

‘The grave’s a fine and private place’:^{*} A preliminary exploration of the law relating to posthumous sperm retrieval for procreation

Introduction

The application of advances in reproductive technologies continues to raise significant legal and ethical questions. The retrieval of sperm from a dead man for procreation is no exception, not least because individual choice regarding procreation represents the very essence of human self-determination.

There is nothing new about a child being born after the death of her father. This happens in instances where a woman’s husband or partner dies during pregnancy. In such a case, neither of the parents intended to have a posthumous child. Posthumous sperm retrieval, however, presents a situation where a child is not only born, but conceived after her father’s death. This is now possible due to advances in reproductive technologies that allow for the cryopreservation of gametes and as well as in-vitro fertilisation.

A request for posthumous sperm retrieval typically comes in a situation where no prior consent for the procedure exists: a person requests the removal of the sperm of a deceased spouse or partner in situations of unexpected loss and tragedy, such as the sudden death of that spouse or partner in a motor vehicle accident.¹

In most cases involving posthumous sperm retrieval the wishes and opinions of the deceased are not known – he has not given informed consent to the retrieval of his sperm; and often he had not even expressed a wish to have children. Because he had died suddenly, he has had no opportunity to discuss posthumous fatherhood. Moreover, even if he had indeed expressed a wish to have children at some point in the future, it is unclear whether that necessarily

^{*}From the poem ‘To his coy mistress’ by Andrew Marvell (1621-1678), reprinted in *The Norton anthology of poetry* (1970) (3rd ed) 337 at 338. The next line of the poem reads – ‘But none, I think, do there embrace’.

¹See Strong ‘Consent to sperm retrieval and insemination after death or persistent vegetative state’ (2000) *Journal of Law and Health* 243; Parker ‘Response to Orr and Siegler – collective intentionality and procreative desires: The permissible view on consent to posthumous conception’ (2004) *Journal of Medical Ethics* 389–392; and Kerr ‘Post-mortem sperm procurement: Is it legal?’ (1999) *De Paul J of Health Care Law* 39.

means that he would have wanted children when he is not there to raise them.

Individual autonomy regarding reproductive choice is not the only potential ethical or legal problem raised by posthumous sperm retrieval for procreation. Other problems include the best interests and welfare of the child resulting from such sperm retrieval; the right to bodily integrity of the deceased; and the interests of other members of the deceased's family (whether emotional or financial).²

The focus of this short contribution is on the law related to posthumous sperm retrieval for procreation in South Africa, in situations where no prior consent from the deceased exists. As its title indicates, the contribution is not intended to be an exhaustive analysis but is merely a preliminary exploration of some of the ethical and legal problems, hopefully stimulating debate on this very complex and sensitive issue. The discussion begins with an outline of the practical and medical aspects of posthumous sperm retrieval, followed by a brief overview of the current South African law regarding posthumous sperm-retrieval for procreation. Next, a possible constitutional challenge to the existing law is briefly debated. The contribution ends with a few concluding remarks.

Medical aspects and past practices

Posthumous sperm retrieval involves the withdrawal or 'harvesting' of sperm from a recently-deceased person by various methods, including the surgical excision of the epididymis; irrigation or aspiration of the vas deferens; and rectal probe electro-ejaculation.³ For the sperm to be viable the procedure must ideally be carried out within 24 hours after death.⁴

The possibility of posthumous reproduction was first described in a 1954 article in the popular journal, *Nature*. Bunge showed that it was theoretically possible to freeze and thaw human spermatozoa for later use.⁵ In 1980, Rothman described the first case of posthumous sperm retrieval: upon his family's request a 30-year-old man, injured in a motorcycle accident and declared brain dead, had his sperm collected and preserved for later use.⁶

The best known case of posthumous sperm retrieval for reproduction undoubtedly is that of Mrs Blood. Diane and Stephen Blood unsuccessfully attempted to conceive a child before Stephen Blood was diagnosed with meningitis on 26 February 1995.⁷ When her husband slipped into a coma, Diane Blood requested that

²In this regard, see eg Hoffman and Morriss 'Birth after death: Perpetuities and the new reproductive technologies' (2004) *Georgia LR* 575.

³See Bahadur 'Death and conception' (2002) *Human Reproduction* 2769 and Kerr *et al* 'Postmortem sperm procurement' (1997) *The Journal of Urology* 2154-2155.

⁴*Ibid.*

⁵See Bunge 'Fertilizing capacity of frozen human spermatozoa' (1953) *Nature* 767769.

