

Clear legal rules about use of sperm and eggs in fertility treatment must remain to protect the vulnerable, says study

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Clear legal rules outlining the use of the sperm and eggs of those who are incapacitated must remain in place to protect the vulnerable from being involved in fertility treatment without their consent, a new study says.

There are strict laws in England and Wales involving the use of reproductive materials, but the research outlines how recent court cases have weakened this existing rigorous consent regime.

It warns this could create a common law exception to informed consent, leaving the current law in a delicate position. The research says it is "not outside the realms of possibility" that some people may try to take advantage of the recent court cases to conceive their 'perfect family' without the knowledge of their incapacitated partner.

The Human Fertilisation and Embryology Act 1990 (as amended in 2008) stipulates that each party must give written, informed consent to ensure that our reproductive materials are used within strict parameters.

The landmark case of "Y v A Healthcare NHS Trust [2018] EWCOP18" caused significant concern when judges authorized the retrieval, storage and use of sperm from a suspected brain stem dead man for procreative purposes under the Mental Capacity Act 2005.

The decision has since been confirmed as the correct approach by the Court of Protection in *Re X (Catastrophic Injury: Collection and Storage of Sperm)* [2022] EWCOP 48, and a public consultation was thereafter opened by the Human Fertilisation and Embryology Authority in Spring 2023 on the matter of consent. Presumed consent was suggested by the Authority as an alternative to informed consent, akin to the 'opt-out' system currently for organ donation in the UK. This idea seems to have been dropped as of early 2024, but the concern over incapacitated patients remains.

The study, by Lisa Cherkassky from the University of Exeter Law School, is [published](#) in the journal *Legal Studies*. It says the Human Fertilisation and Embryology Act 1990 (as amended in 2008) and its strict consent regime around informed consent should remain the

'benchmark' for lawful [fertility treatment](#) in the UK.

Dr. Cherkassky said, "The consequences of the decision in *Y v A* Healthcare NHS Trust could be highly significant, raising questions about the exploitation of incapacitous patients and the misuse of genetic material.

"The legal preference for rigorous consent in medical care over the past three decades is appropriate, and any alternative forms of consent could open a slippery slope to the unethical use of vulnerable individuals for their reproductive materials."

The UK has one of the most rigorous fertility legal frameworks in the world. The Human Fertilisation and Embryology Act 1990 (the 1990 Act) was the first attempt to regulate what quickly became a global race to create babies in vitro after the birth of Louise Brown in 1978.

The appeal courts have mostly adhered to the strict regime of the 1990 Act, sending a clear message to practitioners and patients that the informed consent of both gamete providers was the key to unlocking fertility treatment in the UK.

Dr. Cherkassky said, "To authorize fertility treatment in the 'best interests' of a suspected brain stem dead patient, who has no capacity or understanding of the procedure or its consequences, could not only be viewed as illogical, but runs the risk of 'plundering' vulnerable patients for their reproductive materials in a highly invasive and arguably sexual way. It could also bring the law and the medical profession into disrepute by performing medical procedures upon incapacitous patients on the request of third parties with no clear benefit to the patient.

"The 1990 Act does not allow for an 'inferred' or a 'presumed' consent to fertility treatment; it requires written consent to the posthumous use of

embryos under Schedule 3. Yet recent cases show a judicial trend towards authorizing fertility treatment without the consent of one gamete provider where they can no longer consent for themselves.

"The right of withdrawal (from fertility treatment) is granted in recognition of the dignity to which each individual is entitled. Such must include an individual's right to control the use of their own genetic material. In my judgment, it would be contrary to public policy for courts to enforce agreements to allow use of genetic material where informed consent is lacking.

"Ethically it would be very difficult to support the use of patients who lack capacity in assisted reproductive technology if they did not consent to it in advance, for reasons of dignity, confidentiality, genetic destiny, public policy, and the individual's right to choose parenthood.

"The chances of a similar case coming before the Court of Protection in the future are high. The next 'incapacitous retrieval' case will be just around the corner. In the hope that the decision in *Y v A Healthcare Trust* has not led to a total disarticulation of the 1990 Act, the next case is greatly anticipated and it is hoped that the decision will adhere to the clear rule of law on informed [consent](#) to the storage and use of gametes to prevent any further legal and ethical uncertainty."

More information: Lisa Cherkassky, Incapacitous patients, assisted reproductive technology, and the importance of informed consent, *Legal Studies* (2023). [DOI: 10.1017/lst.2023.10](https://doi.org/10.1017/lst.2023.10)

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