproductive Ethics) (Appellant) v. Human Fertilisation and Embryology Authority (Respondents)
[2005] UKHL 28

LORD HOFFMANN

My Lords,

1. Zain Hashmi is a little boy, now aged 6, who suffers from a serious genetic disorder called beta thalassaemia major. His bone marrow does not produce enough red blood cells and in consequence he is often very poorly and needs daily drugs and regular blood transfusions to keep him alive. But he could be restored to normal life by a transplant of stem cells from a tissue compatible donor.
2. The problem is to find compatible tissue which Zain's immune system will not reject. The chances of finding a compatible donor who is not a sibling are extremely low. Even in the case of siblings, the chances are only one in four. None of Zain's three elder siblings is compatible. In addition, the donor must be free of the same disorder. That lengthens the odds even more. Zain's mother, Mrs Hashmi, has twice conceived in the hope of giving birth to a child whose umbilical blood could provide stem cells for Zain. Once the foetus was found to have beta thalassaemia major and she had an abortion. On the second occasion she gave birth to a child whose tissue turned out not to be compatible.
3. There is a way to save the Hashmi family from having to play dice with conception. For 30 years it has been possible to produce a human embryo by fertilisation of egg and sperm outside the body and then to implant that embryo in the womb. In vitro fertilisation (IVF) has enabled many couples who could not achieve natural fertilisation to have children. More recently, it has become possible to perform a biopsy upon the newly fertilised IVF embryo and remove a single cell to test it for genetic disorders. This is called pre-implantation genetic diagnosis (PGD). It provides a woman with information about the embryo proposed to be implanted in her body so that she may decide whether or not to proceed. Mrs Hashmi, for example, would have been spared having to have her foetus carrying beta thalassaemia major aborted if the embryo had been created by IVF and the disorder diagnosed by PGD.
4. Still more recently, and so far only in the United States, it has become possible to use the same single cell biopsy technique to test for tissue compatibility. This involves examination of the human leukocyte antigens (HLA) and is known as HLA typing. That means that if Mr and Mrs Hashmi's sperm and eggs are used to create IVF embryos which are then tested for beta thalassaemia major by PGD and for tissue compatibility with Zain by HLA typing, they can know that the child Mrs Hashmi conceives will have stem cells which could cure Zain. The question in this appeal is whether this can lawfully be done in the United Kingdom.
5. After the birth of the first IVF child or "test tube baby" in 1978, it became clear that the new technique, together with other potential developments in embryology and genetics, could raise serious medical and ethical issues. The government appointed a committee under the chairmanship of Dame Mary Warnock DBE to advise. It reported in 1984 (Report of the Committee of Inquiry into Human Fertilisation and Embryology). The centrepiece of the committee's recommendations was the creation of a statutory licensing authority to regulate all research and treatment which involved the use of IVF embryos.
6. This recommendation was given effect by the Human Fertilisation and Embryology Act 1990, which set up the Human Fertilisation and Embryology Authority ("the authority"). Members are appointed by the Secretary of State and it has to have a lay (ie not medically qualified or engaged in IVF treatment or research) chairman and deputy chairman and a majority of lay members: para 4 of Schedule 1. Members provide a broad range of experience: social, legal, managerial, religious and philosophical, as well as medical and scientific.
7. The source of the authority's power is section 3(1), which makes it a criminal offence to bring about the creation of an embryo or keep or use an embryo except pursuant to a licence from the authority. The proposed treatment of Mrs Hashmi to assist her in bearing a tissue-compatible child involves the creation and use of embryos and therefore requires a licence. In this case, the authority has granted

a licence which permits both PGD and HLA typing. But Ms Quintavalle, the claimant in these proceedings, who is director and founder of a group which believes in absolute respect for the human embryo, says that the authority has no power to authorise HLA typing. She brought judicial review proceedings for a declaration to that effect. It was granted by Maurice Kay J but an appeal was allowed and the application dismissed by the Court of Appeal (Lord Phillips of Worth Matravers MR and Schiemann and Mance LJJ) [2004] QB 168.