⁶Rothman 'A method for obtaining viable sperm in the postmortem state' (1980) *Fertility and Sterility* 512.

⁷Bennett 'Posthumous reproduction and the meaning of autonomy' (1999) *Melbourne University LR* 286 at 287.

a sample of his sperm be taken. Two samples were taken by electro-ejaculation: on 1 March and on 2 March, hours before Stephen Blood was certified clinically dead.⁸

Diane Blood's subsequent request to be artificially inseminated with her husband's sperm to have his child was in contravention of British law (the Human Fertilisation and Embryology Act 1990). Mrs Blood then proposed to travel overseas to have the artificial insemination done, but was refused permission to export the sperm.⁹ Mrs Blood then took the matter to court. The Court of Appeal observed that the preservation of sperm without prior written consent of the deceased was illegal in terms of the Human Fertilisation and Embryology Act.¹⁰ This meant that Diane Blood's storage of the sperm had been illegal as she had no such consent.¹¹ Despite this, the Court upheld Diane Blood's appeal, stating that 'Mrs Blood has the right to receive treatment in Belgium with her husband's sperm unless there are good public policy reasons for not allowing this to happen'.¹² Diane Blood gave birth to a healthy child in 1998.¹³

Other instances of posthumous sperm retrieval for procreation have been documented: For example in France, as early as 1984, when Alain Parpalaix's wife Corinne wanted to retrieve his sperm after his death from the *Centre d'Etude et de Conservation du Sperme Humain* where it had been deposited;¹⁴ in Israel in 1994, when a child was born to the widow of his dead father after she had been impregnated with the father's sperm;¹⁵ and in Italy in 1995, when a child was born two years after his mother's death (her sister provided a surrogate womb for an embryo retrieved from the dead woman).¹⁶

In light of the above, the South African position regarding posthumous sperm retrieval is examined below.

Current South African law on posthumous sperm retrieval for procreation

In future, the provisions of chapter 8 of the National Health Act 61 of 2003 will regulate the control and use of blood, blood products, tissue and gametes in humans,

⁸*Ibid.*

⁹*Ibid.*

¹⁰*R v Human Fertilisation and Embryology Authority; Ex parte Blood* [1996] 3 WLR 1176 (QBD); *Blood* [1997] 2 All ER 687 (CA).

¹¹Bennet (1999) *Melbourne University LR* 286.

¹²*Ex parte Blood* 703-704, as quoted in Bennet (1999) *Melbourne University LR* 286 at 289.

¹³*Id* 290. For a more detailed account of the circumstances surrounding Diane Blood's attempts to use her dead husband's sperm for procreation, see eg Morgan and Lee "In the Name of the Father?" *Ex parte Blood: Dealing with novelty and anomaly* (1997) *Modern LR* 840.

¹⁴See Shuster 'The posthumous gift of life: The world according to Kane' (1999) *Journal of Contemporary Health Law and Policy* 401 at 405.

¹⁵See Sharig and Tabak (2008) *Medicine and law* 463.

¹⁶*Id* 464.

as it will repeal the Human Tissue Act 65 of 1983.¹⁷ However, although promulgated in 2003, chapter 8 of the National Health Act is still to come into effect (only s 53 has so far entered into force). In 2007, Draft Regulations in terms of the National Health Act have been published for comment but have not entered into force.¹⁸

In the interim, therefore, posthumous sperm retrieval for procreation continues to be governed by the Human Tissue Act and its Regulations. The Human Tissue Act regulates human organ and tissue donation and transplantation for various purposes, including medical and dental training and research and the artificial fertilisation of persons. 'Tissue' is defined by the Act as any human tissue, 'including any flesh, bone, organ, gland or body fluid, but excluding any blood or gamete'; while a 'gamete' is defined as 'either of the two generative cells essential for human reproduction'. A 'gonad' is defined as 'the human organ which produces gametes'.¹⁹

The Act deals extensively with the formalities required for valid consent to the removal of tissue, blood or gametes from the bodies of *living* persons.²⁰ Section 2 of the Act prescribes the formalities that must be complied with when the bodies or the tissue of *deceased persons* are donated: a 'competent person' may donate his 'body or any specific tissue thereof' to be used after his death 'for any of the purposes as contemplated in section 4(1)', or he may consent to a post-mortem examination of his body.²¹ Section 4(1) allows the following as legitimate purposes: medical or dental training; research; the advancement of medicine or dentistry; or therapy, which includes the use of tissue in any living person or persons; or for the production of a therapeutic, diagnostic or prophylactic substance. If a specific 'donee' had been indicated, a legitimate purpose is also therapy, which includes the 'use of tissue concerned by such a donee'.²²

