

Donor Consent for Posthumous Reproduction: Legal and Ethical Perspectives



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Abstract

Several legal and ethical issues are raised because of the progression of biotechnology. Many medical treatments using novel biomedical technology cause legal uncertainties as legislation always fall behind the rapid advancement of biotechnology. One of the latest enhancements in biomedicine in the 20th century is Assisted Reproductive Technology (ART). The new knowledge of procreation has been born because of this advancement. While the ethical debates of procreation issue have not been resolved yet, biotechnology development has allowed post-mortem reproduction. Numerous legal and ethical quandaries are certainly emerged as a consequence of this post-mortem artificial insemination. These include the extraction and application of sperm after death, inheritance, and the potential for legal action concerning wrongful life or negligence by the child. There is no regulation in Indonesia concerning this matter. Thus, this paper will examine jurisdictions in several countries, such as the US, the UK, and Australia in relation to donor consent for posthumous reproduction which might be used to fill in the gap of positive law in Indonesia. The legal need of consent and the ethical concept of autonomy which considers the best interest of posthumously conceived child will be discussed in this article.

Keywords : Ethics; Law; Medicine; Posthumous; Reproduction

Abbreviations : ART: Assisted Reproductive Technology

Main Text

Background

The advancement of biomedical knowledge usually develops many legal and ethical issues. Legal uncertainties are often raised in many medical treatments using new biotechnology technique as legislation could not keep pace with the rapid progress of biomedical technology. In the 20th century, one of the latest enhancements in biomedicine is Assisted Reproductive Technology (ART). This development has generated new understandings of procreation. While the ethical debates of procreation issue have not been settled yet, biotechnology advancement has allowed post-mortem reproduction. Post-mortem artificial insemination certainly raises numerous legal and ethical quandaries. Several legal issues including the extraction and use of sperm after death, inheritance, and the potential for legal action concerning wrongful life or negligence by the child [1]. Even though some communities may condemn the practice of posthumous reproduction, empirical finding has indicated that post-mortem ART is supported by American society as reported [2]. In similar vein, jurisdictions in several countries, such as the US, the UK, and Australia, have permitted post-mortem reproduction [3]. Most of these legislations have reached an agreement in relation to the need of prior consent for posthumous conception from a deceased person. This position

will be defended in this paper based on the legal need of consent and the ethical concept of autonomy which considers the best interest of posthumously conceived child.

Definition and History

The meaning of posthumous reproduction is using gamete materials, either retrieved from a cadaver or obtained from stored gametes during lifetime, for procreative purposes after the death of one or both biological parents [3-6]. The use of frozen sperm to conceive a child after the death of prospective father was first occurred on Cambridgeshire, UK in 1977 [1]. In 1980, the first post-mortem sperm retrieval was described by Rothman [2,7,8]. Subsequently, the first child was born through a successful test-tube reproduction using posthumous semen nineteen years later [2]. To this date, no report has been found of any conception using posthumous ovum because of the complicated process of harvesting egg in relation to hormonal inducement [1]. Thus, the scope of this paper will be limited to posthumous sperm retrieval and use.

The Legislation of Posthumous Reproduction in Australia

Four states have enacted legislation regulating assisted reproductive technology in Australia [9]. Three of these

regulations explicitly legitimate the use of gametes, either collected ante-mortem or post-mortem, to conceive children after death where prior consent has been provided by the deceased person:

- I. Assisted Reproductive *Technology Act* 2007 (NSW), s 23(a),
- II. Assisted Reproductive *Treatment Act* 2008 (VIC), s 46(b),
- III. Assisted Reproductive *Treatment Act* 1988 (SA), s 9(1)(c)(iv)(C)

Meanwhile, in Western Australia, the posthumous use of gametes is prohibited under the directions of *Human Reproductive Technology Act* [10]. Other States and Territories comply with the NHMRC Ethical Guidelines, which recommend that sperm can only be used with prior written deceased consent [3,11].

