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ASSISTED REPRODUCTIVE TECHNOLOGIES AND HUMAN RIGHTS

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by Kate Galloway

Assisted reproductive technologies (ART) have challenged our thinking around what it means to be human. Associated with this is the dignity and humanity in a decision to become a parent, and how our genetic material is to be used. On the one hand we might claim a "reproductive right" as an expression of our personal autonomy and control over our bodies. On the other hand, we may call for reproductive justice – an idea that seeks to balance a complex matrix of competing claims for dignity of personhood. These claims may involve men and women as donors of gametes, women who carry a child to term, and the child themselves.

ART is regulated by legislation in every Australian state, and under Commonwealth law and policy. While a willing donation of sperm or ova to conceive a child may seem to promote personal autonomy, there are many ways in which human dignity can potentially be compromised through use of ART. This starts with how we understand control or "ownership" of gametes themselves, through to our right to be a parent, or to contribute to reproduction when we ourselves do not wish to be a parent.

The question of rights to sperm was tested in a recent decision in the New South Wales Supreme Court. The Court found that Ms Edwards, the wife of a deceased man had a *possessory* interest in his sperm, removed after his untimely death. The Court was reluctant to find that anyone – including the deceased himself – had *property* in the sperm. Indeed the Courts have traditionally found that there is no property in the human body. While there are a number of exceptions to this principle, the idea is based on an aversion to ownership of humans or to their commodification. It seeks to support the dignity of humanity. So while Ms Edwards was awarded possession of the sperm, the Court fell short of finding that she "owned" them.

In contrast, in a 2012 decision, the Supreme Court of British Columbia in *JCM v ANA* found that sperm straws (i.e. vials of preserved sperm) were indeed property. JCM and ANA were former spousal partners who had used donor sperm to conceive their first child. There were 13 sperm straws remaining and when the couple separated, one partner sought to have them destroyed. The other partner wanted to use them to conceive again with her new partner. (See overviews of the case here and here.)

The court ordered the parties to share the 13 sperm straws. One partner was to receive six straws, the other seven. The court found that "the US cases demonstrate the importance of balancing the right to procreate with the right to avoid procreation" [67] but that this was not an issue in this case: use of the sperm by JCM would not affect the procreative rights of ANA as the child would not be related to her in any way.

Unlike *Edwards*, this case rejected the long-held view that there is no property in the human body. However, both cases differentiated rights in sperm from general property interests.

> 'I do recognize that sperm used to conceive two children for two loving parents does not have the same emotional

> status as a vehicle or a home.' (Justice Russell [54] in *JCM v ANA*)
>
> This judgment addresses some, but by no means all, of the issues that relate to such a complex, difficult and controversial question. (Justice Hulme [1] in *Edwards*)

Edwards resolved the question of possession independently of the lack of consent by the deceased. The donor's autonomy was only thinly protected because the Court did not have to make a finding about the use of the sperm for reproduction – its judgment was limited to the right to possession. In *JCM v ANA*, the donor's autonomy was not in issue as there was no question about consent to the use of the sperm. However the donor's autonomy has become relevant in different circumstances.

In Ontario in the 2012 decision in *Deblois v Lavigne* a sperm donor sued the mothers of a child born using his sperm. He sought recognition as the child's father and "general and liberal" contact with the child. He had given the sperm pursuant to a contract with the child's mothers. Part of the contract provided that the donor father would have no contact with any child born as a result of insemination.

In this case, the interests of the donor father were in issue; and these interests go beyond determining personal autonomy through property in or possession of sperm. Instead, this case was concerned with contractual rights going to the heart of autonomy in terms of parenting. This is far different from the right to procreate or avoid procreation mentioned in *JCM v ANA* as procreation has already occurred.

The question might be asked: to what extent is parenthood divisible from gametes themselves? Is parenthood an integral part of our autonomy and therefore our human rights? In this case, the Court denied the father's claim, based on the best interests of the child. That this decision depended on the child's rights, rather than the rights of the mother or donor father, highlights the complexity of such cases.

The question of autonomy and parenthood becomes further complicated within surrogacy arrangements in which these existing elements of parenthood – genetic and social – are added to the emotions and physical changes of gestation experienced by the birth mother who relinquishes her child. Without diminishing the emotional experience of a sperm donor, carrying a child to term involves an entirely different commitment emotionally, physically and economically. Coupled with the social construction of motherhood and the economic and social reality for many who become birth mothers, the nature of women's autonomy within a decision to enter a surrogacy arrangement can be problematic.

On the one hand, those in favour of freedom of contract argue that it is every adult's right to reproduce as they see fit, and that this in itself is an expression of autonomy. On the other hand, others argue that the birth mother is simply a means to an end for the intending parents and that she is ripe for exploitation – so her autonomy is therefore impaired by the arrangement. Additionally, there is concern about the potential for commodification of the resulting child – that the surrogacy arrangement is no more than a trade in babies thus detracting from human dignity. For this reason, commercial surrogacy is prohibited in Australia though so-called altruistic surrogacy is permitted.

The extent of our personal autonomy and how we express ourselves through reproduction and control over our reproductive capacity has been both enhanced and challenged by new technologies. The law has taken a cautious approach, tending to favour decisions on a case-by-case basis. This allows for consideration of the competing claims over our bodies and our genetic materials.

Kate Galloway is a legal academic at James Cook University in Cairns. Her areas of interest include feminist legal theory and justice.

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