A Response to the ACART Consultation on Posthumous Reproduction 2018

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Introduction

In late 2017, the High Court of New Zealand delivered a historic judgment permitting the extraction and storage of sperm from a deceased male in order for his partner to use this sperm to conceive a child.[1] The male in question, referred to as Mr. Lee, died suddenly while his long-term partner (known as Ms Long) was pregnant with their first child.[2] Following Mr Lee's death, due to the biological time pressures, an application without notice was made to the Court by Ms Long and an interim order was made for the extraction of his sperm. On the advice of the Court[3], a substantive application was then made to address the retrieval, storage and use of Mr Lee's sperm by Ms Long. In the absence of New Zealand legislation providing for such circumstances[4], the Court considered firstly whether it had jurisdiction to make an order regarding Ms Long's application, and secondly, if such jurisdiction did exist, the detail and circumstances under which an order ought to be made. Ultimately, the Court held it had inherent jurisdiction in upholding the interim order for the retrieval storage and custody of Mr Lee's sperm.[5]

The use of the sperm by Ms Long was held to be a matter for the Ethics Committee on Assisted Reproductive Technology (ECART)[6] to determine under the Advisory Committee on Assisted Reproductive Technology Guidelines. These guidelines currently would not permit Ms Long to use Mr Lee's sperm for insemination.[7] The resulting situation exemplifies the clear gap in posthumous reproductive legislation. Ms Long was permitted to retrieve sperm from Mr Lee yet cannot use this sperm for its intended purpose as Mr Lee gave no written consent to this.[8] Arguably, under the current guidelines an absurdity can result, where time and resources are dedicated to the retrieval of sperm which has no end result. It is my submission that the absence of written consent need not *always* be a boundary to the use of a deceased man's sperm by his partner. There may be situations where inferred or implied consent can be acceptably found.

For the purposes of brevity, the focus of the submission will centre around the issue of consent regarding the retrieval and use of sperm rather than ovum, though I acknowledge that there are significant grounds for extensive discussion in many other areas. This submission will centre largely around consultation questions 1(a) and 5.

The Current Position on Written Consent

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[1] *Re Lee* [2018] 2 NZLR 73.
[2] *Re Lee,* n 1 at [3].
[3] *Re Lee,* n 1 at [13] per Heath J.
[4] The Human Assisted Reproductive Technology Act 2004 (HART) does not specifically provide for regulation and use of posthumously collected sperm.
[5] *Re Lee,* n 1 at 733.
[6] Designated under s 27 of the HART Act.
[7] The ECART *Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man*, promulgated under s 35 HART Act.
[8] *Re Lee,* n 1 at [7].

The nature of assisted reproductive techniques and capabilities are ever-evolving and the HART Act delegates the vast majority of policy development to ACART,[9] which allows for the outcome of various applications to be determined on an ad hoc basis by the ECART.

Per s 4 (d) of the Hart Act, an individual *should* make an informed choice and give informed consent to an assisted reproductive procedure. There is no expansion upon what constitutes this consent, and the language used by Parliament when drafting of the provision does not appear to explicitly prohibit a procedure without consent.[10] *Re Lee* has confirmed and expanded upon *Re M*[11]; the current New Zealand position allows the court to exercise its jurisdiction to allow for the immediate retrieval and storage of sperm following death without written consent.[12]Yet the court has no jurisdiction to authorise the use of this sperm, which remains the discretion of the ECART in line with the ACART guidelines.

The Position For and Against Written Consent

Violation of Reproductive Autonomy

The basis for a discussion around consent is largely due to an underlying presumption that an absence of information pertaining to the one's wishes ought to be treated as a refusal of consent.[13] We consider a deceased person have a sufficient interest in not having children after their death to not only make their refusal decisive but to consider no information to be a refusal of consent.

There are significant policy considerations which support this presumption. Various statutes[14] reflect that as a society we place importance on the wishes of our posthumous selves. Similarly, New Zealand society values the capacity and ability to give informed and clear consent to a medical treatment as a measure of individual autonomy[15]. From this position, the argument for requiring written consent to the retrieval and use of sperm is strengthened. Yet there are instances where personal autonomy can be justifiably limited[16] and it would seem that if this can be acceptable when an individual is alive, then there are certainly grounds for limiting autonomy when one is dead.