The Need for Donor Consent in Posthumous Sperm Retrieval

The legal concept of consent should be applied in every medical practice, including ART. Obtaining consent from patients will certainly protect health practitioners from the legal liability of conducting criminal assault and trespassing to the person [12]. Certainly, consent is strongly related to the right of self-determination as stated by Cardozo J [13]. Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault. In Australia, the High Court has confirmed this concept in *Secretary, which mandates consent for any medical procedure on every alive or dead patient* [1]. Hence, it is important to note that harvesting sperm from dead body without donor consent is a form of illegal battery or assault.

However, several cases have demonstrated that donor consent is not an absolute prerequisite to collect sperm from a deceased person. One of the examples [10,14]. In this case, Hulme J permitted the collection of sperm without donor consent under the *Human Tissue Act* 1983 (NSW), s23 and s25 in relation to *Coroners Act* 2009 (NSW) [9]. But, this decision could lead to several difficulties. First, the manner of death in this case is unnatural. Mark Edwards suddenly died because of occupational accident. In this kind of reported death, it is obviously clear that the coroner can give consent to tissue removal. But, in natural death, obviously, the Coroners Act cannot be applied. The next difficulty is related to the property right.

The Need for Donor Consent in Posthumous Sperm Possession and Use

The justification of property right has been arisen in recent case law in relation to the possession and use of posthumous sperm. Fundamentally, the common law embraces the idea of *res nullius* (no property) to human body. According to this concept,

nobody can own human corpse, except for the purposes of burial or there are any additional 'work and skill' on the bodily material [10,13,15,16]. In fact, nevertheless, several court decisions are not in line with the concept of *res nullius* of human tissue. The judges are inconsistent to apply the concept of no property, particularly the *Doodeward* exception, while deciding post-mortem reproduction cases involving donor consent. Obvious examples can be found [14,17]. In both cases, Hulme J and Gray J took a position which violates the *res nullius* rule of human tissue to make *prima facie* decisions for the release of the deceased's sperm to their spouses for ART treatment. But, the downside of these approaches is every one could possess the post-mortem tissue. It could lead to the misuse of posthumous sperm intended for creating human life in favour of one's advantages, either for scientific purposes or even worse, for economic purposes [16]. Although creating embryos designed for research is sometimes ethically permissible, the law should regulate it, at least by mandating donor consent so that the posthumous sperm can be used properly for both reproductive and non-reproductive aims. This legal scheme is definitely in line with the principle of respect for autonomy.

The Concept of Autonomy

The concept of autonomy has influenced the legal and ethical consideration of consent to medical treatment [3]. Autonomy has been defined by Beauchamp and Childress [18] as: "self-rule that is free from both controlling interference by others and from certain limitations such as inadequate understanding that prevents meaningful choice". Thus, according to this definition, ethically and legally, there are three main components of consent: (a) valid, (b) inform, and (c) enact [12]. Valid means the patient must have the capacity to make a decision and the consent is voluntarily given without coercion. Inform means the patient must be given sufficient disclosure of information and the information must be fully understood by the patient. Enact means the patient must make a specific decision and the decision must be authorised.

Competency is the most important consideration in legal field to ensure the validity of consent. The legal test of competence, which consists of three stages, must be performed to ensure that one has a decision making capacity. These stages are: (a) the patient must comprehend and retain the information, (b) the patient must believe the information, and (c) the patient must have capability in weighing and balancing the information [19]. When a person suffers an impairment of decision making capacity, the proxy's substituted judgment would replace patient's position to extend the patient's wishes in decision making process based on one's written advance directive, one's previously known wishes, and one's best interest [7,19]. A deceased person is obviously incapable to involve in decision making process, so that the alternative approaches which have been mentioned previously should be applied to pass on the deceased's consent. Hence, when alive and competent, people can explicitly state their wish to donate gametes after death for

the purpose of reproductive treatment. This approach could be assumed as a form of advance directive, which is defined as [19]: “decisions made by patients about what medical treatment they would like in the future, if at some point they cannot make decisions for themselves”.