8. Whether the authority can grant such a licence depends on the extent of its powers under the 1990 Act. Section 11 provides that the authority may grant three kinds of licences and no others. Licences must be (a) "authorising activities in the course of providing treatment services" or (b) "authorising the storage of gametes and embryos" or (c) "authorising activities for the purposes of a project of research". The specific activities which may be authorised in the course of providing treatment services or for the purposes of research are then set out in Schedule 2.
9. In this case we are particularly concerned with the activities which may be authorised to be done in the course of providing treatment services. "Treatment services" are defined by section 2(1) to mean, among other things, medical services provided to the public for the purpose of assisting women to carry children. IVF is of course such a service; the proposal is to assist Mrs Hashmi to carry a child conceived by the implantation of an IVF embryo. So the question is whether PGD and HLA typing are activities which the authority can authorise to be done "in the course" of providing her with IVF treatment.
10. To find the answer, one must look at the list of activities in para 1 of Schedule 2. Para 1(3) provides that the authority may licence an activity on the list only if it appears to the authority to be "necessary or desirable for the purpose of providing treatment services". The activities include:
"(d) practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose".
11. The authority's case is that both PGD and HLA typing are to determine whether an embryo would be suitable for the purpose of being placed in Mrs Hashmi. The definition of treatment services focuses upon the woman as the person to whom the services are provided. The authority says that Mrs Hashmi is entitled to regard an embryo as unsuitable unless it is both free of abnormality and tissue compatible with Zain. Without such testing, she cannot make an informed choice as to whether she wants the embryo placed in her body or not. The authority considers it desirable for the purpose of providing her with treatment services, ie IVF treatment, that she should be able to make such a choice. Mr Pannick QC, who appeared for the authority, pointed out that the Act does not require that PGD or HLA typing should *constitute* treatment services. They must be activities *in the course* of such services, ie in the course of providing IVF treatment.
12. The claimant, on the other hand, says that this gives far too wide a meaning to the notion of being suitable. It would enable the authority to authorise a single cell biopsy to test the embryo for whatever characteristics the mother might wish to know: whether the child would be male or female, dark or blonde, perhaps even, in time to come, intelligent or stupid. Suitable must therefore have a narrower meaning than suitable for that particular mother. Maurice Kay J thought that suitable meant only that the embryo would be viable. That would rule out a good deal of PGD, because many genetic abnormalities do not affect the viability of the foetus. The abnormality manifests itself after birth. Before your Lordships, Lord Brennan QC, for the claimant, disavowed so narrow a construction. I think that he was right to do so. The narrower meaning is particularly difficult to support when paragraph 3(2)(e) lists, among the research projects which may be licensed, "developing methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation." It would be very odd if Parliament contemplated research to develop techniques which could not lawfully be used. So Lord Brennan accepts that suitable means more than viable. Building on paragraph 3(2)(e), he says that an embryo is suitable if it is capable of becoming a healthy child, free of abnormalities. PGD to establish that the embryo is free from genetic abnormalities is therefore acceptable. But not HLA typing. A baby which is not tissue compatible with Zain would not be in any way abnormal. It just would not answer the particular needs of the Hashmi family.
13. "Suitable" is one of those adjectives which leaves its content to be determined entirely by context. As my noble and learned friend Lord Scott of Foscote put it in argument, a suitable hat for Royal Ascot is very different from a suitable hat for the Banbury cattle market. The context must be found in the scheme of the 1990 Act and the background against which it was enacted. In particular, one is concerned to discover whether the scheme and background throw light on the question of whether the concept of suitability includes taking into account the particular wishes and needs of the mother. If so, the authority may authorise tests to determine whether the embryo is in that sense suitable for implantation in her womb. It may, but of course it is not obliged to do so. It may consider that allowing

the mother to select an embryo on such grounds is undesirable on ethical or other grounds. But the breadth of the concept of suitability is what determines the breadth of the authority's discretion.

14. The Warnock Report discussed possible future developments in embryology. Some of these, such as creating children in vitro or the gestation of human embryos in other species, it recommended should be unequivocally banned. On others, it made no such recommendations. One of these was embryonic biopsy, such as can now be used for PGD and HLA typing. It described (in para 12.13) the advantages of PGD in detecting abnormalities before implantation ("avoiding the difficult decision for the parents of whether to seek a termination where abnormality is detected") and its disadvantages, namely the need to use IVF. It concluded that it was unlikely that embryonic biopsy would become a feasible method of detecting abnormal embryos for some considerable time.
15. For present purposes, the most relevant discussion in the Warnock Report concerned gender identification. The report considered (in para 9.8) the possibility of gender identification of an IVF embryo by single cell biopsy. Such information could be used to select embryos to "prevent the birth of a child with a sex-linked hereditary disease". The committee saw no reason why this should not be done: para 9.11. It then went on to consider the use of gender identification to select the sex of a child "for purely social reasons". After some discussion of the social issues (population distribution, the role of women in society), the committee said that it was unable to make any positive recommendations. Nevertheless:

    "the whole question of the acceptability of sex selection should be kept under review (See chapter13)."

