

REPRODUCTIVE TECHNOLOGY

The dead man's sperm case

ANNE WINCKEL reflects on whether the law should allow posthumous assisted reproduction.

The conundrum

Earlier this year a Canberra woman (Ms AB) obtained permission from the Victorian Supreme Court to collect sperm from the body of her deceased husband. He had just died in a car accident in Victoria. The sperm is now stored at the Royal Women's Hospital. Should the woman be able to use the sperm in IVF? Under Victorian law she cannot. It is important for other jurisdictions to pass similar legislation.

The current Victorian legal prohibition is appropriate, especially in the context of the lack of specific consent by the husband, the best interests of the child, the issues affecting members of the extended family, and the rights of men and women to have control over their own bodies and their reproductive functions.

Legal restrictions

In Australia

There is an ongoing debate about the extent to which the law should intervene in 'private' matters such as assisted reproduction. The Australian law currently varies between States, but Victoria has some of the most detailed and restrictive laws in the world. Under the *Infertility Treatment Act 1995* (Vic.), it is unlawful for a woman to be inseminated with the sperm of a dead man (s.43). Further, the procedure would be prohibited in Victoria because artificial reproductive treatment procedures are restricted to people who are married or in stable de facto relationships. As a widow, Ms AB does not qualify for the treatment.

Ms AB's only option is to have the insemination done in another place. She can apply for permission from the Infertility Treatment Authority to transport the sperm to another jurisdiction. The ACT, for instance, does not legally regulate IVF type procedures. It is a criminal offence to export genetic material without authorisation.

However, there is still an impediment to Ms AB's use of her husband's sperm in other jurisdictions. Even those Australian States which do not have IVF legislation are subject to the NHMRC *Ethical Guidelines on Assisted Reproductive Technology* (1996). These guidelines emphasise the importance of a number of relevant issues: the need to consider the long-term welfare of the child; the need for informed consent of gamete (sperm or egg) providers; and the relevance of the wishes of the deceased spouse where the surviving partner seeks to use an already stored gamete. In relation to

assisted reproductive technology (ART), Article 11.1 recommends a prohibition on the use of gametes or embryos harvested from cadavers.

Overseas

Apart from arranging for an insemination which breaches current laws and guidelines, Ms AB's only other option would be to transport the sperm overseas. Belgium for instance, is a country which does not require the prior written consent of the donor to store or use sperm to create a pregnancy. They do still require verbal evidence of prior consent of the deceased.

The UK and some parts of the USA have been more stringent about consent requirements. A 1988 New York State Task Force report on ART recommended that written instructions be required and followed with respect to the posthumous use of all gametes.¹ In Britain, a person's written consent is required before their genetic material can be used.

Recently in the UK, a 30-year-old woman (Diane Blood) was refused consent to use the sperm which she requested be obtained from her husband who was in a coma from bacterial meningitis. The man died without regaining consciousness, and the consent form remained unsigned. Despite evidence that he had given verbal consent to the woman regarding his desire for her to have his child, the British Human Fertilisation and Embryology Authority (HFEA) refused permission for her to use the sperm. She did, however, successfully gain permission to export the sperm to Belgium in 1997 due to European law. The HFEA specified certain conditions: that the specimen be used only for her own treatment, and that account be taken of the welfare of the child that might be born, including the child's need for a father.²

Previously frozen gametes

It is important to distinguish the recent Victorian case from more common cases where a wife seeks to use sperm which has already been frozen with the consent and intention of reproduction on the part of the husband who subsequently dies. Nevertheless, it is interesting to note that even in such a case as this, the 1984 UK Warnock Committee's Report recommended that the storage authorities should have the right of use or disposal after a sperm provider's death. The Committee was actively discouraging the use of consensually frozen sperm.

This conflicts with a French precedent of the same period which allowed the use of previously frozen sperm. The *Parpalaix* case arose in December 1983 when Alain Parpalaix died having expressed to his new wife Corinne his desire to be succeeded by a child. Two years earlier when he was in a de facto relationship with Corinne, he had deposited sperm in CECOS, a sperm storage centre, when it was discovered that he had cancer of the testicles. After his death, and after much legal debate, Corinne won an order from the Court to obtain the sperm from CECOS. One of the key issues which persuaded the Court was the fact that they were convinced by the intent of the deceased.