However, the deceased’s wishes are frequently unknown. It could result in a speculation about what are the actual desires of the late, especially in the case where there is no written consent from the late [2,4]. Moreover, in most cases of sudden death, people would not have an opportunity to state their wish explicitly since they do not have time to contemplate this matter [3]. Furthermore, in daily real life, people rarely plan for their death, particularly in relation to posthumous reproduction, unless they have been diagnosed with a terminal illness while undertaking fertility treatment [2,20,21]. But, nowadays, electronic media have provided much information about posthumous reproduction, which is easily accessible to general public. It could influence people to start planning for posthumous conception. In addition, it is arguably more ethical to treat the unknown wish of the deceased as a form of negative right. Although, admittedly, a deceased person no longer has a positive right since the dead body no longer has any duty and obligation, the late still possess a negative right of self-determination, that is an absolute right not to be interfered, which should be respected [7,22]. Therefore, if the intention of a deceased person is not known, it should be presumed that the donor has never been involved in decision making process to validly consent the retrieval and use of his sperm for conceiving a child after death.

Furthermore, prior consent to posthumous conception is required to protect the best interests of the late. Schiff [23] has argued that un consented post-mortem gametes harvesting affects the deceased’s interest since it could harm individual’s interest. In similar vein, several scholars have emphasised that a person has reproductive interests that could be extended and could be harmed after death [21,24,25]. According to Kant, violating individual’s interests is treating the person merely as a means, without regarding one’s own goals [18]. Nonetheless, a dead person, evidently, is unable to achieve any goals, as assumed by Leven book [26]: “when a person no longer exists, he no longer has goals or desires or wants”. Giordano holds a similar position [27], alleging that “to think that we can violate someone’s autonomy or best interests by acting on a dead body is therefore fallacious, because the person is extinguished and there is no autonomy and no best interests to protect.” Indeed the violation of individual autonomy can only happen when a person still alive. In other words, the interests of the dead are less important than the interests of the living [22]. But, there might be conflict of interests between two living parties, involving the spouse and the future child born by posthumous reproduction. In legal sense, the best interest of posthumously conceived child is paramount, which will be explained next.

Donor Consent Protects the Welfare of the Child to be Born

Donor consent to posthumous artificial insemination could safeguard the interest of a child conceived using post-mortem sperm. The future wellbeing of this child is tightly connected to the issue of inheritance. Children will have the right of inheritance if they have legal parents. There is a restriction of inheritance right for children who are born after the death of their parents. This issue is regulated under the common law which states that children may inherit if they are born within 280 days of the death of the parents [1]. Similarly, *Succession Act 2006 (NSW)*, s 107 situates that the child must be born before the intestate’s death. If the child is born after the intestate’s death, the fertilisation must be occurred before intestate’s death. These jurisdictions, clearly, prevents children conceived from posthumous sperm to inherit the estate from their father. This legal constraint, however, could be managed by establishing a legally recognised familial relationship because it is the basic concept of inheritance right [1]. One of the strategies is providing explicit wish to build a complete family with children while alive, so that if the unfortunate incident occurs, the spouse could integrate the deceased’s will into collective intention by performing post-mortem artificial insemination as demonstrated [17].

Conclusion

To sum up, donor consent should be a legal precondition for posthumous conception. This requirement is also appropriate ethically since it respects the dead’s will. Despite the unknown intention of the deceased to posthumous conception, the negative right of the late should be respected. Collecting and using people’s reproductive material after death without consent not only violates the principle of respect for autonomy, but also devalues one’s bodily integrity and self-determination. In addition, the best interest of posthumously conceived children would be protected by the availability of legal donor consent. Legal practitioners should consistently apply the concepts of consent, property right, and succession, which are presented in recent jurisdictions to make accountable legal decisions in posthumous reproduction disputes.

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