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COMMENTARY

Posthumous conception by presumed consent. A pragmatic position for a rare but ethically challenging dilemma

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Abstract The prevailing legal position and opinion of professional societies such as the European Society for Human Reproduction and Embryology and the American Society for Reproductive Medicine is that posthumous sperm conception should only occur in the presence of explicit written consent from the deceased man. However, in our opinion this is an impractical approach as the majority of deaths of reproductive-age men are sudden and unexpected, thereby precluding explicit consent. Previously in this journal we have outlined arguments supporting a move to a standard of presumed consent for posthumous conception, with provisions for men to 'opt out' and safeguards to protect the welfare of the prospective mother and her child. In a recent commentary in this journal, Kroon outlines arguments against our position of presumed consent as an unacceptable violation of the deceased's autonomy. However, such arguments on the primacy of the rights of the dead are in our opinion not paramount, especially since this position blocks access to posthumous conception for the majority who support its use. The objective of this commentary is to provide a rebuttal to the concerns raised by Kroon and hopefully reorientate the discussion towards the rights and welfare of the living (widow, prospective child), not the dead.

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Introduction

In 2015, we published our views advocating for a standard of presumed consent to be adopted in posthumous sperm conception (Tremellen and Savulescu, 2015), a position not supported by professional bodies such as the European Society for Human Reproduction and Embryology (ESHRE) and the American Society for Reproductive Medicine (ASRM) and considered radical by other commentators (Kroon, 2016). However, the purpose of that publication was to reorientate the ethical discussion relating to posthumous conception away from its current focus on autonomy and the

rights of the deceased to a more pragmatic consideration of the welfare of the living (widow and potential prospective child). We are happy that our paper has triggered academic debate.

Kroon's commentary on this earlier paper raises three principal criticisms: the current uncertainty surrounding men's views on posthumous use of their sperm; the importance of explicit consent and rights of the deceased; and the perceived conflict between our position of presumed consent while supporting men's right to explicitly opt out of posthumous conception while still alive. Each of these concerns will be addressed in turn.

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Autonomy and the need for explicit consent

The existing legal position on posthumous sperm conception in most parts of the world is that explicit (written) consent from a man must be obtained in order for his sperm to be collected and used following his death to create a child. While we accept that this is the ideal scenario, it is unfortunately an impractical position as the vast majority of deaths in men of reproductive age are sudden and unexpected, thereby precluding explicit consent. It is for this very reason that we need to explore the position of consent in posthumous conception, since mandating explicit consent effectively relegates posthumous conception to an insignificantly rare therapy of marginal clinical utility. Our paper hoped to overcome this intellectual road block and help facilitate discussion considering other possibilities like presumed consent with relevant safeguards for its use. We thank Kroon for his insightful commentary. His description of our position of presumed consent being consistent with sperm being considered as a 'pure genetic resource' in which the deceased has no meaningful interests, and therefore does not require his explicit consent, is an accurate appraisal of our position, although with a few minor qualifying caveats.

We reaffirm our view, supported by others (Delaney and Hershenov, 2009), that when an individual is dead, they no longer have any meaningful interests. A man's organs and gametes are useless to him after death, but life-saving or life-creating to others. Our argument is that just like organs, gametes are a resource that should be considered for use after death. The burden of posthumous conception (legal process and costs, IVF treatment, pregnancy, delivery and upkeep of child) is entirely borne by the mother, not the deceased. As such, donating gametes to a partner is not an easy rescue; it is a zero-cost rescue to the deceased. Given this fact, posthumous conception should in our view be facilitated by moving to a standard of presumed consent, not hindered by arguments such as potential infringement of the rights of the deceased.

Philosophical tension between presumed consent and accepting a man's right to opt out

In his commentary, Kroon expresses concerns relating to the perceived conflict in our position of treating sperm as a pure genetic resource (and explicit consent not being required), versus our stated position supporting a man's right to opt out of posthumous conception while still alive. We understand that these positions do appear to be contradictory but we feel that it is a defensible pragmatic position.

At the moment, we have the situation where the majority of men do not make their views on posthumous conception known to their partner and family, primarily because they have never given it any consideration. This is understandable since most men of reproductive age do not seriously contemplate the possibility of their untimely death. However, when men of reproductive age are asked to give serious consideration to posthumous conception, the evidence to date suggests that the majority are happy to support their partners' use of their sperm posthumously (Nakhuda et al., 2011; Pastuszak et al., 2013; Hans, 2014). Therefore, the current default position requiring

explicit consent is preventing the majority of women from having the opportunity to use their partner's sperm posthumously, even though it is more likely that he would have supported such an action. We are simply suggesting the default position should be flipped 180 degrees to presumed consent in the absence of an explicit opt-out from the man. While we accept that this position will result in a minority of men's sperm being used posthumously against their will, we believe that this is a lesser moral wrong than blocking the wishes of the majority because of a lack of explicit consent. Indeed, as the policy becomes more widely known, those who have objections are likely to express them, as has happened in an opt-out system for organ donation in general. Such systems work perfectly well and increase the supply of life-saving organs (Rithalia et al., 2009).

