

make a decision reflecting his values—and there was no disagreement amongst them on this. They were able to show a “demonstrable basis in former autonomous decisions”¹⁰ that Mr Clough would have given his permission for Ms Baker’s request for his sperm to be harvested after death.

A further interesting thing about this case is that it illustrates the way in which ethics, law, and personal opinion can differ. My intuitive response to this case was that Ms Baker should not try to have her dead fiancé’s baby. Nevertheless, on critical reflection I find there are good reasons in support of her request to retrieve and harvest her fiancé’s sperm and no good argument to support my initial response. Ethical reasoning involves critical analysis and (depending on choice of ethical theory), seeking to determine the best outcome

from all possible alternatives or looking to see if there are any ethical principles being violated. Legal reasoning is different. In denying Ms Baker’s request, the judge relied on precedent as a guide. Legal decisions based on precedent are standardised, consistent, predictable and impersonal, and rooted in the values and ethical standards of the past.

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Commentary

J Oakley

Could it ever be ethically justifiable to remove a dead man’s sperm to enable his partner to bear a child to him? If he had clearly indicated his agreement to this in advance, then the posthumous removal of his sperm for this purpose can be ethically justified, particularly in circumstances where the interests of the resulting child can be adequately met. Few dead men would have addressed such a possibility while alive, however, unless they had a specific reason to consider such an issue, perhaps because of a terminal illness. With out a prior indication that removal of his sperm for this purpose would be in accordance with his wishes in such circumstances, the posthumous use of a man’s sperm for procreation is unethical.

Posthumously removing organs and tissue from those who have given prior consent to this is commonly thought ethically acceptable. Indeed, some argue that cadaveric organ donation can be ethically justifiable in the absence of an explicit prior directive from the donor, so long as there is reason to believe this to be consistent with the values of the deceased person. Whatever we make of this latter suggestion, however, it does not follow that cadaveric sperm donation is justifiable in similar circumstances.

Deciding on behalf of another (on the basis of their known values) that their organs and tissue will be donated to other patients is one thing, but deciding on behalf of another that they will have offspring raises some significantly different issues. (Of course, some men might regard donating their sperm as akin to the posthumous donation of an unneeded

organ, but many men do not view sperm donation in that way.) Indeed, those same values—for example, of personal intimacy—that help justify women’s reproductive decisions (regarding access to assisted reproductive technologies and abortion) as being within a protected zone relatively free of state intervention are the values which, for many men, would make being volunteered by another—even one’s surviving partner—to have offspring a deeply intrusive practice.†

Although procreation may be a fundamental human interest, plenty of fertile people autonomously choose to forgo altogether having children. Someone who thinks, for example, that he would be unable because of other commitments to help raise a child, might believe that his absences would be sufficiently detrimental to any prospective child that he would autonomously choose not to become a parent (even if his partner was willing to carry a disproportionate share of the parenting burdens). If a clinically dead man had such a view, but had not documented in writing that his sperm

† Justice Blackman famously argued, in delivering the opinion of the US Supreme Court in the landmark abortion case of *Roe v Wade* (1973), that “the Court has recognized that a right of personal privacy, or a guarantee of personal privacy, does exist under the Constitution” and that a line of Supreme Court decisions “make it clear that only personal rights that can be deemed ‘fundamental’...are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage...procreation...contraception...family relationships...and child rearing and education”.

was not to be posthumously harvested for reproduction, would it really be justifiable for his surviving partner to harvest his sperm? It does not follow from the fact that a person, while alive, was very keen to have children with his partner that he would have wished his partner to conceive and bear a child to him after his death.

As Spriggs points out, prior to his accidental death in North Queensland, Andrew Clough had expressed a keen desire to have children with his partner Simone Baker. He may also have been a sperm donor in earlier years, and he had given consent for his organs to be donated in the event of his death. Nevertheless, it should not be inferred from these observations that Andrew would have wanted his sperm used by Simone to conceive and bear a child after his death. It is perfectly consistent to want children with one’s partner while one is alive, but to prefer that one is not posthumously made a parent after one’s death. There can be good reasons for preferring not to become a posthumous parent. As his death was unanticipated, it seems that Andrew did not have occasion to address such a contingency with his partner Simone. Without Andrew’s prior authorisation for his sperm to be used for procreation after his death, I believe that the posthumous removal of his sperm for this purpose cannot be ethically justified.

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