16. Chapter 13 was devoted to recommending the establishment of what became the authority. The committee said in para 13.3 that:
    "The authority should be specifically charged with the responsibility to regulate and monitor practice in relation to those sensitive areas which raise fundamental ethical questions."
17. Because the authority would be concerned not merely with medical or scientific matters but with "broader matters and with the protection of the public interest" the committee recommended (in para 13.4) substantial lay representation:
    "If the public is to have confidence that this is an independent body, which is not to be unduly influenced by sectional interests, its membership must be wide-ranging and in particular the lay interests should be well represented."
18. The conclusion which I draw is that the committee contemplated that the authority would decide the circumstances, if any, in which sex selection on social grounds should be authorised. As sex selection on social grounds is the most obvious case of selecting an embryo on grounds other than its health, I would infer that the Warnock Committee did not intend that selection of IVF embryos on grounds which went beyond genetic abnormality should be altogether banned.
19. It does not of course follow that Parliament gave effect to this recommendation in the 1990 Act. But the Act was preceded by a White Paper, Human Fertilisation and Embryology: A Framework for Legislation, published in November 1987, which suggests acceptance of the views of the Warnock Committee on this point. In this paper, the Government set out the general principles upon which it proposed to legislate. In para 13 it accepted the "basic principle underlying the Warnock Report recommendations - namely the need 'to regulate and monitor practice in relation to those sensitive areas which raise fundamental ethical questions.' " The authority would therefore exercise its functions in areas which included "any [research or] treatment involving human embryos created in vitro." (The square brackets were to leave Parliament to decide, as it subsequently did, whether to allow research at all). The intention was therefore to define the functions of the authority in very broad terms. To ensure that the legislation was flexible enough to deal with "as yet unforeseen treatment developments which may raise new ethical issues", the Bill would:
    "contain powers to make regulations (subject to the affirmative resolution procedure) to add to or subtract from the range of matters coming within the regulatory scope of the authority." (Para 14).
20. On prohibited areas of research (assuming that any research was to be allowed) the government did not think that the Warnock Committee had gone far enough. It had proposed (in para 12.16) that the authority should promulgate guidance on research which was "unlikely to be considered ethically acceptable in any circumstances". The government thought (in para 36) that the legislation should "clearly prohibit" some such activities, but with a power for Parliament itself, by affirmative resolution, to make exceptions if new developments made them appropriate.
21. Included in the matters which were to be prohibited were what journalists commonly call "designer babies" or, as the White Paper put it, in para 37:
    "the artificial creation of human beings with certain pre-determined characteristics through modification of an early embryo's genetic structure."

Another was the cloning of individuals by nuclear substitution. But, relevantly for present purposes, there was no proposal to include in the "clearly prohibited" list the testing of embryos to enable the mother to choose to carry a child with characteristics of her choice. One infers that the White Paper intended the fundamental ethical issues which such activities might raise to be determined by the statutory authority, subject to the regulation-making power by which Parliament could impose its own decision.

