Bioethical Inquiry (2014) 11:131–134
DOI 10.1007/s11673-014-9516-5

RECENT DEVELOPMENTS

Reproductive Tissue and Contract

Mark Giancaspro

Received: 20 February 2014 / Accepted: 19 March 2014 / Published online: 18 April 2014

Introduction

In *Clark v Macourt* ([2013] HCA 56 (18 December 2013), the High Court of Australia was confronted with a unique dispute between two medical practitioners specialising in the provision of assisted reproductive treatment services. The dispute stemmed from an agreement made between the parties in January 2002 whereby the appellant, Anne Clark, agreed to purchase assets (including a stock of frozen donated sperm) from the St. George Fertility Centre in Sydney, a company controlled by the respondent, David Macourt. Under the deed of sale, the respondent guaranteed the performance of St. George's obligations.

On April 8, 2005, the total amount payable for the assets under the specified price scale in the deed was $386,950.91. The appellant claimed that the majority of the sperm straws were unusable due to St. George having breached a number of warranties under the deed. She therefore paid $167,000 and refused to tender the outstanding balance. St. George sued to recover the money whilst the appellant countersued St. George and the respondent for damages for breach of the warranties.

Pursuant to the deed of sale, St. George was required to provide with the sperm stock all relevant records including donor details, consent forms, and other documentation in accordance with Reproductive Technology Accreditation Committee of the Fertility Society of Australia (RTAC) guidelines. St. George failed to maintain sperm donor records as was required and, subsequently, the appellant alleged that this rendered 3,009 of the 3,513 straws of sperm delivered unusable. She was accordingly forced to purchase alternative sperm from a U.S. company (Xytex) to make up the shortfall. She subsequently claimed damages for the losses she incurred as a result of St. George's breach of the sale deed. The critical question in this case was how the damages were to be quantified, for, as will be seen, different methods of calculation produced markedly different results.

The Lower Court Decisions

The primary judge of the New South Wales Supreme Court determined that at least 2,500 of the straws transferred to the appellant could have been used. It was found that, even if St. George had appropriately fulfilled all of the warranties in the sale deed, it would not have been possible for the appellant to use all 3,513 straws of sperm owing to the "family limit rule" in the Reproductive Technology Accreditation Committee of the Fertility Society of Australia (RTAC) Code of Practice. The rule limited the number of children generated by any one donor to 10 to avoid accidental consanguinity ([89] Keane J). And so the primary judge determined damages by deducting the number of straws of sperm used (504) from those that the appellant could reasonably

M. Giancaspro (✉)
Law School, University of Adelaide,
North Tce, Adelaide 5005, Australia
e-mail: mark.giancaspro@adelaide.edu.au

have expected to be able to use (2,500), generating a figure of 1,996. His Honour then calculated what it would have cost her to purchase 1,996 warranty-compliant sperm straws at the date of St. George's breach of contract, arriving at a figure of $1,246,026.01. Judgment was entered for the appellant in this amount against St. George and the respondent (as guarantor of the vendor's obligations) (*St George Fertility Centre Pty Ltd v Clark* [2011] NSWSC 1276). These orders were not the subject of appeal.

The Court of Appeal was asked to consider the issue of damages, the respondent arguing that the appellant should have received none given that she purchased sperm straws from Xytex and charged patients treated with these samples a fee which covered her costs *Macourt v Clark* [2012] NSWCA 367. Thus, it was argued, the appellant avoided any loss she would otherwise have sustained. The respondent was successful on this basis. The appellant subsequently appealed to the High Court.

The High Court Decision

By 4:1 majority, the High Court found in favour of the appellant. Hayne, Crennan, Bell, and Keane JJ opined that the Court of Appeal had erred in its approach to the issue of damages and allowed the appeal, directing that consequential orders be made. Gageler J dissented.

Before discussing the various judgments it is useful to make two observations. First, whilst fundamentally directed at the issue of contractual damages, this case also touches upon the controversial issue of property in human tissue. There is a long line of established authority suggesting property rights can be identified in such things as human blood (*R v Rothery* [1976] Crim LR 691), urine (*R v Welsh* [1974] RTR 478), and hair (*R v Herbert* [1961] JPLGR 12), however contemporary advances in technology have more recently resulted in the commodification of human reproductive tissues including embryos, eggs, and sperm. The present case is clear evidence of this trend. In 2011 the story of Jocelyn Edwards, the widow who sought a court declaration entitling her to possession of sperm that was extracted from her late husband's body shortly after his death in order to conceive his child through IVF, was widely circulated through the media. Justice Hulme of the New South Wales Supreme Court held that the petitioner was so entitled, noting the complexity in recognising "property" in such things as human tissue but stressing that the petitioner's right was one to possession of the sperm and that no property entitlement was being sought nor recognised beyond this context (*Jocelyn Edwards*; *Re the estate of the late Mark Edwards* [2011] NSWSC 478 (23 May 2011) [77]–[78]). In *Clark v Macourt* it was accepted that the sperm straws constituted "property" and so possessory entitlement was not in issue.

