reached his conclusion almost entirely on the basis of an extensive quotation from that treatise:

> ... a defendant who is not contractually bound may have benefited from services rendered in circumstances in which the court holds him liable to pay for them. Such will be the case if he freely accepts the services. In our view he will be held to have benefited from the services rendered if he, as a reasonable man, should have known that the [claimant] who rendered the services expected to be paid for them and yet he did not take a reasonable opportunity open to him to reject the proffered services. Moreover in such a case he cannot deny that he has been unjustly enriched.

Lightman J. decided that the Council had failed to establish any unjust factor. The Council had itself been at fault and, as a result of this, there was no reason for Mr. Rowe to suspect that he was not paying for services.

Aside from three cases, relevant by analogy only, there is only one reference to a case directly in point and that is to Lord Hope in *Kleinwort Benson Ltd.* v. *Lincoln City Council* [1999] 2 A.C. 349 at 408–409. Even that reference is somewhat obscure.

We are thankfully well past the age of the convention that only dead academics will be cited in court. It does appear, however, that, in this instance, an academic treatise provided the justificatory basis for a judicial decision. One is led to conclude that Hedley's view ([1995] 54 C.L.J. 578 at 599) that theorists, in the promotion of unjust enrichment, have given judges a shiny new toy to play with, has proved, in the context of this decision, to be absolutely accurate.

MARGARET HALLIWELL

PURPOSIVE INTERPRETATION AND THE MARCH OF GENETIC TECHNOLOGY

THIRTY years ago the Australian High Court described the law as "marching with medicine but in the rear and limping a little" (*Mount Isa Mines* v. *Pusey* (1970) 125 C.L.R. 383). Today this maybe an apt description of the lag between law and recent advances in genetic technology. In *R. (Quintavalle)* v. *Secretary of State for Health* [2003] UKHL 13, [2003] 2 W.L.R. 692 the applicants asked the court to declare whether embryos created by cell nuclear replacement ("CNR") (a form of human cloning involving an enucleated human egg and a cell from a donor's body) were regulated under the Human Fertilisation and Embryology Act

1990, which was passed in an era when embryos were only ever created by fertilisation of an egg by a sperm.

Section 1(1)(*a*) of the Act defines an embryo as "a live human embryo where fertilisation is complete". The legal difficulty is that cloned embryos created by CNR never go through the fertilisation process; and so the law seems here to have fallen behind scientific development. The interesting issue in *Quintavalle* was whether the House of Lords would adopt a purposive interpretation that would tend to the law's limp, notwithstanding the express words of section 1(1)(*a*).

Quintavalle, a representative of Pro-Life Alliance ("the Alliance"), sought a declaration that the HFEA had no power to license cell nuclear replacement research because the embryos created did not fall within the statutory definition of "embryo". The Government counter-argued that on a purposive interpretation embryos created by CNR were covered since Parliament had intended to protect comprehensively, either by prohibition or licensing, live human embryos outside the human body. The reference to "fertilisation being complete" in section 1(1)(*a*) was meant only to describe when the Act's protection took effect. Crane J. granted the declaration sought by the Alliance, saying that the Government's argument involved "an impermissible rewriting and extension of the definition". The Court of Appeal set aside the declaration, a decision that the House of Lords subsequently confirmed, holding that the purposive interpretation sought by the Government did *not* require the court to assume the mantle of legislator.

Most interestingly, *Quintavalle* enshrines a rule for purposive interpretation. It applies where an omission is attributed, not to Parliamentary inadvertence, but to the existence of a new state of affairs bearing on policy, such as scientific technology not anticipated at the time of enactment. To paraphrase Lord Wilberforce's speech in *Royal College of Nursing* v. *Department of Health and Social Security* [1981] A.C. 800, Parliament's express meaning may not be extended to cover new states of affairs if the reading requires the court to fill gaps or to ask what Parliament would have done with reference to things outside the text of the Act. However, an extended reading may be given where one of two conditions is fulfilled—the genus of subject-matter encompasses the new subject matter; or Parliament's purpose is clear and an extended reading is necessary to give effect to it—and provided that countervailing considerations do not exist ("the *RCN* criteria"). Examples of countervailing factors include (i) that the Act is designed to be restrictive or circumscribed; and (ii) that a new state

of affairs exists that is different in kind or dimension from the subject-matter addressed by Parliament.

