

Focus HEALTH LAW

Competing rights highlighted in sperm donor cases



Sara Cohen

Last year, a trio of cases dealing with sperm donation and/or the children conceived from the use thereof illuminated the inherent tension between the rights of donors, intended parents and donor-conceived children. As the courts could not rely on precedent or legislation to decide the cases (as no relevant decisions or legislation existed) they were required to provide at least a part answer to significant policy questions, such as: is a donor a parent? Are gametes property? Do donor-conceived people have a right to know their origins? When do the best interests of children conceived through donor gametes outweigh the rights of the donors or the users of the donor gametes?

Pratten v. British Columbia (Attorney General) [2011] B.C.J. No. 931 (overturned, [2012] B.C.J. No. 2460), is perhaps the most well-known of the three decisions. Olivia Pratten is a young woman conceived in British Columbia during the early 1980s through the use of anonymously donated sperm. She alleges that she, along with other donor-conceived people, suffers significant anxieties and other harms as a result of, *inter alia*, B.C.'s failure to ensure records are kept about the sperm donor, and to provide not only health information but identifying information about the donor

to her. Ms. Pratten alleges that this failure amounts to discrimination as compared with adult adoptees, who may access records about birth parents, including identifying information, upon reaching the age of majority, and constitutes a breach of her s. 15 and 7 rights under the *Charter of Rights and Freedoms*. Ms. Pratten points to a sizable body of academic literature acknowledging the psychological difficulties experienced by donor-conceived people. Should Ms. Pratten's claim be successful at the Supreme Court of Canada, it is widely expected that anonymous gamete donation will be prohibited across the country.

Justice Elaine Adair of the British Columbia Supreme Court noted that "...based on the whole of the evidence...using an anonymous gamete donor is harmful to the child, and it is not in the best interests of donor offspring." Justice Adair largely agreed with Ms. Pratten's position, finding that donor-conceived adults are discriminated against as compared to adult adoptees, and that Ms. Pratten's section 15 (1) *Charter* rights had been violated by B.C.'s unconstitutional under-inclusive adoption legislation. The B.C. Court of Appeal unanimously overturned this decision, though, holding that a breach of Ms. Pratten's s. 15(1) *Charter* rights is permissible under s. 15(2) (affirmative action). Further, Ms. Pratten's s. 7 rights were not violated, and the remedy sought by Ms. Pratten is "...far more extensive" than any person, including non-donor offspring, are entitled to; there is no legal

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entitlement to know one's past.

While the *Pratten* decision, particularly that of the lower court, focuses almost exclusively on the best interests of the donor offspring, *J.C.M. v. A.N.A.* [2012] B.C.J. No. 802, also by the B.C. Supreme Court, declines to take this factor into account. In this case, a lesbian couple had purchased sperm through a bank and used it to conceive two children. The couple inadvertently failed to distribute the remaining straws of sperm upon the dissolution of the relationship. The applicant now wanted to make use of the stored sperm so that the new child would be biologically related to the two previous children, but the respondent refused to consent to the use. Although the applicant argued that it is in the best interests of the future child to allow the use of the sperm so that he or she will be biologically related to siblings, and the respondent argued that there is inherent value in gametes so sperm ought not be commodified by dividing it like common property, the court ignored or rejected both arguments and instead divided the remaining straws as equally as possible between the parties as a division of marital property upon the dissolution of the relationship.

Finally, *Deblois v. Lavigne* [2012] O.J. No. 3671 is the first time an Ontario court has been asked to uphold a sperm donor agreement and rule on the parental rights of sperm donors. A lesbian couple asked an acquaintance to donate sperm for their reproductive use with the understanding that the women, and not the donor,

would be the parents of the child. The parties entered into a known donor agreement (without seeking the assistance of legal counsel). Three months after the child was born, the donor brought a motion for interim access to the child. The motion was heard when the child was 21 months old, and by that time, the judge declined to grant the interim order finding that interim access was not in the child's best interest. Like the court in *Pratten*, the court in *Lavigne* focused on the best interests of the child, and although we assume the decision upholds the sperm donor agreement, a close reading of the judgment demonstrates that the agreement itself was largely ignored by the court in making its decision.

Taken together, the three decisions depict a tension between the best interests of children conceived through the use of donor gametes versus the rights of donors and parents. The three cases also depict that no rhyme or reason yet exists as to when a court will prioritize the best interests of a child, or a future child, over the rights and interests of donors and parents.

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Partner: Advocates are concerned about miscarriages of justice

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vated sexual assault.

It's the definition of "realistic possibility" that has raised the ire of HIV/AIDS groups and individuals across the country. In what amounts to overturning an earlier, established case, the Supreme Court unanimously determined that the only safe sex is vaginal sex that takes place when a condom is used and the person living with HIV has a low or an undetectable viral load. It remains unclear what constitutes a realistic possibility for other sexual activity.

The choice is not a popular one among HIV groups and individuals—and may have significant public health implications.

"It kicks the legs out from under

Prosecutorial guidelines: excerpts

Prosecutorial guidelines have been developed in England, Wales and Scotland to assist counsel in laying appropriate charges regarding HIV, assault and disclosure. Here are a few excerpts from the Scottish guidelines:

- While recognising that culpable and reckless conduct to the danger of others is potentially criminal, in cases involving exposure to sexually transmitted infections, where there has been no resultant transmission of the infection, prosecution for the crime of culpable and reckless conduct would only be contemplated in exceptional circumstances.
- In cases of exposure alone, and in view of the negligible risk of transmission, there is a very strong presumption against prosecution in these circumstances.

the public health mantra that people should get tested," said Jacqueline Gahagan, a professor of health promotion at Dalhousie

University in Halifax.

At present, she said, it is estimated that 25 per cent of individuals with HIV are undiag-

nosed. If an individual doesn't know they have HIV, they cannot be guilty of not disclosing their status.

Another health concern rests with the legal green light to not wear a condom when certain conditions are met. "I am hesitant to endorse an option that doesn't recommend a barrier method," Gahagan said.

These health-related concerns, she added, may be difficult for the legal system to address. "I don't think the criminal justice system is able to look at the nuances of the public health issue. It uses a sledgehammer."

In the absence of clear and consistent guidelines, there is concern that prosecutors will have free reign. "In Ontario and Que-

bec, prosecutors have been quite aggressive on this issue," Kazatchkine said. "We've seen people charged with practising oral sex. We've even seen people charged for mutual masturbation."

The issue of disclosure itself is a thorny one. "It's a really difficult thing to prove that you disclosed. It usually comes down to credibility," she said.

Disclosure may also put some people at risk, Vonn said. "Some women will have to disclose to abusive partners."

Those concerns, advocates believe, will lessen if prosecutorial guidelines are implemented.

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