22. The structure of the 1990 Act reflects the scheme foreshadowed in the White Paper. Section 3(3)(a) prevents, as the Warnock Committee recommended, the development of the foetus in vitro by providing that a licence may not authorise the keeping or use of an embryo after the appearance of the primitive streak. Nor may the authority authorise the placing of an embryo in an animal (subsection (3)(b)) or the cloning of an embryo (subsection (3)(d)). By para 1(4) of Schedule 2, a licence may not authorise altering the genetic structure of any cell while it forms part of an embryo. These activities are all clearly prohibited. In addition, section 3(3)(c) enables the Secretary of State and Parliament by affirmative resolution to add other activities involving the keeping or using of embryos to the prohibited list.
23. Subject to these prohibitions, the licensing power of the authority is defined in broad terms. Paragraph 1(1) of Schedule 2 enables it to authorise a variety of activities (with the possibility of others being added by regulation) provided only that they are done "in the course of" providing IVF services to the public and appear to the authority "necessary or desirable" for the purpose of providing those services. Thus, if the concept of suitability in sub-paragraph (d) of 1(1) is broad enough to include suitability for the purposes of the particular mother, it seems to me clear enough that the activity of determining the genetic characteristics of the embryo by way of PGD or HLA typing would be "in the course of" providing the mother with IVF services and that the authority would be entitled to take the view that it was necessary or desirable for the purpose of providing such services.
24. The chief argument of Lord Brennan against interpreting suitability in this sense was that, once one allowed the mother's choice to be a legitimate ground for selection, one could not stop short of allowing it to be based upon such frivolous reasons as eye or hair colour as well as more sinister eugenic practices. It was, he said, inconceivable that Parliament could have contemplated the possibility of this happening.
25. Let it be accepted that a broad interpretation of the concept of suitability would include activities highly unlikely to be acceptable to majority public opinion. It could nevertheless be more sensible for Parliament to confine itself to a few prohibitions which could be clearly defined but otherwise to leave the authority to decide what should be acceptable. The fact that these decisions might raise difficult ethical questions is no objection. The membership of the authority and the proposals of the Warnock Committee and the White Paper make it clear that it was intended to grapple with such issues.
26. In this case, as I have said, Maurice Kay J thought that suitable meant no more than suitable to produce a viable foetus but Lord Brennan, understandably unwilling to argue that Parliament might have outlawed PGD, said that it meant suitable to produce a healthy foetus, free of genetic defects. But this definition is itself not free from difficulty. What amounts to a genetic defect? Marie Stopes, an enthusiastic believer in eugenics, cut off relations with her son because she considered that the woman he chose to marry suffered from a genetic defect: she was short-sighted and had to wear spectacles. Surely it would be more sensible to concentrate on whether choice on such grounds was ethically acceptable rather than to argue over whether it counted as a genetic defect. The great advantage which Parliament would have seen in using broad concepts to define the remit of the authority is that it would avoid sterile arguments over questions of definition and focus attention upon the ethical issues.
27. Even in cases in which one could clearly say that the ground for selection was not a genetic defect, a total prohibition might exclude cases which many people would think ethically acceptable. Mr Pannick drew attention to the facts of *Leeds Teaching Hospitals NHS Trust v A* [2003] 1 FLR 1091. In the course of providing IVF treatment to a husband and wife, the hospital mixed up the sperm provided by the husband with that of another man. As a result, a woman gave birth to twins, the father of whom was a stranger. But they suffered from no genetic defects and Mr Pannick points out that if the muddle had been suspected before implantation of the embryo, Lord Brennan's construction of suitability would have prevented any tests to check the embryo's DNA. Likewise, many people might agree with the authority that the tests proposed to be conducted in the present case would be ethically acceptable. It often seemed that an unstated assumption in Lord Brennan's argument was that the authority was likely to authorise anything that it was not positively prohibited from authorising or that it could not be trusted to make proper ethical distinctions. But these assumptions are in my opinion illegitimate. The authority was specifically created to make ethical distinctions and, if Parliament should consider it to be failing in that task, it has in reserve its regulatory powers under section 3(3)(c).