It is submitted that the sections of the Act set out above do not authorise posthumous sperm retrieval for procreation. Not only is the deceased's prior written consent to such retrieval absent,²³ but procreation cannot be understood to be a legitimate purpose in terms of section 4(1) of the Act. In addition, the Act refers specifically to 'tissue' in section 4(1)(b) – not 'gametes'. Moreover, the equivalent section of the Act dealing with tissue and gametes removed from the body of a *living* person – section 19 – explicitly states 'in the case of such gamete, the artificial insemination of another person'.²⁴ The Act further authorises a medical practitioner, in certain circumstances, including during a post-mortem

¹⁷In terms of s 93(1) of the National Health Act.

¹⁸See below.

¹⁹Section 1.

²⁰Section 18.

²¹Section 2(1)(a)-(b).

²²Section 4(1)(b).

²³Section 2.

²⁴Section 19(c).

examination, to remove 'tissue' from a deceased person and hand it over to an authorised entity for the purposes contemplated in the Act.²⁵ Note that only the removal of 'tissue' is authorised – not 'gametes'.

If the failure to mention procreation as a legitimate purpose in section 4(1) had left any doubt as to whether the Human Tissue Act allows posthumous sperm retrieval for reproductive purposes, that doubt has to be dispelled by section 16 of the Act. Section 16 expressly prohibits the removal of 'gonads' from a deceased person for the transplantation into the body of a living person 'if the purpose of such transplantation may be procreation'. The fact that 'gonads' are mentioned in section 16 and not 'gametes' is likely due to the fact that section 4 of the Act already prohibits the removal of gametes from the body of a deceased person for any purpose other than those expressly mentioned (such as research and training). The prohibition against the removal of gonads for procreation further strengthens the argument that posthumous reproduction is considered undesirable by the drafters of the Act. Owing to the statutory prohibition outlined above, no High Court is permitted to grant an order authorising posthumous sperm retrieval, unless the prohibition against posthumous sperm retrieval can be shown to be in contravention of some provision of the Constitution, 1996.²⁶

The Regulations promulgated pursuant to section 37 of the Human Tissue Act²⁷ fail to mention posthumous sperm retrieval for procreation. Therefore it cannot be used to substantiate an argument that posthumous sperm retrieval for such purposes is authorised.

Like the Human Tissue Act, chapter 8 of the National Health Act does not expressly mention the situation regarding the posthumous retrieval of a gamete, organ or tissue for reproductive purposes. 'Tissue' is defined in the Act as human tissue, and includes 'flesh, bone, a gland, an organ, skin, bone marrow or body fluid', but excludes blood or a gamete.²⁸ A 'gamete' is defined as 'either of the two generative cells essential for human reproduction'.²⁹

Section 62 of the National Health Act provides for the donation of human bodies and the tissue of deceased persons. According to section 62, a person 'may donate his or her body or any specified tissue thereof' to be used after his or her death or give consent to the post-mortem examination of his or her body, for any purpose provided for in the Act.³⁰ In the absence of a donation or of a contrary direction by that person whilst alive, the spouse, partner, major child, parent, guardian, major brother or major sister of that person, in the specific order

²⁵Sections 7 and 9.

²⁶See below.

²⁷Artificial insemination of persons and related matters, GN R1182 in GG 10283 (1986-06-20) and amended by GN 1354 in GG 18362 (1997-10-17).

²⁸Section 1.

²⁹Section 1.

³⁰Section 62(1)(a).

mentioned, may, after that person's death, donate the body or any specific tissue of that person to an institution or a person contemplated in section 63.³¹

Mirroring section 4(1) of the Human Tissue Act, the National Health Act outlines the legitimate purposes of donation of a body, tissue, blood or blood products of a deceased in section 64. They are the following (my italics):

- (1) A donation in terms of section 62 *may only* be made for –
 - (a) the purposes of the training of students in health sciences;
 - (b) the purposes of health research;
 - (c) the purposes of the advancement of health sciences;
 - (d) therapeutic purposes, including the use of tissue in any living person; or
 - (e) the production of a therapeutic, diagnostic or prophylactic substance.

It is clear from the section quoted above that the posthumous donation of sperm for procreation will not be allowed in terms of the Act. Not even in terms of the widest possible interpretation of subsection (1)(d) will posthumous sperm retrieval for procreative purposes be allowed: procreation cannot be understood to be a 'therapeutic purpose'; and the phrase 'use of tissue in any living person' clearly excludes gametes from possible uses, as gametes are excluded from the definition of 'tissue' in section 1 of the Act.