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[9] Section 32, HART Act.
[10] The use of 'should' does not imply mandatory nature, rather it is merely directive.
[11] *Re M* [2014] NZHC 757. The retrieval and storage of sperm from a comatose man was held to be legal.
[12] Per s 12 of the Senior Courts Act 2016, also discussed in n 1 at [29].
[13] Bennett, B. (1999). Posthumous reproduction and the meanings of autonomy. *Melbourne University Law Review*, 23(2) at page 305.
[14] Including but not limited to: Human Tissue Act 2008, Wills Act 2007, Burial and Cremation Act 1964, Coroners Act 2006, Crimes Act 1961.
[15] Confirmed in s 11, New Zealand Bill of Rights Act 1990.
[16] For example, under the Mental Health (Compulsory Assessment and Treatment) Act 1992, a patient can be subject to involuntary treatment orders. Arguably, this is an infringement upon the right to medical autonomy, but this infringement is deemed justifiable through a combination of legal, medical and public policy reasons.

Before this is examined further, the question then must be asked: can the deceased even have reproductive autonomy? I do not challenge that New Zealand law places importance on an individual's posthumous wishes. However, I question how far this importance can extend towards influencing our laws, and in particular, whether the concept of reproductive autonomy can be extended beyond death. The basis of autonomy is self-determination[17], or the 'ability to shape our lives according to our interests'[18], a concept in which a deceased person can no longer partake as there is no longer a life to shape. I am in agreement with Douglass and Daniels, who state that death 'extinguishes autonomous decision making'.[19]

As discussed earlier, we do give some effect to decisions made prior to death, but the scope of this is limited. We do not allow the deceased to have an eternal political vote, despite an argument that an individual may have an interest in the effects of the political landscape on their family or business. From this, perhaps autonomy ceases to exist when one is dead, but a decision made autonomously during one's life ought to still be respected and may be still breached in death.[20] It is on this basis there is a risk in allowing for anything less than written consent, but this risk in breaching autonomy must be balanced with the other relevant interests.

No Desire to Parent Posthumously

A clear breach would be evidenced where the deceased expressed his opposition to the use of his sperm posthumously. In such a case, there can be little argument for implied or inferred consent. Yet often in the case of a sudden and young death, while there may be an understanding that a child is what the couple would have wanted or planned for the future, the deceased may have nothing in writing to confirm this, and little in the way of evidence that the deceased had even contemplated their own death, let alone posthumous parenthood.

In such cases, the difficulty lies in determining what would constitute implying or inferring consent. In both *Re M* and *Re Lee* there was an existing child of the relationship[21], and this provided the court with a fairly persuasive argument that the deceased had intended to be a father and consent to posthumous parenthood may be inferred accordingly. I note that this is a clear limitation in using the current New Zealand authorities on retrieval as the only basis for amending the law both on retrieval and use.

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[17] Beauchamp, T.L., & McCullough, L.B. (1984). *Medical ethics*. Englewood Cliffs: Prentice-Hall at page 42.
[18] See generally, Dworkin, R. (1993) Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom 224. New York: Knopf.
[19] Douglass, A., & Daniels, K. (2002). Posthumous reproduction: A consideration of the medical, ethical, cultural, psychosocial and legal perspectives in the New Zealand context. *Medical Law International*, 5(4) at page 266.
[20] Bennett, n 13.
[21] In *Re Lee*, n 1, the child was in utero.

It seems that implying or inferring consent from evidence the deceased had contemplated reproducing posthumously or intended to or had already undertaken parenthood is likely to be justified without risking acting directly against the deceased wishes for their posthumous self. What happens if, without evidence to show this, the deceased had no intention of becoming a parent at all or, perhaps even more problematic, no intention of becoming a parent posthumously?

Ensuring there is a high threshold required when showing evidence of the deceased intending to be a parent may prevent the former. It is difficult to see how consent could be inferred from a complete lack of evidence the deceased even wished to have children. Regarding the latter proposition, many couples may discuss the possibility of future children, but it is more difficult in predicting whether an intention to procreate would remain in the instance of one partner's death. There are a multitude of reasons why this may be the case. The deceased may not wish to have a child they will never know, they may not wish their child to grow up without a father or they may not wish for their partner to parent their child without them. Requiring written consent is the best form of protection for these rights. If consent can be attained simply from an individual's behaviour or words prior to their death this may be a 'source of apprehension' for the living.[22]

The Surviving Partner's Reproductive Interests

It could be argued that an overly conservative approach to written consent has the ability to deprive the surviving partner of *their* reproductive interests. Where there is evidence that the deceased had contemplated *posthumous* parenthood, such as in *Re Edwards*[23], there is implicit consent, and requiring written consent seems to deprive both surviving partner and deceased of their wishes.