28. Perhaps the most telling indication that Parliament did not intend to confine the authority's powers to unsuitability on grounds of genetic defects is, as Mance LJ pointed out [2004] QB 168, 209, para 143, the absence of any reference in the Act to selection on grounds of sex. It could be said that the Act made no reference to HLA typing because neither the Warnock Committee nor Parliament in 1990 foresaw it as a possibility. But there was intense discussion, both in the report and in Parliament, about selection for sex on social grounds. If ever there was a dog which did not bark in the night, this was it. It is hard to imagine that the reason why the Act said nothing on the subject was because Parliament thought it was clearly prohibited by the use of the word "suitable" or because it wanted to leave the question over for later primary legislation. In my opinion the only reasonable inference is that Parliament intended to leave the matter to the authority to decide. And once one says that the concept of suitability can include gender selection on social grounds, it is impossible to say that selection on the grounds of any other characteristics which the mother might desire was positively excluded from the discretion of the authority, however unlikely it might be that the authority would actually allow selection on that ground.
29. Lord Brennan referred to the well known remarks of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800. The question in that case was whether section 1(1) of the Abortion Act 1967, which in certain circumstances legitimated abortion "when a pregnancy is terminated by a registered medical practitioner" could include the case in which it was terminated by a nurse under the general supervision of a medical practitioner who was not actually present. The question arose because of the development since the passing of the Act of a new method for terminating pregnancy. Lord Wilberforce said (at p 822):
"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."
30. Lord Brennan commended in particular Lord Wilberforce's opinion that the Abortion Act should be construed with caution because it was dealing with "a controversial subject involving moral and social judgments on which opinions strongly differ." That, he said, was equally true of the 1990 Act.
31. Lord Wilberforce's remarks provided valuable assistance to the House in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687. The question there was whether the definition of an embryo in the 1990 Act, which contemplated that it would be created by fertilisation, extended to embryos created by cell nuclear replacement in an unfertilised egg. This was a method of creating embryos which was not contemplated at the time of the Act and the language of the definition was to some extent inappropriate to describe it, but the House nevertheless held that the policy of the Act was to regulate the use of embryos however created. The House followed Lord Wilberforce's guidance in holding that there was a "clear purpose in the legislation" which could "only be fulfilled if the extension was made".
32. But, like all guidance on construction, Lord Wilberforce's remarks are more appropriate to some cases than others. This is not a case in which one starts with the presumption that Parliament's intention was directed to the state of affairs existing at the time of the Act. It obviously intended to regulate research and treatment which were not possible at the time. Nor is it a case, like the first *Quintavalle* case, in which the statutory language needs to be extended beyond the "expressed meaning". The word "suitable" is an empty vessel which is filled with meaning by context and background. Nor is it helpful in this case to ask whether some new state of affairs falls within "the same genus" as those to which the expressed policy has been formulated. That would beg the question because the dispute is precisely over what the genus is. If "suitability" has the meaning for which the authority contends, then plainly PGD and HLA typing fall within it. If not, then not. Finally, Lord Wilberforce's recommendation of caution in the construction of statutes concerning controversial subjects "involving moral and social judgments on which opinions strongly differ" would be very much to the point if everything which the Act did not forbid was permitted. It has much less force when the question is whether or not the authority has power to authorise it.

33. Lord Brennan and Mr Pannick each relied upon different statements made by ministers in Parliament during the debates on the Bill which became the 1990 Act. As is almost invariably the case when such statements are tendered under the rule in *Pepper v Hart* [1993] AC 593, I found neither of any assistance.
34. I would therefore accept Mr Pannick's argument and hold that both PGD and HLA typing could lawfully be authorised by the authority as activities to determine the suitability of the embryo for implantation within the meaning of paragraph 1(1)(d).
35. Lord Brennan made some criticism of the way in which the authority had from time to time stated its policy and relaxed some of the conditions upon which licences were granted. For example, the authority originally gave a licence for HLA typing only if the cell biopsy was also required for PGD, because it considered that the risk to the embryo from removal of a cell did not warrant it being done for HLA typing alone. More recently, after further study of the effects of a cell biopsy, it has decided that the risk is low enough to justify a licence for HLA typing alone. That seems to me exactly in accordance with the duty of the authority to keep the state of the art under constant review.
36. Another point on which the authority has shifted its position is the use of bone marrow rather than umbilical cord blood as a source of stem cells. Bone marrow may in some cases be more suitable but involves a far more intrusive operation upon the donor child than taking cord blood. The policy formulated by the authority in 2001 (under which the licence which authorised the treatment of Mrs Hashmi was granted) required a condition that "the intention" should be only to take cord blood. After a review in 2004, the authority decided to delete this condition. It was in practice unenforceable because once the embryo had been implanted and the child conceived, the case passed out of the jurisdiction of the authority. On 21 July 2004 the authority endorsed with amendment the following recommendation of its Ethics and Legal Committee:
    "It was acknowledged that the HFEA did not have any power to impose a condition that would prohibit any future attempt to obtain bone marrow. However the committee noted that obtaining bone marrow for the treatment of siblings from children from the age of one year was a relatively routine treatment strategy where no other matched donor was available. The committee also noted that under common law the test for the type of medical procedures that may be performed on a child is very much higher when such treatment is non-therapeutic. Although parents usually give consent to a child's medical treatment, the courts always have the power to overrule their consent where the procedure would not be in the child's best interests."
37. These reasons appear to be valid. I have no doubt that medical practitioners take very seriously the law that any operation upon a child for which there is no clinical reason relating to the child itself must be justified as being for other reasons in the child's best interests. If the question appears to be doubtful, a ruling from the court may be obtained. The authority is in my opinion entitled to assume that a child conceived pursuant to its licence will, after birth, receive the full protection of the law.
38. In my opinion, however, it is unnecessary to express any view about Lord Brennan's criticisms of the way the authority has exercised its jurisdiction. There has never been any suggestion that the authority acted unreasonably in granting a licence. The case has always been that it had no power to do so. In my opinion it did, and I would therefore dismiss the appeal.

