Y V A HEALTHCARE TRUST [2018] EWCOP 18 AND THE MENTAL CAPACITY ACT 2005: TAKING GAMETE RETRIEVAL TO THE BANK

In *Y v A Healthcare Trust* [2018] EWCOP 18 (hereafter *Y v A*), Z, a 46-year-old man, was married to Y in 2014 after a four-year relationship. They had a son in 2016 but struggled to conceive a second child. In September 2017 the couple discussed assisted conception with a general practitioner and were booked in for their first treatment on 16th July 2018. In preparation for the treatment, the couple were given consent forms to sign regarding the retrieval, storage and use of their gametes in life and in death. They engaged in lengthy discussions about the kind of assisted conception they wanted, but they failed to sign the forms. On the 5th July 2018, Z was in a catastrophic motorcycle accident. A brain scan showed that due to a lack of oxygen he had sustained significant brain damage. The medical team caring for Z suggested that they perform brain stem death tests and, if no brain activity was identified, pronounce him dead and remove him from life support. Y wanted to retrieve Z's sperm before he died and was worried that the paperwork was not signed properly, submitting to the Court of Protection that an "irreplaceable hole" would be left in her life if she was unable to complete the fertility treatment. Y recalled that, as a couple, they did discuss the event of death and she told the court that Z wanted her to continue with the fertility treatment "if it was what she wanted". In the first case of its kind, an urgent application was made to the Court of Protection on 12th July 2018 whereby Y sought the following relief against the hospital Trust, the Human Fertilisation and Embryology Authority (hereafter 'HFEA') and the Official Solicitor for Z;

a. A declaration that, notwithstanding her husband's incapacity and his inability to consent, it was lawful and in his best interests for his sperm to be retrieved and stored prior to his death; and
b. An order pursuant to section 16 of the Mental Capacity Act 2005 ('the 2005 Act') directing that a suitable person (not Y) should sign the relevant consent form for the storage of Z's sperm on her husband's behalf.

Gwynneth Knowles J granted the application on 12th July 2018 using the court's decision-making powers under sections 15 and 16 of the 2005 Act. Z was shown by the medical evidence to lack the "capacity to make decisions on such matters as were described in the declaration" under section 15(1)(b) of the 2005 Act, and the court was therefore invited to declare "the lawfulness of any act yet to be done" to Z under section 15(1)(c) of the 2005 Act (at [11] and [22]). Z was also found to "lack capacity in relation to matters concerning his personal welfare" under section 16(1)(a) of the 2005 Act, allowing the court to "make a decision on his behalf" in relation to common law sperm retrieval under section 16(2)(a) of the 2005 Act (at [12], [19] and [22]).

Gwynneth Knowles J proceeded to examine the test for "best interests" outlined within section 4 of the 2005 Act, pursuant to section 1(5) which states that "an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests". Gwynneth Knowles J considered Z's active role in seeking fertility treatment with Y before his motorcycle accident and determined that his past and present wishes, feelings, beliefs and values under section 4(6) of the 2005 Act were that his existing son with Y should have a sibling (at [23]). Gwynneth Knowles J concluded, in answering the first ground of Y's application in the affirmative, that it was in the best interests of Z to have his sperm retrieved:

> "It seems to me that Z would have chosen to allow clinicians to retrieve his sperm so that it might be stored and then used after his death so that his little boy might be able to have a brother or sister. That choice was entirely consistent with the evidence before me and consistent with what I had learned about Z's hopes and dreams for a family life with Y and children of their own. I was also satisfied that Z had contemplated what might happen if he died and that family life might not include him in person but might, however, include a child conceived by Y after his death using his sperm…I am in no doubt that the decisions I have taken on Z's behalf were in his best interests even though his death was imminent" (at [24]).

The authorised retrieval of Z's sperm in *Y v A* is problematic under the current law of best interests. It is the first time a UK court has been asked to authorise the removal of gametes from a living adult for the purposes of fertility treatment who, because of a lack of capacity, could not issue his own consent. The obvious route was section 4(6) of the 2005 Act, indicating its first known intersection with the strict provisions of the Human Fertilisation and Embryology Act 1990 ('the 1990 Act'). The 2005 Act covers not only medical treatment but personal welfare, property and affairs under section 16(1), placing a wider emphasis on the wishes, feelings, beliefs and values of the patient and those caring for him under sections 4(6) and (7) (in support, see *NHS Trust v Y* [2018] UKSC 46). However, the concluding statement made by Gwynneth Knowles J, that: "I am in no doubt that the decisions I have taken on Z's behalf were in his best interests even though his death was imminent" (at [24]) would seem to contain a striking contradiction. Z was suspected to be brain-stem dead. Sperm retrieval mattered nothing to Z, nor did it serve any purpose for Z. He had no "hopes and dreams for a family life with Y" in his unconscious or brain-stem dead state. It was not best for Z. It was best for Y and her family.