The second observation to be made with respect to *Clark v Macourt* is that, whilst all members of the High Court were in agreement as to the applicable principles governing the accurate quantification of the appellant's damages, *how* those principles were to apply was what differentiated the judgments. The point of contention was whether it could, as the respondent submitted, be said that the appellant had wholly avoided her loss notwithstanding the respondent's breach of the warranties contained within the sale deed. To put the decision in context it is necessary to discuss some fundamental principles of contract law.

Contract Law and the Quantification of Damages

The general principle governing the measure of damages in the law of contract was expressed by Parke B in *Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363,365 in the following terms: "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." This principle has been approved by the High Court on numerous occasions. All members of the High Court in *Clark v Macourt* acknowledged that *Robinson* was the governing principle relevant to determining what damages, if any, the appellant was entitled to ([7] (Hayne J), [26] (Crennan and Bell JJ), [59]–[60] (Gageler J), [106] (Keane J)). The purpose of an award of damages in contract law is to compensate the plaintiff for his or her losses resulting from a breach of contract, not to punish the defendant. Accordingly, the issue in *Clark v Macourt* was not how an award of damages could penalise the respondent for breach of the warranties contained in the sale deed, but how the appellant's losses caused by this breach could be compensated. A corollary principle is that a plaintiff cannot recover damages for losses which were either avoidable or actually avoided; this is the principle of mitigation. (See the comments of Hayne J in *Clark v Macourt* [2013]

HCA 56 (18 December 2013) at [17]. See generally Paterson, Robertson, and Duke 2012, 528–533.)

The High Court's Reasoning

Whilst a majority of the High Court agreed that the NSW Court of Appeal's approach to the calculation of the appellant's damages was erroneous, there was no clear consensus as to why. Hayne J considered the amount the appellant outlaid to acquire the 1,996 straws of Xytex sperm as being the appropriate quantum of damages for the respondent's breach of the sale deed (*Clark v Macourt* [2013] HCA 56 (18 December 2013) [12].). She obtained no advantage from this arrangement but merely replaced what the vendor had agreed but failed to supply ([20]–[21]). Crennan and Bell JJ broadly agreed with this view, adding that the respondent proffered no evidence that the acquisition costs of the Xytex sperm "were not an appropriate proxy for the value of the St George sperm, had it been compliant with the vendor's warranty" ([39]). (See also the discussion at [37]–[38].) The fact that the appellant could have passed on the reasonable costs of obtaining the substitute sperm to her patients was irrelevant ([38]).

Justice Keane delivered the leading judgment, the other majority judges agreeing with his Honour's reasoning and conclusions ([23] (Hayne J), [24] (Crennan and Bell JJ).). In Keane J's view, where a purchaser receives inferior goods of smaller value than what he or she ought to have received, the purchaser has lost the difference in the two values and it is immaterial that by good fortune (with which the seller has nothing to do) the purchaser has been able to recoup what he or she paid for the goods ([133]–[134]). The fact that the appellant was able to obtain substitute sperm from Xytex and thereby recuperate what she paid St. George for the non-compliant sperm it provided her was of no consequence. The value of the St. George sperm was to be found not in what it might yield in the relevant market as a commodity but, as the deed of sale contemplated, as business stock. The appeal was ultimately allowed and it was directed that consequential orders be made.

As mentioned earlier, Gageler J dissented from the majority and sought to dismiss the appeal. His Honour was of the view that the New South Wales Court of Appeal was correct in finding that the appellant obtained suitable alternative frozen sperm straws to make up for those she didn't receive as a result of the respondent's breach of contract and was thereby in a position to avoid any loss by subsequently recouping the costs from her patients ([72]). As we have seen, this approach to the quantification of the appellant's damages was flatly rejected by the majority.