LORD SCOTT OF FOSCOTE
My Lords,
39. I have had the advantage of reading in draft the opinions of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. For the reasons they have given I, too, would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE
My Lords,
40. I have had the privilege of reading in draft the opinions of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. I am in full agreement with them and for the reasons given by Lord Hoffmann and Lord Brown I too would dismiss this appeal.

LORD STEYN
My Lords,
41. I have had the advantage of reading the opinions of my noble and learned friends Lord Hoffmann and Lord Brown of Eaton-under-Heywood. For the reasons they have given I would dismiss the appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

42. This case is all about the scope of a power, not about its exercise. The important, but limited, question it raises is whether the Human Fertilisation and Embryology Authority ("the authority"), created by the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), is empowered by the 1990 Act to license tissue typing, a process by which embryonic cells are tested for their compatibility with the tissue of a sick sibling with a view to planting a compatible embryo into the mother's womb and the eventual treatment of the sibling with blood from the baby's umbilical cord (or, failing that, with bone marrow to be taken when the newborn child is older).
43. The ethical questions raised by such a process are, it need hardly be stated, profound. Should genetic testing be used to enable a choice to be made between a number of healthy embryos, a choice based on the selection of certain preferred genetic characteristics? Is it acceptable to follow a procedure resulting in the birth of a child designed to secure the health of a sibling and necessarily therefore intended to donate tissue (including perhaps bone marrow) to that sibling? Is this straying into the field of "designer babies" or, as the celebrated geneticist, Lord Winston, has put it, "treating the offspring to be born as a commodity?" These are just some of the questions prompted by this litigation. But troubling though such questions are, the arguments are certainly not all one way, as may be demonstrated by the facts of this very case.
44. Mr and Mrs Hashmi's fourth child, Zain, has a serious blood disorder, beta thalassaemia major. His condition is wretched, his prospects uncertain. His best chance of a cure is by a transplant of stem cells from someone with matching tissue. Since none of the three elder siblings have matching tissue, Mrs Hashmi decided to have a fifth child in the hope that its tissue would match Zain's. Having conceived, she discovered from pre-natal testing that that child too would have beta thalassaemia major and so she underwent an abortion. She conceived again and a healthy son was born, but unfortunately his tissue did not match Zain's. It was at this point that Mrs Hashmi, contemplating a sixth child, began investigating the possibilities of IVF treatment and eventually, with medical advice, sought to benefit from a licence under the 1990 Act.
45. The licence was granted by the authority on 22 February 2002. It was made subject to conditions which the authority had laid down on 13 December 2001 when announcing a policy decision to permit tissue typing in cases where pre-implantation genetic diagnosis ("PGD") was already necessary to avoid passing on a serious genetic disorder. Included amongst the conditions were that the sick sibling's condition should be severe or life threatening, of a sufficient seriousness to justify the use of PGD; that the embryos should themselves be at risk of that condition; that all other possibilities of treatment and sources of tissue for the sick sibling should have been explored; that the technique should not be available where the intended recipient is a parent; and that the intention should be to take only cord blood for the purposes of the treatment.
46. True it is that since that December 2001 policy decision the authority has contemplated licensing tissue typing on a less restricted basis: first, in cases where there is no need for PGD; secondly, where the intention is if necessary to use bone marrow and not just blood from the abdominal cord; and thirdly, where a parent rather than a sibling is to be benefited. All this, however, goes only to emphasise the comparative narrowness of the issue presently before the House. Your Lordships are simply not concerned with the conditions under which tissue testing should be licensed, assuming it is licensable at all—nor even, indeed, with *whether* it should be licensed. Your Lordships' sole concern is whether the Act *allows* the authority to license tissue typing were it in its discretion to think it right to do so.
47. IVF treatment is a fast moving medical science. It is clear that when the 1990 Act was passed PGD was expressly foreseen but tissue typing was not. It is your Lordships' task to decide whether by the 1990 Act, Parliament was conferring power upon the newly created authority to take whatever decisions arose from such unforeseen possibilities as tissue typing, or whether Parliament must rather have been contemplating the need for further primary legislation to deal with whatever ethical questions arose out of such future discoveries.
48. Whether or not the authority is empowered to license tissue typing ultimately depends on the true construction of two particular provisions in the 1990 Act, section 2(1) and paragraph 1(1)(d) of Schedule 2. It is convenient at once to set these out (italicising the most important words) and also section 11(1), their immediate statutory context:

    Section 11(1) provides:

    "The authority may grant the following and no other licences—(a) licences under paragraph 1 of Schedule 2 to this Act authorising activities in the course of providing treatment services . . .".