As evidenced in *Re Lee,* cases will often arise in which there are pre-existing or in-utero children and there is a strong interest in future children sharing the same genetic material and providing a genetic sibling. Where there are no pre-existing children, it is arguable that a party may enter and continue a relationship on the basis of having children at some point in the future. Yet while the surviving partner has their own right to their reproductive interests, no one has the absolute right to reproduce with a certain person and there is no right to the use of a person's genetic material.[24] While it is unequivocal that an individual has a right to decide who they reproduce with, this does not mean that they have a right to reproduce with whoever they please. Purely because an individual has an interest in reproducing with a certain person does not provide justification for access to their genetic material.[25]

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[22] Schiff, A.R. (1997). Arising from the dead: Challenges of posthumous procreation. *North Carolina Law Review*, 75(3) at page 946.

[23] *Re Edwards* [2011] NSWSC 478, (2011) 81 NSWLR 198.

[24] Bennett, B. (1999). Posthumous Reproduction and the Meaning of Autonomy, 23 *MELB. U. L. REV*. 286, 302. Supported by: Katz, K.D. (2006). Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying, *U. CHI. LEGAL F*. 289, 300–01 and Cohen, G. (2008). The Right Not to Be a Genetic Parent, 81 S. CAL. L. REV. 1115 1121

[25] Cohen, n 21.

The issue with this approach is determining what form of relationship can be deemed to have sufficient interest in the deceased's genetic material in the absence of written consent. The argument is based upon a relationship of expectation between the deceased and the survivor. A 2011 study has shown only a very small number of men in couples trying to conceive were opposed to the concept of posthumous reproduction.[26] Yet, without written consent or evidence of intention to reproduce with the partner in question, we may only be relying upon evidence of one individual - an individual who wants to use the sperm and therefore has a conflict of interests. There is clear potential for an overextension of the law if verbal conduct is deemed sufficient for the surviving partner to have an interest. A situation must be avoided in which a short term partner can claim the right to have their deceased partner's children, grandparents who wish to continue their legacy or family name or even more extreme, a situation where a person claims an interest without evidence of a relationship at all.[27]

As before, evidence of the deceased consenting to reproduce with the surviving partner can be inferred from a range non-written of evidence. Pre-existing embryos, evidence of attempts to conceive or children of the relationship indicate, not only a decision to reproduce but to reproduce with the partner in question. This is likely to limit the scope to those with legitimate claims.

The Overseas Position on Written Consent

Before any alteration is made to the New Zealand law I believe the current overseas positions on requiring written consent ought to be considered carefully. The United Kingdom approach to consent is very strict regarding both the retrieval and use of sperm posthumously, almost certainly requiring written consent for both.[28] Underlying this strict approach is the common law position that stipulates there can be no property rights over a body, and thus no one else can consent to the posthumous retrieval of sperm.[29] The Mental Capacity Act (2005) (UK) prohibits the consent from another allowing the retrieval of sperm from a comatose person.[30] This strict approach is mirrored regarding the use of sperm. Consent must be in writing, signed and not 'withdrawn'[31] and no verbal, implied or inferred consent will suffice.[32] In a sudden death, such as *Re Lee*, these requirements are unlikely to be met.

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[26] Nakhuda, G.S., Wang, J.G., Sauer, M.V., 2011. Posthumous assisted reproduction: a survey of attitudes of couples seeking fertility treatment and the degree of agreement between intimate partners. *Fertil. Steril.* 96, 1463–1466. 8.5% of men who were attempting to conceive with their partner were opposed to posthumous reproduction.

[27] See, for example, the 'Brad Pitt' scenario theorised by Cohen, n 21 at 1156.

[28] I use 'almost certainly' on the basis that there have been recent challenges to this statutory authority. See, for example, *Samantha Jefferies v BMI Healthcare Ltd and HFEA* [2016] EWHC 2493 (Fam). Though this case allowed Ms Jeffries to use embryos already in existence, it is an example of the English position swaying slightly.

[29] *L v Human Fertilisation and Embryology Authority* [2008] EWHC 2149 (Fam), [2009] Eu LR 107 at [144]–[161].