More recently, the Canadian Royal Commission on New Reproductive Technologies (1993) recommended that stored embryos ought not be used after the death of one of the

parties. They commented that normally couples could not reproduce after one of them died, and so the same approach should apply to couples who had frozen embryos. Strict laws have also now been passed in California requiring written consent from the provider of the sperm or eggs before they can be used. This is the result of increasing litigation over genetic material being given to others without consent of the person who generated it.

Ethical questions

Victoria's prohibition on the posthumous use of gametes is consistent with an ethical approach to reproduction and ART.

One can sympathise with Ms AB's desire to reproduce using her dead husband's sperm if it is based on her own clear knowledge of his intention that he posthumously father children. Indeed, if perhaps Ms AB already had an only child with her husband, one could appreciate her desire to provide her child with a sibling. Even so, there are strong policy considerations which outweigh such matters. Also it is clear that a desire to reproduce against the explicit wishes of a deceased husband would be ethically untenable.

Informed specific consent is central to all medical procedures. Giving detailed counselling and gaining clear consent from gamete donors before their gametes are used in ART is also a central part of the Victorian law. Likewise, the major UK, Canadian and New York reports on ART focus on explicit consent.

If consent is not required with respect to the use of gametes, it is possible that a deceased man or a woman could have biological offspring even though they were firmly opposed to reproducing. The situation is even more undesirable when a third party (not a spouse) requests the use of the gametes without consent. In America there are increasing reports of requests for the removal of sperm from dead or unconscious husbands, fiancés, boyfriends, family members or friends. The New York State Task Force has recommended that gametes should generally not be retrieved without informed consent in writing. A worse scenario would be where the State harvested gametes from cadavers to use in donor programs.

There are numerous other ethical considerations such as:

- The best interests of the child are paramount, and the UN Convention on the Rights of the Child states that a child has a right to know and to be cared for by his or her parents (Article 7). Also, one must not ignore the potentially detrimental effect on the child of learning how they were conceived.
- The deceased person's own family must also be considered. The child will presumably have grandparents and others who are affected by the birth.
- This raises the controversial area of inheritance, for example, what if any rights an unborn child has to inherit, and how much time may pass before that inheritance violates the rule against perpetuities (the rule does not take into account time passing outside the normal gestation period).
- Finally, consider the same conundrum if a woman is killed in an accident, and the husband requests the removal of any available ovum. He desires to have another woman implanted with embryos formed using his deceased wife's eggs. This procedure is also currently unlawful under Victorian law. Such a prohibition should be reflected throughout Australian jurisdictions.

Anne Winckel lectures in Legal Studies at the University of Melbourne.

References

1. The New York State Task Force on Life and the Law, *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy*, New York, 1988, p.315.
2. Ahuja, K.K. et al., 'Pregnancy following intracytoplasmic sperm injection treatment with dead husband's spermatozoa: ethical and policy considerations', (1997) 12 *Human Reprod.* 1360-1363, p.1363.

PRISON HEALTH SERVICES

Metropolitan Women's Correctional Centre — a case study

'... all is not well at Deer Park.'¹

ADRIAN HOWE comments on a case study of prisoners in a private prison in Victoria.

The Metropolitan Women's Correctional Centre (MWCC) was opened in Deer Park in August 1996 becoming Victoria's first private prison and thus the first prison in the State to experience the problems which ensue when prisons and prison health services are privatised. Critical reviews of the operation of private prisons overseas and in Queensland have shown that the privatisation of correctional services has seriously limited access to information in prisons. This is especially true when the private contracting arrangements are made with the State Government under the rubric of 'commercial confidentiality'.

Most crucially, the control or 'imprisonment' of information in private prisons has effectively relegated public accountability to a poor second place behind the rights of private contractors to profit from prisons.² MWCC, which was built on land previously owned by Australian Defence Industries and used for rocket motor testing and weapons testing and also to dump defective explosives and munitions, is a case in point. Concerns expressed by prisoner advocate groups about chemical contamination of the soil have never been allayed, the private contractor having refused to release documents under Freedom of Information (FOI) on the catch-all privatisation grounds of 'commercial confidentiality' and 'contrary to public interest'. Is the site a health hazard? In the absence of assurances about its safety, who knows?

While threats of law suits for defamation have dogged attempts to reveal the operation of private prisons in Australia, they have not stopped the stream of allegations about inadequate health services coming from prisoners and prisoner advocate groups. Nevertheless, prison watchers report health and other issues in private prisons at their peril. What can be stated is that after staffing, health services (which are the biggest expense in prison) have been the subject of ongoing complaints in MWCC.

Health issues

Women prisoners allege that the health services provided to the prisons in MWCC are substandard. In July this year