This contradiction is reminiscent of bone marrow donation case *Re Y (Mental Patient: Bone Marrow Donation)* [1997] Fam. 110 (hereafter *Re Y*), in which Connell J confirmed that the retrieval of cells, tissues or organs from an adult is a trespass and a battery unless that person consents to it or it is in their best interests (at 113). He fashioned a unique best interests test from the judgment in *F v West Berkshire Health Authority* [1990] 2 A.C. 1 and saviour sibling case *Curran v Bosze* (1990) 566 N.E.2d 1319 to authorise the extraction of bone marrow from an incompetent adult on the premise that her frail mother was expected to succumb to the stress of losing her other daughter to leukaemia: "it is to the benefit of the [donor] that she should act as donor to her sister, because in this way her positive relationship with her mother is most likely to be prolonged" (at 115). It is unlikely that the incompetent donor in *Re Y* derived any benefit from the retrieval of her bone marrow if, as Connell J described in the judgment at 112, she had no understanding of the facts and showed no recognition of her family. The best interests test in *Re Y* therefore served the needs of others. A surprising parallel can be drawn to the current case of *Y v A* in that Y, Z's wife, was the sole beneficiary of the best interests test when applied to Z. He could be viewed as an unknowing vessel, harvested for his resources to fulfil the needs of others. Sperm retrieval for an unconscious man is highly invasive. In a process known as electroejaculation, an electric probe is inserted into the rectum towards the prostate and seminal vesicle. Sperm is discharged into the bladder due to the absence of muscular contractions, meaning the sperm has to be collected via a catheter up the urethra. A general anaesthetic is provided to living patients who undergo this procedure because it is painful.

It is accepted that Z probably did make his wishes on fertility treatment clear during his living days, making the possibility of posthumous consent more credible. It is also accepted that the

old common law used in *Re Y* was couched in terms of medical benefits and burdens as opposed to beliefs and wishes that are easier to satisfy (see *F v West Berkshire Health Authority* [1990] 2 A.C. 1 and *Airedale NHS Trust v Bland* [1993] A.C. 789 for the old common law). However, it may have been more fitting within the language for Gwynneth Knowles J to say that Z "may have wished" for his sperm to be retrieved, as opposed to it being "in his best interests". This alteration in syntax matters, as it draws a clear line between supposition and fact. The term "best interests" suggests a tangible interest to Z, of which there is none to measure. An absent interest in the retrieval of sperm renders the retrieval unlawful, and to authorise it on the premise that it was in his best interests when he was suspected to be brain-stem dead does not make legal (or moral) sense. The best interests test is not made out. The "may have wished" construction, on the other hand, is a decision based on speculation and is easier to fulfil for a patient like Z, but its speculative nature is arguably not the appropriate route to consent in the strictly regulated area of assisted conception.

The Warnock Report (Report of the Committee of Enquiry into Human Fertilisation and Embryology, Department of Health and Social Security, July 1984, Cmnd: 9314, London: HMSO) intended any future fertility law to be clearly defined in order to protect the preciousness of human life and the vulnerability of the embryo (at para. 11.17). To this end, a time limit for embryonic storage was agreed upon (at para. 10.10) and ownership of embryos was prohibited (at para. 10.11). Lord Bingham in the unrelated case of *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 also made it clear that the exacting provisions of the 1990 Act served a clear purpose (at [13]):

> "It is, however, plain that while Parliament outlawed certain grotesque possibilities (such as placing a live animal embryo in a woman or a live human embryo in an animal) it otherwise opted for a strict regime of control. No activity within this field was left unregulated. There was to be no free for all".

This sentiment was echoed in the earlier case of *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] A.C. 800 whereby Lord Wilberforce stated that the role of the courts when interpreting a statute was to focus on the intentions of Parliament (at 822):

> "The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. [The courts] cannot fill gaps; they cannot by asking the question 'What would Parliament have done in this current case – not being one in contemplation – if the facts had been before it?' attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself".