Conversely, if a man explicitly rejects the concept of posthumous conception while he is alive, then we believe that this decision should be respected as he was an autonomous individual when he made that decision and his instructions are unambiguous. We believe that there is a significant moral difference between acting against an individual's express wishes and taking action in the absence of knowing an individual's preferred wishes. Furthermore, it is unlikely that most women would want to use their dead partners' sperm if he had expressly rejected the idea while alive. As such, our position is that sperm should be seen as a genetic resource that does not require explicit consent for its use, but in a setting of explicit instruction against its use these views should be respected. It is for this reason that we feel that it is imperative that an opt-out registry should be produced before changing clinical practice to the default of presumed consent, so as to protect the rights of these men.

This position of considering sperm as a pure genetic resource is not absolute and has other caveats that help protect the welfare of a prospective mother and child. In our original paper we suggest a series of measures (psychiatric assessment, counselling and mandated waiting period after her partner's death before attempted conception) to ensure that a prospective mother is making an informed decision that is not excessively clouded by the grief of bereavement. Secondly, we support posthumous conception only when the man has had a meaningful relationship with the prospective mother (married or de-facto relationship of significant duration), and do not support his sperm being accessed by women that he never had a relationship with him. This is because we believe that a child born from posthumous conception would understand their mother's motivation to have a child from their loved partner, but is unlikely to accept her conceiving with the aid of a dead man's sperm that she never knew. Sufficient donor sperm is available from live donors to meet these women's reproductive needs. Therefore, our position is that sperm should be considered a pure genetic resource only in the context of a well-established relationship before death, and excludes those men who expressly did not wish to father children after death.

Uncertainty regarding men's position on posthumous conception

One of the key arguments behind our support for presumed consent is that all of the surveys to date suggest that the majority of men do support their partners accessing their

sperm for the purposes of posthumous conception (Nakhuda et al., 2011; Pastuszak et al., 2013; Hans, 2014). We therefore mount an argument that moving to a default position of presumed consent protects the reproductive rights of the majority, where the current standard of explicit consent only protects the rights of the minority (non-consenting men who have not expressed their views to others). Kroon outlines a position, supported by others (Jones and Gillett, 2008), that it is extremely difficult to accurately assess the hypothetical wishes of men for the use of their sperm after death since their acceptance of posthumous conception is likely to be modified by many factors, some which they cannot be privy to in life. For example, a man may support his partner using his sperm to have a child if she is financially secure and healthy, but not if she is unwell or the child is likely to be brought up under conditions of financial hardship. As such it is impossible for a man to give a comprehensive blanket approval of his support for posthumous conception while alive. However, the prospective mother is likely to consider these important factors when deciding to use her dead partner's sperm, especially as she alone carries the burden of raising the child and would of course have that child's best welfare at hand.

We accept that the current body of knowledge surrounding intentions for posthumous conception is limited, and in some circumstances biased by sampling men undergoing fertility treatment or sperm cryopreservation for fertility preservation reasons (Nakhuda et al., 2011; Pastuszak et al., 2013). However, the largest study to date, surveying over 2000 individuals randomly selected from the general public, did conclude that the majority of men do want their partner to have the option of using their sperm posthumously (Hans, 2014). As such we contend that our position of presumed consent is supported by the majority position according to all the available survey data to date. Furthermore, Hans (2014) goes on to calculate that abandoning the prevailing assumption against consent for a more liberal presumed consent position will result in the actual wishes of the deceased being honoured three times more often than currently is allowed for by the position of explicit consent. When one considers that posthumously collected sperm is only used for conception in approximately 10% of cases (Kroon et al., 2012; Shefi et al., 2006), the chance of creating a child against the wishes of the deceased is very small (2.6%) compared with the approximate 70% chance of the deceased's wishes not being followed if posthumous conception is blocked in the absence of explicit consent. Given this, the correct moral position is to allow for the majority position of posthumous conception in the absence of a written directive against this action from the male partner.

Welfare of the living is paramount

The commentary on presumed consent offered by Kroon makes little mention of the welfare of the child or the widow, primarily focusing on the autonomy and rights of the deceased. While it is a view held by some that it is preferable for children to be raised by two parents, there is little evidence that children brought up in single-parent families are significantly disadvantaged (Golombok and Badger, 2010). It is possible that children born from posthumous conception may be teased by other children given the unusual nature of their conception.

However, the same was true when IVF was first introduced and this does not seem to have been an overwhelming objection to it. As posthumous conception is a lengthy and costly process, a path unlikely to be undertaken by a woman who is not committed to providing a supportive loving environment for her child, it is hard to see that allowing for more liberal posthumous conception will lead to the conception of a large number of unloved or disadvantaged children. Furthermore, the data available to date does not show any clear medical issues for the physical health of children born from posthumous conception (Robson et al., 2015), although we do acknowledge that larger studies need to be conducted.

As IVF technology advances and society comes to accept single parenting as a legitimate social construct, the time has also come to reconsider our previous prohibition on posthumous conception in the absence of explicit consent. Philosophical arguments centred on the primacy of the 'rights of the dead' are in our opinion not helpful. The autonomy of the living and the wishes of those who object to posthumous donation can adequately be respected by an opt-out system to gamete donation. The ideal position going forward is to develop guidelines that prevent posthumous conception for men who object (i.e. to create an opt-out registry) and to publicise these, while facilitating this process for women who do wish to undertake this treatment, and who satisfy relevant mental-health safeguards. We call on societies such as ESHRE and ASRM to commence this debate and develop relevant guidelines. As the American author George Arnold (1834–1865) said, 'the living need charity more than the dead'. We hope the focus of the posthumous conception debate moves towards the rights and welfare of the living, not the dead.

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