

Insurance

Case note

25 May 2011

Is human tissue "property"? Jocelyn Edwards; Re the estate of the late Mark Edwards [2011] NSWSC 478

A recent decision of Justice Hulme of the Supreme Court of New South Wales is the first case of its kind in Australia to allow a widow to extract her deceased's husband's sperm with the result that she will likely use it for assisted reproduction.

Jocelyn Edwards and her husband married in November 2005. They began planning to have children shortly thereafter. In mid-2008, Mr and Mrs Edwards contemplated fertility treatments and assisted reproductive technology after failing to conceive. In early 2009, Mr Edwards told his wife that he was concerned that he may have a terminal illness. According to Mrs Edwards' affidavit in the proceedings, he said:

"If something happens to me I would want a part of me to be here with you. Our baby will be a part of us - our legacy even after we are both gone...Please promise me you will still have our baby."

Mr and Mrs Edwards took steps to undertake in-vitro fertilisation (IVF), a well known form of assisted reproductive technology (ART). An appointment was scheduled for 6 August 2010 following initial discussion with the clinic and following testing. Unfortunately, on 5 August 2010, Mr Edwards was fatally injured in a workplace accident. Mrs Edwards made inquiries with hospital staff about extraction of Mr Edwards' sperm to enable her to proceed with IVF.

On the evening of 5 August, Justice Simpson of the Supreme Court of New South Wales discussed the matter with the Coroner who indicated that she authorised for the procedure to be performed. Justice Simpson made an order allowing the extraction.

Mrs Edwards filed a summons seeking a declaration that she be entitled to possession of the deceased's sperm. The Attorney General neither consented to, nor opposed the Court granting the relief sought.

Justice Hulme's judgment centred on two issues, namely:

- Whether the deceased's sperm was property that could be passed to his estate in the absence of written consent by the deceased prior to his death
- whether it would be possible for Mrs Edwards to use the sperm in obtaining IVF treatment in New South Wales or elsewhere.

Human tissue as property?

Senior Counsel for Mrs Edwards submitted that she had a right to possession of any part of Mr Edward's estate. The Attorney General submitted that the right of an executor or administrator to possession of the deceased's body, however, is limited to ensuring a prompt and decent burial or cremation. The previous authorities supported the Attorney General's submissions.

Justice Hulme was assisted by the Court of Appeal of England and Wales' decision in *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37 which held that sperm samples can be categorised as property. In *Yearworth*, six men were diagnosed with cancer and, prior to undergoing treatment, were asked if they wished to provide semen samples for storage. Due to a problem with the level of liquid nitrogen in the tanks which stored the sperm, the samples thawed and were not able to be used. The men (including one man's estate) commenced proceedings claiming that they had suffered either psychiatric injury or mental distress. The defendant submitted that the men were not entitled to damages as the inability to use the sperm was not property damage. The Court of Appeal held unanimously that the sperm could be property for the law of negligence.

In Justice Hulme's view, the cases, although not binding, were persuasive of the view that the law should recognise the possibility of reproductive material being regarded as property. His Honour did, however, qualify that it would only be in certain circumstances, such as when it has been donated or removed for the purpose of being used for ART.

If Mr Edwards' sperm could be categorised as property, whose property was it?

After considering various discretionary factors, Justice Hulme found that it was open for the Court to find that not only was Mrs Edwards the only person in whom such an entitlement would fall to, but that she was also entitled to possession of the sperm.

The ability to utilise ART

After indicating that Mrs Edwards would be entitled to Mr Edwards' sperm, Justice Hulme then raised the question of whether she would be able to use the sperm for ART.

There was no dispute between the parties that the legislation in New South Wales (and in many jurisdictions around Australia) prohibits an ART provider from allowing a person to use the sperm of a deceased person unless the deceased person provided written consent. As Mrs Edwards was prevented from undergoing ART in New South Wales, Justice Hulme considered whether she was prohibited in taking the sperm interstate or overseas to undergo IVF treatment.

Section 21 of the Assisted Reproductive Technology Act provides that an ART provider must not supply a gamete (for example, sperm) or an embryo to another person (including another ART provider) except with the consent of

the gamete provider and in the manner that is consistent with the gamete provider's consent. Section 22 goes on to prohibit an ART provider from "exporting" a gamete from the State of New South Wales.

The question then arises whether Mrs Edwards is allowed to undergo IVF treatment interstate or overseas when she is prohibited from undergoing treatment in New South Wales? Justice Hulme questioned whether the granting of her application would amount to "the turning of a blind eye to actions taken which were contrary to New South Wales legislative provisions".

In Justice Hulme's view, the handing over of sperm would be more appropriately regarded as the sperm being "released" rather than being "supplied". As for the prohibition on exportation (Section 22), it was submitted that as the prohibition attaches to the ART provider, and not the recipient of the material, it would not result in a breach of the Act, despite IVF Australia's knowledge that Mrs Edwards intended to take the sperm outside of the state. His Honour accepted that submission.

Justice Hulme granted Mrs Edwards' application.

It is too soon to say if the legislation in other states of Australia will change to make it more difficult for women to undergo ART in circumstances where their partner has passed away. It is also yet another example of the courts adapting to societal changes flowing from scientific advancements.

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