Significance of the Decision

This decision added to a long line of High Court authorities that have emphasised the fundamental principle governing the award of damages; namely, that where a party suffers loss by reason of a breach of contract, they are to be placed, as far as money can do so, in the position they would have been in had the contract been performed (*Robinson v Harman* (1848) 1 Ex 850, 855; 154 ER 363, 365). The appellant's loss was measured not by reference to what she actually paid to obtain and use substitute sperm in her medical practice, but by reference to the value of what St. George promised, but failed, to deliver. The ultimate consequence was that a breach of contract for the sale of business assets valued at a hint under $387,000 resulted in an award of damages in the amount of approximately $1.2 million.

To some, this outcome might seem a little unjust, perhaps even unreasonable. Indeed, the respondent contended that this result was counterintuitive (see the comments of Keane J at [135]). However, as Keane J noted, such an appeal to intuition was misguided for four reasons: First, this is the complaint of every vendor in breach of a contract in which the purchaser makes the better bargain; second, Xytex was the only source of suitable replacement sperm and, being a U.S. company, the appellant was confronted with transport and storage costs as well as a disadvantageous currency exchange rate; third, the parties contemplated a higher turnover of stock due to the appellant's acquisition of St. George's assets (including its goodwill and patient lists); fourth and finally, the respondent did not offer any evidence of a more reliable proxy for the value of the undelivered St. George sperm than the acquisition cost of the Xytex sperm ([135]–[138]). The decision also makes clear that subsequent transactions involving the use of replacement goods (in this case sperm) are relevant to the quantification of damages only where the plaintiff's loss is subsequently aggravated or where he or she enjoys an advantage ([21] Hayne J).

Though, strictly speaking, the concept of "property" in human reproductive materials such as sperm was not in issue in *Clark v Macourt*, it would have been

interesting to hear the High Court's perspectives on this highly controversial and emerging field of the law. The legislative implications of transactions involving the exchange of human sperm for valuable consideration were briefly discussed in the case. Section 16 of the *Human Cloning for Reproduction and Other Prohibited Practices Act* 2003 (NSW)—which makes it an offence for a person to intentionally receive "valuable consideration" from another person for the supply of a human egg, human sperm, or a human embryo and defining "valuable consideration" for this purpose as excluding "the payment of reasonable expenses incurred by the person in connection with the supply"—was held not to apply as the Act was not in force at the time the deed of sale between the parties was made ([42] Gageler J and [122]–[123] Keane J). Moreover, the *Human Tissue Act 1983* (NSW) prohibition against the sale of sperm did not apply as the supply was made to enable the sperm to be used for "therapeutic," "medical," or "scientific" purposes; an exception under s 32(2) of that Act. The facts and scope of the issues in *Clark v Macourt* did not allow for a deeper discussion of the legislative framework or ethical implications pertaining to the commodification and sale of human tissues. This discussion is beyond the scope of this article.

The concept of donor insemination is certainly not new; an instance of a man providing semen for an infertile couple or individual was first reported back in 1909 (Daniels 2000). The large and complex market for sperm donation and exchange that we have today never would have been anticipated at that time. In the last 100-plus years, rapid growth in technology and dramatic advances in medicine and science have made it possible for human sperm to be stored and used to artificially inseminate wanting would-be mothers. Where nature does not allow, it is now possible for doctors to trigger pregnancy in a woman. This has seen human reproductive tissues assume an unprecedented and increasingly significant commercial value. Whereas in years gone by such things as sperm would have been useless once extracted from the body, today they can be preserved and used in a variety of manners and are thus coveted by reproductive medical professionals. This has resulted in something of a shift in society's perception of the value of the human body. As Boulier explains:

> As a result of these new technologies, human body parts have taken on a new value above and beyond any sentimental, dignitary, or elemental value. Although this process began long ago, it has accelerated greatly in the last few decades with the pace of the new technologies. Indeed, as a result of these advances, body parts have been treated more and more like property by the ordinary person faced with these issues (Boulier 1995, 694–695).

Gametes in particular are uniquely significant in that they are capable of generating a human life. Their transformation into a valuable commodity consequently attracts greater societal attention and scrutiny, generates more emotional discussions, and raises more complex ethical and legal issues. This is what distinguishes issues of property in limbs or blood from issues of property in reproductive tissues such as sperm or ova (Jansen 1985, 123). Cases such as *Clark v Macourt* serve only to thrust this issue back into the limelight. Although *Clark v Macourt* was fundamentally a contract law dispute which merely skirted the multifaceted issues that affect sperm donation, sale, and use, it nonetheless emphasises the increasing commodification of human reproductive tissues and the subsequent legal issues that can arise when contracts become involved.

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