Sperm removal and dead or dying patients: a dilemma for emergency departments and intensive care units

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ABSTRACT

- An unexpected consequence of the increase in the use of fertility treatment is that emergency department and intensive care doctors are receiving requests from wives (actual or de facto) of dying or recently deceased men for sperm removal.
- Legislation in all states and territories regulates removal of sperm from a dying man and, provided that lawful consent is obtained, a doctor can harvest sperm.
- In several states, including Victoria, harvested sperm cannot be used in a fertilisation procedure without the man's consent, and debate surrounds the issue of consent and how it can be proved.
- Recent Victorian Law Reform Commission recommendations attempt to streamline the law to make a man's consent the cornerstone of decision making for both harvesting and subsequent use of sperm.

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In 2004, 2.5% of all live births in Australia were the result of artificial reproductive technologies.[1] With fertility treatments now so common, an unexpected consequence for emergency department and intensive care doctors is a request from a wife for sperm removal from a dying or recently deceased patient. These requests raise legal issues relating to both the harvest and subsequent use of the sperm.

We present here two hypothetical scenarios to highlight the laws that apply to sperm harvesting in Victoria and other Australian jurisdictions. We consider recommendations made by the Victorian Law Reform Commission which, if enacted, would require the man's written consent. In our article, a reference to a "wife" includes a de facto wife and a reference to a "husband" includes a de facto husband.

Case scenario 1

A 42-year-old man sustains major head injuries in a motor vehicle accident in rural Victoria. The ambulance service takes him to the nearest hospital but he dies shortly thereafter. The police contact his 34-year-old wife and inform her of her husband's death. The wife rings the hospital and asks that sperm be extracted from her husband. She explains that she has been trying to become pregnant and has recently been referred for in-vitro fertilisation treatment.

Regulating the harvesting of sperm

The *Human Tissue Act 1982* (Vic) regulates the removal of sperm from a "dead" or "brain dead" person in Victoria. Comparable legislation operates in other Australian states and territories — *Transplantation and Anatomy Act 1978* (ACT); *Human Tissue Act 1983* (NSW); *Human Tissue Transplant Act 1979* (NT); *Transplantation and Anatomy Act 1979* (Qld); *Transplantation and Anatomy Act 1983* (SA); *Human Tissue Act 1985* (Tas); and *Human Tissue and Transplant Act 1982* (WA). Requests for sperm harvest typically arise in circumstances in which a young man has died unexpectedly, making the death the subject of a coronial investigation. In such cases, consent for any sperm harvest must be sought from the Coroner. Only if the Coroner gives a direction that coronial consent is not required can the wife (as the senior available next of kin) provide the necessary consent.

In non-coronial cases, a wife can provide consent, provided that the man voiced no objection to the possibility of sperm harvest during his lifetime. Use of the sperm in a fertilisation procedure can be regarded as a "medical purpose" under the Victorian Human Tissue Act.

Regulating the use of sperm

In Victoria, once sperm are retrieved from a deceased man, further requirements must be satisfied before they can be used. Under the recently enacted *Assisted Reproductive Treatment Act 2008* (Vic), written consent by the man for his sperm to be used posthumously by his wife must be produced and the approval of the Patient Review Panel must be obtained.

Posthumous use of gametes is also specifically regulated in South Australia (where written consent and medical infertility are necessary preconditions)[2] and Western Australia (where gametes must not knowingly be used after the death of the gamete provider).[3] Legislation in New South Wales similarly requires the written consent of the gamete provider.[4]

In the remaining jurisdictions, the National Health and Medical Research Council (NHMRC) guidelines (*Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*) set the standard, but have no legal force. They provide that posthumous use of gametes should only be permitted when the deceased donor has left clearly expressed and witnessed consent.[5] In practice, the NHMRC guidelines are not always strictly enforced; for example, when there is evidence of oral or implied consent.[6]

Exporting the sperm

Under the Victorian Assisted Reproductive Treatment Act, gametes may be exported from Victoria to another state or territory with the written consent of the Assisted Reproductive Treatment Authority. The fact that the exported sperm are to be used in a manner that contravenes Victorian law (owing to the lack of written consent by the deceased man) must be considered but is not decisive. It may be sufficient to show that the deceased man would have consented to the proposed use of his sperm.[6] Also relevant is whether any child born as a result of a treatment procedure "would be nourished, loved and supported".[6]

So, while both Victorian law and the NHMRC guidelines make the written consent of a man a prerequisite to the posthumous use of his sperm, in reality a wife in Victoria (and wives in other jurisdictions) may still be able to harvest and use a dead husband's sperm to become pregnant by relying on something less than written consent.

