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Property and Procreation: Problematising Sperm

Recently in the US, bills have been sponsored in a number of states providing for personhood for sperm. One bill, for example, provided that ejaculating anywhere outside a woman's vagina constitutes 'an action against an unborn child'. These bills were put up in response to legislation regulating women's reproductive rights - curtailing women's access to contraceptives and abortion.

The law in the US (and elsewhere) continues to regulate the reproductive rights of women with wide acceptance that this is appropriate. In contrast, the 'sperm bills' are considered satirical. It's OK to regulate women's reproductive rights, but patently ridiculous to regulate men's.

This shows that reproductive rights and regulation of gametes is obviously a complex issue for the law. (See my previous post here)

This complexity is borne out through a comparison of a recent Canadian decision (*JCM v ANA*), a forthcoming Canadian case (*deBlois*), and a 2011 Australian decision (*Edwards*). (I've written about this case here.) To what extent does the law recognise rights to sperm, in terms of property; procreation; and parenting?

Property in Sperm

Earlier this year, the Supreme Court of British Columbia in *JCM v ANA* found that sperm straws (ie vials of preserved sperm) are indeed property. *JCM* and *ANA* were former spousal partners. Donor sperm had been used to conceive the couple's first child, and the couple was now separated. There were 13 sperm straws remaining and one partner sought to have them destroyed, the other to use them to conceive again with her new partner. (See excellent overviews of the case here and here.)

The court ordered the 13 sperm straws were to be shared as between former spousal partners. One partner was to receive 6 straws. The other partner was to receive 7, and was to pay compensation for the additional sperm straw. 'Once the claimant and respondent purchased the sperm straws, those sperm straws were their property to be used for their benefit.' [57]

The court found that 'the US cases demonstrate the importance of balancing the right to procreate with the right to avoid procreation' [67] but that this was not an issue in this case: use of the sperm by *JCM* would not affect the procreative rights of *ANA* as the child would not be related to her in any way.

In *JCM v ANA* the court was clear in rejecting the rationale of the Australian decision *Doodeward v Spence*. *Doodeward* affirmed a long-held view that there was no property in the human body, yet found an exception where there had been the exercise of work or skill to change the nature of the body or body part. The Canadian court accepted the UK case of *Yearworth v North Bristol NHS Trust*, which rejected *Doodeward* as a basis for the law in this area

The Australian decision in *Edwards* did accept *Doodeward* and this supported the finding of a type of property interest in the preserved and stored sperm of the deceased. The difference is of course, that the Supreme Court of New South Wales was bound by the case, where the Supreme Court of British Columbia was not.

Both these decisions however differentiated property (or possessory rights) in sperm from general property interests.

'I do recognize that sperm used to conceive two children for two loving parents does not have the same emotional status as a vehicle or a home.'

ABOUT ME



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I lecture in land law at James Cook University and I write and think about the nature of property and its representations in the law; about issues affecting women; about justice generally; and about legal education.

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(Russell J [54] in JCM v ANA)

This judgment addresses some, but by no means all, of the issues that relate to such a complex, difficult and controversial question. (Hulme J [1] in Edwards)

That the courts recognise the human elements of determining interests in sperm points to the inadequacy of property law to deal with such issues. Property only addresses a small part of the equation. It is not just the ownership or right to possession of the sperm themselves, but their necessity in procreation - an issue for both father and mother - and the resultant parenting that are relevant in the law's treatment of gametes.

Right to Procreate and Parent

In contrast to these decisions, the deBlois matter has commenced in the Ontario Superior Court between a sperm donor and the mothers of a child born using his sperm. According to press reports, the sperm were given pursuant to a contract with the child's mothers. Part of the contract provided that the donor father would have no contact with any child born as a result of insemination. The donor now seeks recognition as the father, and 'general and liberal' contact with the child.

In this case, the interests of the donor father are in issue; and these interests go beyond determining property in the sperm. The case seems concerned with contractual rights denying the donor father from parenting the child. This is far different from the right to procreate or avoid procreation mentioned in JCM v ANA as procreation has already occurred. The issue here is parenting. To what extent is this divisible from the sperm themselves?

Property and Procreation

Talking of sperm in terms of 'straws' it is easy to categorise them as property and to distance the legal argument from their role in procreation. While Russell J was careful to respect this aspect of the 'substance at issue', the division of the straws as between the parties in JCM v ANA does not go any way towards resolving the potentiality for procreation of the sperm themselves. In this case, the relevant capacity for procreation lay with the parties, not with the sperm (as a thing) or their donor and was not in issue before the court. The sperm are characterised squarely within property law and nothing else.

The relative importance of separating the property nature of sperm from their procreative capacity changes when the donor father is involved. For example in the Edwards decision, while the father was deceased, it was still relevant that he and his wife had stored the sperm with the intention of procreating. The donor husband's wishes lent weight to the wife's application for possession of the sperm.

In a further step, the deBlois case removes the issue of property altogether, with focus purely on parenting 'rights' arising out of the contract. It seems from the press report, that the mothers will argue that the donor father agreed to give the sperm without any parenting rights; and the father is arguing duress in signing the agreement, seeking to have it set aside. Yet the claim to parent arose from what would originally have been characterised as a property transaction. This represents the other end of the spectrum of claims involving gametes and reproduction, and in one way illustrates the limitations inherent in determining rights to sperm based on property interests.

Mini-Me

Perhaps what is interesting about the deBlois case is that it arises because gametes carry one's DNA, a part of oneself. This dimension goes further than procreation as an end in itself, and explains why a person would desire the ongoing parental contact with children born of a gamete donation. It is the gamete's carrying of part of us that makes it so difficult, in my view, to characterise sperm simply as property.

Moore v Regents of California dealt with this to a limited extent, finding that a 'cell line' developed from a patient's spleen cells was not property of the patient; but was rather property of the scientists who developed it from the patient's cells. While quite different in context from the birth of a person, it shows how the law is capable of divorcing 'product' of one's own body from that body thus allowing the commodification of bodily components.

Where to from here?

Cases involving sperm have taken a variety of approaches to sort out possession, procreation and parenting in disputes. This is reflective of recommendations made in Australia that proprietary interests in human genetic samples continue to be determined on a case-by-case basis. The variety of scenarios in which this becomes relevant, indicate that this is sensible.

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I still wonder though if we need to reconsider the nature of gametes - both of men and women - beyond the scope of property. The recent US proposals for the personhood of sperm may not be so far-fetched after all.

Posted by Kate Galloway at 10:13

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