Section 2(1) provides:

"In this Act . . . '*treatment services*' *means medical,* surgical or obstetric *services provided* to the public or a section of the public *for the purpose of assisting women to carry children*."

Paragraph 1 of Schedule 2 provides:

"(1) A licence under this paragraph may authorise any of the following in the course of providing treatment services— … (d) *practices designed* to secure that embryos are in a suitable condition to be placed in a woman or *to determine whether embryos are suitable for that purpose*

. . .

(3) A licence under this paragraph cannot authorise any activity unless it appears to the authority to be necessary or desirable for the purpose of providing treatment services."

49. The critical question, therefore, put compendiously, is whether tissue testing is a practice designed to determine whether an embryo is suitable for placing in a woman (para 1(1)(d)) and necessary or desirable for the purpose of providing a medical service which itself is to assist a woman to carry the child (section 2(1)). Putting the matter quite simply at this stage, there are essentially three possible answers to this question. First, 'no' because the only embryo testing permitted by these provisions is PGD insofar as that is necessary to ensure that the woman can carry the child successfully to full term—in other words embryonic screening to eliminate just such genetic defects as may affect the viability of the foetus and no other. Second, 'no' because, whilst the 1990 Act allows PGD screening to eliminate gene and chromosome defects such as may affect that child (or be carried by that child to future generations), it does not permit tissue typing. Third, 'yes' because tissue typing also can be licensed: like PGD screening, it provides information about the characteristics of the embryo which is relevant to the woman's decision whether or not to carry the child.
50. No one now is contending for the first of those three possible meanings (although it was the meaning adopted by Maurice Kay J at first instance). The appellants contend for the second; the respondent authority and the Secretary of State for Health as intervener contend for the third (the meaning preferred by the Court of Appeal).
51. Initially, I confess to having found some considerable force in the appellant's argument that PGD screening is one thing, and properly licensable under the 1990 Act, tissue typing a completely different concept and impermissible. It is one thing to enable a woman to conceive and bear a child which will itself be free of genetic abnormality; quite another to bear a child specifically selected for the purpose of treating someone else. One can read into the statutory purpose specified by section 2(1), that of "assisting women to carry children", the notion of healthy children—only a genetically healthy embryo being "suitable" for placing in the woman within the meaning of paragraph 1(1)(d). To read into section 2(1), however, the notion that the child will be a suitable future donor for the health of another would be to stretch the statutory language too far. And it may be said to raise ethical questions of a quite different order from those arising out of straightforward PGD screening.
52. By the end of the argument, however, I had come to the conclusion that Mr Pannick QC's contended for construction of the 1990 Act is to be preferred. My reasons for this conclusion can be grouped under three headings and, since I have now had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann, can be comparatively shortly stated.

The background to the 1990 Act

53. I pass over the Warnock Report, pausing only to note that in Chapter 9, headed "The wider use of these techniques" ("Techniques for the alleviation of infertility"), the committee, at paragraph 9.11, expressly envisaged the future possibility of sex selection "for purely social reasons" and concluded that "the whole question of the acceptability of sex selection should be kept under review"—review which inferentially was to be undertaken by a proposed new statutory licensing authority established "to regulate and monitor practice in relation to those sensitive areas which raise fundamental ethical questions." (paragraph 13.3). The White Paper which followed the Warnock Report, Human Fertilisation and Embryology: A Framework for Legislation (1987), proposed at paragraph 14:

"To ensure that the legislation is flexible enough to deal with as yet unforeseen treatment developments which may raise new ethical issues, the Bill will contain powers to make regulations (subject to the affirmative resolution procedure) to add to or subtract from the range of matters coming within the regulatory scope of the authority."

The scheme and structure of the 1990 Act

54. Certain activities in connection with embryos are expressly prohibited—see sections 3, 3A (a prohibition in connection with germ cells introduced by section 156 of the Criminal Justice and Public Order Act 1994), section 4, and paragraph 1(4) of Schedule 2.