Case scenario 2

A 28-year-old man is admitted to an intensive care unit after an open lung biopsy for an infiltrative interstitial lung disease. The biopsy shows alveolar carcinomatosis. After 10 days of aggressive intensive-care support, the family agrees that medical treatment should be withdrawn. At the conclusion of the family conference, the patient's 32-year-old wife requests that sperm be harvested. She has the support of the patient's family. The patient is a registered organ donor.

Regulating consent for sperm harvest on a patient's behalf

When a Victorian patient is incapable of providing consent to medical treatment (including "any medical or surgical procedure") and has left no prior directive, the *Guardianship and Administration Act 1986* (Vic) governs who may give consent on the patient's behalf. If no person has been formally appointed as a substitute decisionmaker, either by the patient or by the Victorian Civil and Administrative Tribunal (VCAT), then ordinarily a wife can give consent. It seems likely, however, that sperm removal constitutes a "special procedure" ("any removal of tissue for the purposes of transplantation to another person"), in which case VCAT must provide the necessary consent.

Any decision to extract sperm must be in the patient's "best interests". Normally an assessment of best interests would envisage some proposed *treatment* for a medical condition, and the statutory criteria reflect this. However, sperm removal is of no medical benefit to a dying man. The statutory criteria of the Victorian Guardianship and Administration Act do include "the wishes of the patient, so far as they can be ascertained" and "the wishes of any nearest relative or any other family members of the patient". Yet, without clear evidence that the patient would have consented to the use of his sperm for posthumous conception, it would be difficult to argue that the procedure was in the patient's, as opposed to the wife's or family's, best interests.

Being a registered organ donor is insufficient evidence that the patient would have wanted to father a child after his death. As Schiff explains, "controlling the fate of gametes is different from — and more significant than — controlling the fate of cadaveric organs, because procreation is central to an individual's identity in a way that organ donation is not".[7]

Elsewhere, only in Queensland — *Guardianship and Administration Act 2000* (Qld) — does sperm harvest (ie, "removal of tissue from the adult while alive for donation to someone else") require consent of the relevant statutory guardianship body. As the procedure is not necessary to prevent danger to the recipient's life (which is a stipulation of the Act), consent should be declined. In the Australian Capital Territory and the Northern Territory, lawful consent can only be given by a legally appointed guardian — *Guardianship and Management of Property Act 1991* (ACT); and *Adult Guardianship Act 1988* (NT). A doctor acting upon an informal consent by a wife could be liable for trespass. In the remaining states and territories, consent for sperm harvesting can be given by the man's wife — *Guardianship Act 1987* (NSW); *Guardianship and Administration Act 1993* (SA); *Guardianship and Administration Act 1995* (Tas); and *Guardianship and Administration Act 1990* (WA). This raises a potential problem of conflict of interests. Clearly, none of the relevant legislation has been drafted with sperm harvesting in mind.

In no jurisdiction is this procedure expressly identified as one requiring consent from a statutory body. This is surprising when the same legislation prevents a wife from giving consent to a procedure that would *deprive* a man of the ability to procreate (eg, sterilisation).

The best interests considerations either focus too narrowly on medical *treatment* for a condition (as with the Guardianship and Administration Act), or focus too broadly on non-medical matters that are not relevant to a dying man. The only criterion of general relevance is the wishes of the patient, and the weight given to this factor varies considerably from jurisdiction to jurisdiction.

Subsequent use of the sperm

If the wife of a dying man, whether in Victoria or elsewhere, is able to obtain his sperm without his written consent, she will then face the same potential barriers to using the sperm as the wife in Case scenario 1.