[30] Section 27(1)(h), Mental Capacity Act 2005 (UK).

[31] Human Fertilisation and Embryology Act 2008 (UK), sch 3, para 1.

[32] This is due to the explicit requirement for written and signed consent, see n 31.

The UK approach bears some similarity to New Zealand, as the Supreme Court has confirmed this 'no property' rule in the in *Takamore v Clarke*.[33] Regarding this, both the New Zealand and UK position to posthumous conception differs from Australia. While the HART Act expressly excludes gametes,[34] gametes are not excluded from the relevant human tissue legislation in various Australian statutes.[35] Various courts have thus concluded that tissue, once separated from the body, can be subject to a proprietary claim and accordingly, the issue of consent for the retrieval of sperm can be dealt with via the relevant human tissue legislation.[36] [37] Where the human tissue legislation has not been used, the Australian courts have covered the gap in legislation using the Court's inherent jurisdiction to declare the retrieval of sperm lawful.[38]

The use of sperm posthumously across Australia is inconsistent with the positon on retrieval, largely owning to the varying state's legislation. New South Wales, Victoria and South Australia all permit the use of sperm retrieved ante or post-mortem where prior consent has been provided.[39] Western Australia explicitly prohibits all posthumous use of gametes.[40] The insufficiency of verbal consent in NSW was evidence in *Re Edwards*[41], where the deceased had specifically asked his wife to have his child in the event of his death. In the other Australian states, non-statutory guidelines provide a framework for the prohibition of posthumous reproduction, and, as they hold no true legal sway, the position for both retrieval and use is unresolved.[42] It seems that the Australian position is currently inconsistent between the retrieval and use of sperm. It has been criticised accordingly[43], with calls for reform.[44]

The Australian and UK positions represent two very different approaches. What the UK loses in flexibility, it makes up for in certainty in the law and the clear protection of the deceased's rights. By relying, in part, on the Court's inherent jurisdiction, the Australian position arguably allows for increased flexibility and scope for a decision made on a case-by-case basis. It does, however, risk an arbitrary application and a retrieval made contrary to the deceased's wishes.

Recommendations and Conclusions

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[33] *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.
[34] Section 7, HART Act, n 4.
[35] See, for example, Human Tissue Act 1982 (Vic); Human Tissue Act 1983 (NSW).
[36] *Re Edwards*, n 23.
[37] *Re Gray* [2000] QSC 390, [2001] 2 Qd R 35.
[38] *Re Denman* [2004] QSC 70, [2004] 2 Qd R 595. This case held the High Court would only not have jurisdiction over a matter if it was expressly excluded.
[39] Section 23(a), Assisted Reproductive Technology Act 2007 (NSW); s 46(b) Assisted Reproductive Treatment Act 2008 (VIC); s 91(c)(iv)(C) Assisted Reproductive Treatment Act 1988 (SA).
[40] Section 22(8)(a), Human Reproductive Technology Act 1991 (WA).
[41] Human Fertilisation and Embryology Act 2008, n 31.
[42] NHMRC, *Ethical Guidelines on Assisted Reproductive Technology* (1996), [11.11]. (Australia)
[43] Oakeley, R. From bereaved to conceived : creating life after death through posthumous assisted reproduction. *Precedent*, No. 122, May / June 2014: at page 8.
[44] Oakley, n 43 at page 9.

Though posthumous reproduction is a recent issue facing the legal system, the issue of consent alone is not. I believe the requirement for the posthumous retrieval and use of sperm should remain as informed consent and the Court ought to be afforded discretion to determine this, similar to many pieces of pre-existing legislation.[45] Guidance may be taken from explicit written instructions, or it may be implied or inferred from *actual* conduct, so long as it able to demonstrate a genuine intention to reproduce with the applicant.

There is an overarching theme for the need for consistency between the position on the retrieval and use of sperm. The regulation of one will naturally affect the other and there seems little point in developing inconsistent regulations. As technology evolves so must the law. In such a new and relatively unexplored area, inevitably novel cases will arise. A position requiring written consent, with no flexibility arguably does not allow for new and unprecedented cases to be decided on their merits. While I am an advocate for certainty within the law and do not support a pure legal realism approach, I believe the law ought to be malleable enough to ensure fairness as best as possible to all affected parties.

[45] For example, under the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996.