With little hesitation, the House of Lords found that the purpose of the 1990 Act was clearly to regulate embryos comprehensively, and embryos created by CNR were within the genus of "embryos" owing to their morphological similarities. Furthermore, there were no relevant countervailing factors—embryos created by CNR were not different in any relevant dimension. In contrast, and for no clear reason, the Law Lords declined to read other sections in light of the *RCN* criteria (*e.g.* s. 3(3)(*d*)).

The tacit claim that the *RCN* criteria delineate an objective and value-free mode of purposive interpretation was unconvincing. The House of Lords relied on many value-laden steps of reasoning, which meant that its purposive interpretation bore the hallmarks of its own moral views rather than being a discovery of the 1990 Parliament's true intention. For example, in giving meaning to the *RCN* criteria the court had to formulate a way to assess "genus" and "differences in kind or dimension". To do this, it had to choose between focusing strictly on biological considerations or alternatively asking whether cloned embryos raise moral or social issues that push them into a new genus or add a new dimension. From its decision to foreground biology we see something of their Lordships' moral views—they see no particular moral problem with cloning technology where others are concerned about slippery slopes, coercion of ova donors, and that cloning fails to accord special moral respect to human embryos. Though their view was morally reasonable, it was not a neutral value-free analysis that removed judicial reasoning from the policy-making domain.

To reach its conclusion, the House of Lords also relied on an unexpected interpretation of "a clear purpose", an element in the *RCN* criteria, where two plausible interpretations overlap. The Alliance argued that Parliament intended first to bring activities with embryos under statutory control (this was the totality of the Government's argument about purpose) and second to decide whether the activity warranted prohibition or was suitable for licensing. In this case the Law Lords seemed to say that the first element constituted "a clear purpose" because it was common to both interpretations. Arguably, the *RCN* criteria should be read to mean that a purposive construction is appropriate if *one and only one* purpose is clear. This seems a better approach: otherwise, judicial analysis becomes an exercise in finding Parliament's minimum purpose, which could be quite different from a reasonable assessment of its true or salient intention.

Of further note, the House of Lords reflected briefly on the impermissibility of gap-filling under the *RCN* criteria. Whereas the Alliance noted several places where the text of the Act could not be read satisfactorily if one extended "embryo" to include embryos created by CNR, the Law Lords brushed these off as insignificant "makeweight" arguments. Their view that the HFEA could determine suitable policies to counteract these textual difficulties is surely impermissible gap-filling under the *RCN* criteria, the only difference being that the House delegated the task to a regulatory agency.

In overview, this unanimous decision from the House of Lords is a powerful statement that purposive statutory construction may be used to treat the law's limp in the field of medical technology, even in the event of contradictory statutory language. The manner in which the *RCN* criteria were applied was odd in places, and rested on the House's unconvincing assertion that it could deduce Parliament's purpose without putting its own value judgments in place of Parliament's. More transparency about judicial method would be appreciated. But in several places we can glimpse for ourselves some of the moral reasoning that may influence the court in subsequent medical biotechnology cases.

KATHY LIDDELL

WHOSE SPERM IS IT ANYWAY?

How legally significant is the presence or absence of the genetic connection between a man and a child in the determination of paternity? The common law regarded it as all important and it is still the case that the status of legal father will generally follow proof, or in the case of marriage to the mother the presumption, of this genetic connection. This is the normal rule which will apply unless there is something to displace it (see, for example Bracewell J. in *Re B (Parentage)* [1996] 2 F.L.R. 15). Where assisted reproduction takes place, however, the Human Fertilisation and Embryology Act 1990 openly treats as legal parents some of those who may lack this genetic connection and denies legal parentage, in the case of licensed sperm donation, to those donating sperm despite their obvious genetic link with the child. When the technicality is stripped away, the underlying assumption is that legal parentage in these cases should reflect the intention to be a parent in the course of a joint enterprise between a man and woman, whether married (s. 28(2)) or unmarried (s. 28(3)), to create a child together. But what if the