Discussion

It is a paradox that sperm may be legally harvested in Victoria, but cannot lawfully be used unless exported to another jurisdiction. The Victorian Law Reform Commission has recommended that Victorian law be amended to remove this anomaly and to strengthen the requirements around written consent.[8] The likely practical effect of these proposed reforms will be fewer sperm harvests. The key recommendations affecting the medical profession are:

- A doctor should only remove gametes from:

  — *a living person* if he or she has consented in writing to such removal; and

  — *a deceased person* if he or she has consented in writing to posthumous retrieval and use by the surviving partner.
- Before gametes are retrieved:

  — written consent (or a statutory declaration by the next of kin that such consent exists) must be provided;
- Before gametes are used in a treatment procedure:

  — written consent must be produced.[8]

Although the Victorian Government has indicated its intention to implement these recommendations, only the third recommendation is provided for under the Assisted Reproductive Technology Act.

The issue of consent

Most agree that a man's consent should be a legal precondition to the use of his sperm for posthumous conception. As Bennett argues:

> the use of a person's reproductive material after their death, in the absence of their consent or knowledge of their wishes, violates not only the reproductive autonomy of the deceased but devalues its currency for the living.[9]

Schiff agrees, explaining, "when it occurs without the person's consent, it deprives an individual of the opportunity to be the conclusive author of a highly significant chapter in his or her life".[7]

However, debate surrounds the issue of how consent should be proved and, in practice, as shown here, Australian jurisdictions differ in the level of proof required. The problem with requiring written consent is that it would be rare for a husband to leave any kind of advance directive, unless the couple had been undergoing

Sperm harvesting — the bottom line for clinicians

Sperm can be legally harvested from a deceased man with:

a) the man's consent given during his life;

b) the Coroner's consent in a coronial case;

c) the next of kin's consent in:

i) a non-coronial case; or

ii) a coronial case (where the Coroner has made a direction that coronial consent is not required).

Sperm can be legally harvested from an unconscious dying patient:

a) in all jurisdictions — with the man's consent given before becoming incompetent.

OR in the absence of the man's prior consent:

b) in Victoria — with the consent of the Victorian Civil and Administrative Tribunal (as a "special procedure");

c) in the Australian Capital Territory and the Northern Territory — with the consent of a legally appointed guardian; and

d) in New South Wales, South Australia, Western Australia and Tasmania — with the consent of the man's wife.*

* This assumes the absence of appointment of an enduring guardian by the man or appointment of a substitute decisionmaker by a guardianship body. ◆

fertility treatment, or there was a diagnosis of a terminal condition. This has led VCAT to comment:

> There is a danger that life, and decisions made about life, are over legalised. Consent is usually given by words or by conduct — not by legal instrument. This means that an assessment of whether or not consent has been given in a particular case will usually require consideration of the circumstances and will require inferences from the circumstances.[6]

Yet, there are difficulties with the notion of implied consent in this context. Evidence that the deceased man intended to have children or was actively trying to conceive a child at the time of death does not, of itself, indicate that he would have desired to conceive a child after his death. As the Supreme Court of Victoria noted:

> It is one thing for a married man to wish to have a family. It is altogether another thing for a married man to consent to his sperm being used in a [posthumous] treatment procedure.[10]

The benefit of written consent is that it provides "an unambiguous and administratively feasible standard to determine when posthumous use should be permitted".[8] It operates as a safeguard to ensure that the documented wishes of the deceased are respected. It may also assist a child to deal with possible concerns he or she might have about having been conceived in these circumstances.[8]

Conclusion

Australian doctors may harvest sperm from a dead or dying man provided that lawful consent is obtained, whether from a guardianship body, a legally appointed guardian or a wife (Box). However, whether the sperm can be used in a fertilisation procedure without the man's written consent is another question altogether. In Victoria, New South Wales, South Australia, and Western Australia, legislation prohibits use of the sperm, and in the remaining jurisdictions NHMRC guidelines (at least in theory) provide for the same result.

This mismatch between the ability to harvest sperm and the inability to use them represents a failure by Australian states and territories to ensure a logical approach to this issue. The recent Victorian Law Reform Commission recommendations are to be commended in their attempt to streamline the law to make a man's consent the cornerstone of decision making at each tier of the process. Thus, if sperm cannot be lawfully used in the absence of consent by the man, sperm should not be able to be lawfully harvested.

Competing interests

None identified.

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