55. Consistently with paragraph 14 of the White Paper, there is power to make regulations (subject to affirmative resolution) both to add to the range of matters coming within the authority's regulatory scope—see paragraph 1(1)(g) of Schedule 2 enabling regulations to be made for the licensing of other practices in the course of providing treatment services—and to subtract from the licensing powers already conferred on the authority—see section 3(3)(c) which enables regulations to be made prohibiting the keeping or use of an embryo in such circumstances as may be specified.
56. This legislative scheme necessarily contemplates that the only fresh practices arising out of unforeseen treatment developments capable of becoming licensable by regulation under paragraph 1(1)(g) will themselves have to be characterisable as being "in the course of," and "necessary or desirable for the purpose of," providing treatment services, which itself argues for a wide construction to be given to the definition of "treatment services" in section 2(1). The scheme also, of course, enables section 3(3)(c) regulations to be made restricting the authority's powers if ever it were thought to be dealing inappropriately with the "new ethical issues" arising out of the "as yet unforeseen treatment developments" contemplated by the White Paper.
57. Lord Brennan QC sought to rely on the interpretative guidance provided by Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822, particularly with regard to legislation "dealing with a controversial subject involving moral and social judgments on which opinions strongly differ", as applied by Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687. There Lord Bingham observed (p 697) that the 1990 Act, besides
"outlaw[ing] certain grotesque possibilities (such as placing a live animal embryo in a woman or a live human embryo in an animal), . . . otherwise opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all."
58. There is no inconsistency however, between that approach and the authority's stance in the present case. There it led to a newly discovered method of creating embryos being held to fall within the scope of regulatory control under the 1990 Act. So too here, the respondent's case is that tissue testing is controlled by the 1990 Act. It is not "left unregulated." There will be "no free for all." Rather the licensing of this new technique is for the discretion of the authority.
The true construction of section 2(1) and paragraph 1(1)(d)
59. I have already described (in para 49) the three possible meanings to be ascribed to section 2(1) and paragraph 1(1)(d) and the rival positions now taken by the respective parties.
60. The strength of Lord Brennan's case lies in the lengths to which Mr Pannick's argument necessarily takes him. Mr Pannick argues that PGD screening assists a woman to carry a child because it gives her the knowledge that the child will not be born handicapped. Without such knowledge some women who carry genetic diseases would not be prepared to have children. In the same way, he argues, tissue typing would assist Mrs Hashmi to carry a child because her wish to do so is conditional upon knowing that the birth of that child would be capable of curing Zain. As, however, Mr Pannick was bound to accept, under this reasoning PGD to ensure that a child had certain characteristics for purely social reasons could also be said to be "for the purpose of assisting women to carry children." (It is of course his case, supported by Mr Eadie for the Secretary of State, that it is for the authority to control PGD so as to ensure that it is not used for such ethically objectionable purposes.)
61. That consequence of the respondent's argument, I repeat, may be seen as the strength of the appellant's case. Its weakness, however, lies in the difficulty Lord Brennan himself has in establishing a satisfactory and coherent dividing line between embryo selection which is permissible and that which is not—let alone finding support for any such dividing line in the 1990 Act. As already stated, I was at one time attracted to Lord Brennan's dividing line between selection aimed purely at eliminating serious genetic or chromosome defects (permissible) and other selective criteria (impermissible). As, however, Lord Hoffmann points out at para 27 of his speech, what amounts to a serious genetic defect will itself often be contentious. Still less can one find in the statutory language any basis for saying that the elimination of serious genetic or chromosome defects contributes to the process of "assisting women to carry children" whereas other embryo selection does not.
62. The fact is that once the concession is made (as necessarily it had to be) that PGD itself is licensable to produce not just a viable foetus but a genetically healthy child, there can be no logical basis for construing the authority's power to end at that point. PGD with a view to producing a healthy child assists a woman to carry a child only in the sense that it helps her decide whether the embryo is "suitable" and whether she will bear the child. Whereas, however, suitability is for the woman, the limits of permissible embryo selection are for the authority. In the unlikely event that the authority were to propose licensing genetic selection for purely social reasons, Parliament would surely act at once to

remove that possibility, doubtless using for the purpose the regulation making power under section 3(3)(c). Failing that, in an extreme case the court's supervisory jurisdiction could be invoked.

63. For these reasons, most of which are more fully explained in Lord Hoffmann's speech with which I entirely agree, I too would dismiss this appeal.

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