# IVF treatment using sperm from deceased husband

## *YZ v Infertility Treatment Authority* [2005] VCAT 2655

By Carmen Currie

The 2005 decision of the Victorian Civil and Administrative Tribunal (VCAT) in *YZ v Infertility Treatment Authority*[1] was a milestone in reproductive law, making it possible for the first time for a Victorian woman to seek IVF treatment using sperm retrieved from her deceased husband.

The decision also provides judicial guidance on the meaning and interpretation of the guiding principles of the *Infertility Treatment Act* 1995 (Vic) (IT Act), including key concepts such as 'infertility' and 'family'.

### BACKGROUND

YZ's husband was killed in a motor vehicle accident in 1998, aged 30. The couple had been married for almost 10 years and were at that time living in Canberra. YZ gave evidence that, at the time of her husband's death, the couple had been trying to start a family.

In the hours after his death, YZ indicated that she wished to have some sperm taken from her husband's body and stored so that she could later use it to conceive a child. An urgent application was made to the Victorian Supreme Court for orders to permit a sample of sperm to be removed from the body and stored (in those proceedings, the applicant was referred to as 'AB'). Gillard J allowed the application, but made an order that the sperm was not be used for any purpose without a further order of the court.

In 1999, YZ decided that she wanted to use the sperm to become pregnant. At that time, however, s43 of the IT Act banned the use of sperm from a man known to be dead in any fertilisation procedure. YZ formally applied to the ITA to transfer the sperm to the ACT to use it there (where no equivalent ban existed), but her request was denied. She did not apply for a review of that initial decision.

In 2001, and again in 2003, parts of s43 were repealed. YZ, in proceedings reported as *AB v Attorney General for the State of Victoria* (2005) 12 VR 485, sought among other things a declaration from the Victorian Supreme Court that s43 did not prohibit the use of the sperm in a particular fertilisation procedure known as 'intracytoplasmic sperm injection' (ICSI). Hargrave J agreed that s43 no longer banned the use of sperm from a dead man in an ICSI procedure, but held that the absence of consent from the husband for posthumous use of the sperm (which was required by s12 of the IT Act) meant that it would not be lawful to use the sperm in Victoria.

YZ then sought permission from the Infertility Treatment Authority (the Authority) to export the sperm to the ACT. When the Authority decided to refuse permission, YZ applied to VCAT for a review of its decision. Her late husband's parents and siblings, and her own parents and siblings, all gave evidence in support of her application, including evidence that they were aware of the couple's desire and attempts to have children and would offer support and assistance to YZ in the event that she had a child. In considering YZ's motivations, Morris J stated, 'I do not find this to be a case where the applicant is motivated by grief. Although the decision she has made will not be the decision of most widows … I accept that her decision is rational and genuine.'[2]

### FINDINGS

The IT Act defines its guiding principles in order of descending importance in s5. Any exercise of discretion by the Authority should be made by reference to those principles, which are:

- the welfare and interests of any person born or to be born as a result of a treatment procedure are paramount;
- human life should be preserved and protected;
- the interests of the family should be considered; and
- infertile couples should be assisted in fulfilling their desire to have children.

The Authority argued that the first guiding principle – 'welfare and interests of person to be born' – should be interpreted very narrowly, confined to a limited set of interests such as being able to know one's biological parents or genetic background. VCAT rejected that submission, and found that the Authority must consider, as a matter relevant to the 'welfare and interests' of the person to be born, whether any child that may result from a treatment procedure will be loved, nourished and supported.

VCAT also gave a broad meaning to the concept of 'family' from the third guiding principle. It accepted that 'family' included YZ's parents and siblings and those of her late husband and, on that basis, their statements in support of YZ were relevant to any decision to be made by the Authority.

Finally, VCAT rejected the Authority's submission that YZ was not 'infertile' within the meaning of the IT Act. The Authority submitted that 'infertile' means 'clinically infertile', and that YZ was a single woman who was 'socially infertile'

and therefore did not fall within the meaning of the Act. Reading the provisions of the IT Act in light of the Federal Court's decision in *Re McBain: ex parte Australian Catholic Bishops Conference* [2000] 99 FCR 116, VCAT held that the meaning of 'infertile' does not turn on a distinction between social circumstances or clinical diagnosis – it is 'a simple matter for a doctor to be satisfied that the woman was unlikely to become pregnant from an oocyte produced by her and sperm produced by her partner'.[3]

Taking into account the principles considered above, and being satisfied that the proposed treatment procedure to be carried out interstate was indeed permitted by the NHMRC guidelines and laws there, VCAT overturned the Authority's decision and granted permission to YZ to take the sperm to NSW for treatment. In concluding, Morris J said: 'In my opinion, there is every reason to think that [YZ's husband] would now want his sperm to be used to produce children mothered by YZ, if this is the course desired by YZ. Most people who die accept that they cannot, and should not, seek to rule from the grave. Rather they leave ongoing decisions to the living; especially the living they love and respect.'[4] ■

**Notes:** **1** *YZ v Infertility Treatment Authority* [2005] VCAT 2655. **2** *YZ v Infertility Treatment Authority* at [18], per Morris J. **3** *Ibid* at [45]. **4** *Ibid* at [70].

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# The standard of care of the learner driver

## *Imbree v McNeilly* [2008] HCA 40 (28 August 2008)

By Tracey Carver

In *Cook v Cook*,[1] the High Court held that the standard of care owed by a pupil to a driving instructor was that reasonably expected of an 'unqualified and inexperienced driver'[2] or an 'inexperienced driver of ordinary prudence'.[3] Recently, in *Imbree v McNeilly*,[4] the High Court concluded that this principle should no longer be followed.

In overruling its decision in *Cook*,[5] a 6:1 majority of the High Court preferred the view expressed in *Nettleship v Weston*.[6] In that case, the English Court of Appeal concluded that the standard of care owed by an inexperienced driver to a supervising passenger should be the same objective standard of reasonable care as that owed to other passengers and road-users generally.[7]

### FACTS

The appellant (Imbree) suffered severe spinal injuries after the first respondent (McNeilly), who was 16 years and 5 months old at the time, overturned the four-wheel-drive station wagon in which he was travelling. McNeilly, although known not to hold a learner's permit and to have little driving experience, was permitted to drive while Imbree sat beside him in the front passenger seat. The accident occurred when McNeilly lost control of the vehicle after swerving off a gravel road to avoid some tyre debris, rather than straddling and driving over it. The second respondent was the vehicle's owner.

### DECISION

The fact critical to the reduced standard of care owed by the learner driver to the instructor in *Cook* was the plaintiff's knowledge of the driver's inexperience:[8]

> '[S]pecial and exceptional facts may so transform the relationship between driver and passenger that it would be unreal to regard the relevant relationship as being simply the ordinary one of driver and passenger and unreasonable to measure the standard of skill and care required of the driver by reference to the skill and care that are reasonably to be expected of an experienced and competent driver. ...
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> [T]he appellant's known incompetence and inexperience as a driver was a controlling element of the relationship of proximity between the parties. That special element of the relationship took it out of the ordinary relationship between a driver and passenger into a special category of relationship between a driver who is known to be quite unskilled and inexperienced and a passenger who has voluntary undertaken to supervise his or her driving efforts.'[9]

However, according to Gummow, Hayne and Kiefel JJ's joint judgment in *Imbree v McNeilly*, translating this knowledge 'into the identification of a separate category or class of relationship governed by a distinct and different duty of care'[10] could no longer be sustained because:

1. It was not argued that a learner driver owes other road-users and passengers a similarly reduced standard of care, even though that plaintiff may also know of the >>