Draft regulations entitled 'Regulations regarding artificial fertilisation and related matters' were published for comment in 2007.³² These regulations do not mention posthumous sperm retrieval for reproductive purposes.

In light of the above it is concluded that neither the existing law in the form of the Human Tissue Act nor the inoperative provisions of the National Health Act allow posthumous sperm retrieval for reproductive purposes.

Open to constitutional challenge?

A person requesting the retrieval of a husband or partner's sperm for procreation might challenge a statutory prohibition against such removal (as contained in the two acts) as a violation of her right of access to reproductive health care services in terms of section 27(1)(a) of the Constitution of South Africa, 1996. Below, a few preliminary thoughts on the possible success of such an argument are outlined.

Access to health care services is guaranteed in section 27 of the Constitution. Section 27(1) determines that everyone has the right of access to health care services, which includes access to reproductive health services. One may assume that 'reproductive health services' in section 27(1) includes a woman's access to artificial reproductive health care services, provided she is able to afford the procedure.³³ That said, it is unlikely that the right to reproductive health care services could be stretched to entitle a woman to reproduce using the

³¹Section 62(2).

³²GG 29527 of 2007-01-05.

³³Carstens and Pearmain *Foundational principles of South African medical law* (2007) 177-178.

gametes of her deceased spouse or partner: in other words, even if artificial reproductive health care services are guaranteed in section 27, the exact means and method of such services are not. Further, one would have to balance a woman's section 27(1) right of access to reproductive health services against the rights of the deceased, amongst others his right to privacy³⁴ and his right to bodily and psychological integrity³⁵.

An important preliminary concern is whether it is possible for a deceased person to be the bearer of a human right such as the one contained in sections 12(2)(a) and (b), guaranteeing his right 'to make decisions concerning reproduction' and 'to security and control over [his] body'. It is submitted that we are not here dealing with a deceased person 'choosing' to procreate or not, but rather with honouring the choices regarding procreation he made while still alive.³⁶ Similarly, section 12(2)(b) does not necessarily literally bestow a deceased person with a right to autonomy (a right which underpins the right to make informed decisions about whether to procreate) – it merely respects his right to autonomy or self-determination to decide whether to have a child while still alive.

A woman requesting posthumous sperm retrieval from her husband or partner for procreative purposes would subject the statutory prohibition in the two acts to a limitations analysis as set out in section 36 of the Constitution. Although space constraints do not permit such an analysis, it is submitted that the above (admittedly sketchy) survey of the relevant constitutional provisions points to a conclusion that posthumous sperm retrieval for procreation without prior informed consent would amount to a violation of both sections 12(2)(a) and 12(2)(b) of the Constitution as it is an invasion of his body. A woman's right to have access to artificial reproductive health care services is unlikely to trump the rights contained in these two sections.

Conclusion

At present posthumous sperm retrieval for the purpose of procreation is prohibited by legislation, and in terms of the, as yet, inoperative chapter 8 of the National Health Act it is equally illegal. It is also likely to violate several constitutional rights – not least the deceased's right to bodily integrity and security. At present chapter 8 of the National Health Act is being extensively redrafted. It can only be hoped that the eventual product will deal expressly, decisively and sensitively with posthumous sperm retrieval for procreation. Although the contribution deals with the retrieval of sperm from a deceased husband or partner, there is no reason

³⁴Section 14.

³⁵Section 12.

³⁶A similar point is argued by Strong in a different context – see Strong 'Ethical and legal aspects of sperm retrieval after death or persistent vegetative state' (1999) *Journal of Law, Medicine and Ethics* 347 at 353.

why these arguments cannot be applied equally to the situation of someone seeking to retrieve and preserve a deceased wife's or partner's ova for procreative purposes.

Melodie Slabbert argues that advances in reproductive technologies have destabilised conventional legal constructions of human bodies: '[h]uman bodies in the age of genetics are indeed, then, bodies transcended'.³⁷ I would argue that posthumous sperm retrieval for procreation is indeed an instance of the destabilisation of the human body in law. It is time to re-examine the statutory prohibition of sperm retrieval for procreation. The prohibition may be entirely inadequate in dealing with the many complex legal and ethical issues.

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³⁷Slabbert 'Human bodies in law: Arbitrary discursive constructions' (2008) *Stell LR* 71 at 99.