Gwynneth Knowles J also reiterated the strictness of the consent provisions in the 1990 Act in *Y v A* (at [16]). It is clear that the whole process of assisted conception is to be governed by strict laws and regulations, ensuring that gametes and embryos are protected from abuse and that parenthood is sought with unequivocal consent. This ensures that any child born is raised devotedly into adulthood. To base any part of the fertility process in conjecture would be to soften the robust spirit of the 1990 Act and open the door to 'band aid babies' who are born into grief, afflicted with loss, and burdened with expectations. It is proposed that sperm retrieval for the purposes of assisted conception should be treated with the same rigour as its storage and use under the 1990 Act. This would mean, at the very least, finding a tangible 'interest' for Z under section 4(6) of the 2005 Act in his unconscious state before the

provision can be made out (which, if his prognosis is brain-stem death, is extremely unlikely).

Pursuant to the second ground of Y's application, that "the court may appoint a deputy to make decisions on behalf of Z" for the storage of his sperm under both section 16(2)(b) of the 2005 Act and sub-paragraph 1(2) of Schedule 3 of the Human Fertilisation and Embryology Act 1990 ('the 1990 Act'), Gwynneth Knowles J ultimately declared that it was lawful for the sperm to be stored "both before and after [Z's] death on the signing of the relevant consents [by another]" to satisfy the law (at [27]). In an unusual twist, Gwynneth Knowles J noted that Y had not asked the court for a declaration as to the lawfulness of the use of Z's sperm in tandem with its retrieval and storage, so to save Y the trouble of attending a second court hearing Gwynneth Knowles J also authorised a deputy under section 16(2)(b) of the 2005 Act to consent to the use of Z's sperm and any embryos developed from it under sub-paragraph 1(2) of Schedule 3 of the 1990 Act on the basis that Z would not have wanted Y to suffer any delay, supporting his wishes, feelings, beliefs and values under section 4(6) of the Mental Capacity Act 2005:

> "Given my findings of fact, it seemed to me that Z would want his sperm not only to be stored but also to be used. Storage and then use were essential parts of a process which Z had embarked upon in the hope of providing his son with a brother or a sister…further legal proceedings might well be required. It seemed to me that the last thing Z would have wanted for Y was that the fertility treatment they both embarked upon might be put at risk or delayed by the outcome of further legal proceedings" (at [25]).

It is noted that sub-paragraph 1(2) of Schedule 3 of the 1990 Act (provided below) does allow another person to consent on behalf of Z for the storage and use of his gametes and this provision was indeed relied upon by Y for these purposes, but the words of the provision suggest that Z must 'direct' that person to sign on his behalf and he must also be 'present' at that signature:

> "Schedule 3: Consents to use or storage of gametes, embryos or human admixed embryos.
>
> 1. Consent
>
> (2) A consent under this Schedule by a person who is unable to sign because of illness, injury or physical disability (a "person unable to sign")...is to be taken to comply with the requirement of sub-paragraph (1) as to signature if *it is signed at the direction of the person unable to sign*, *in the presence of the person unable to sign* and in the presence of at least one witness who attests the signature". (emphasis added)

It is highly unlikely that the deputy assigned by Gwynneth Knowles J to sign on behalf of Z under section 16(2)(b) of the 2005 Act can do so within the meaning of sub-paragraph 1(2) of Schedule 3 if he is not 'directed' to do so by Z owing to Z's suspected brain-stem death. The legal requirement for 'presence' suggests a level of consciousness, but it could easily be argued that a patient who is about to undergo tests for brain-stem death is not 'present' in the relevant sense and is unable to direct anyone to sign on his behalf. This did not prevent Gwynneth Knowles J from finding it to be "undesirable and inconsistent with the facts of the case for the court not to authorise the execution of consents for use as well as storage" at [26]

and [27]. It is not clear, however, how exactly sub-paragraph 1(2) of Schedule 3 was satisfied regarding the storage and use of Z's sperm as no further elaboration was given.

In conclusion, owing to a unique intersection between the 'speculative' best interests test under section 4(6) of the 2005 Act and the 'strict' consent provisions of the 1990 Act, an emotional statement from a surviving wife (under section 4(7)(b) of the 2005 Act) coupled with a future appointment for fertility treatment is the sum total of what is required to authorise the retrieval, storage and use of gametes from a person who lacks capacity. Y's interests are met and Z's wishes are met (despite these sitting the incorrect way around), but there is no longer an emphasis on prescribed consent, the very crux of the 1990 Act. The fact that Z might have been pressured into the fertility appointment, or that Y's statement to the court may have been fictitious, was not considered by Gwynneth Knowles J, despite Z and Y already sharing a son. Questions regarding reproductive freedom, best interests and the route to consent may now be canvassed with heightened interest as a result of the certainty of consent under the 1990 Act being scuppered by a speculative best interests test under the 2005 Act.

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